The Baha Mousa Public Inquiry

Inquiry Chairman: The Right Honourable Sir William Gage

Inquiry Protocol:
Legal Representation at Public Expense

1. This Protocol relates to:

   a) applications by a person who has either been designated by the Chairman to be a Core Participant in the Inquiry or is an individual witness who has not been so designated ("applicant") for an award to be made under section 40(1)(b) of the Inquiries Act 2005 ("the Act") in respect of expenses to be incurred in respect of legal representation ("legal expenses"); and

   (b) following a decision to make an award, the assessment of legal expenses which become payable under it.

2. Issues relating to the designation of a person as a Core Participant in the Inquiry, and of a qualified lawyer as their recognised legal representative of a Core Participant and/or an individual witness, are dealt with separately to the question of funding in accordance with the procedures set out in the Inquiry's Procedures document.

3. The procedures set out in this Protocol are subject to, and should be read with, the provisions in sections 17 and 40 of the Act, the Notice of Determination dated 20 October 2008 made by the Secretary of State for Defence under section 40(4) of the Act ("the Minister's Determination") set out at Annex A to this Protocol, and Rules 19 to 34 of the Inquiry Rules 2006(SI 2006/1838) ("the Rules").

General principles concerning applications for awards

4. A person is eligible to be considered for an award only if they are:

   (a) a person attending the Inquiry to give evidence or to produce any document or other thing; or

(b) a person who, in the opinion of the Chairman, has such particular interest in the proceedings or outcome of the Inquiry as to justify such an award.

5. In exercising his power to make an award relating to legal representation at public expense:

(a) the Chairman must act with fairness and with regard also to the need to avoid any unnecessary cost (whether to public funds or witnesses or others); and

(b) ensure that he complies with the qualifications and conditions set out in the Minister's Determination.

6. Subject to the qualifications and conditions placed on him by the Minister, the Chairman will, when determining an application for an award relating to legal expenses to be incurred, take into account:

(a) the financial resources of the applicant; and

(b) whether making an award is in the public interest.

7. Having regard to the criteria set out in paragraph 6 of this Protocol, the considerations set out in paragraph 2.1 of the Minister's Determination and to his powers under section 17(1) of the Act, the Chairman envisages that awards will be made only in cases where he decides that:

(a) the applicant –

(i) played, or may have played a direct and significant role in relation to the matters to set out in the Inquiry's terms of reference; and/or

(ii) has a significant interest in an important aspect of the matters set out in those terms of reference; and/or

(iii) may be subject to explicit or significant criticism during the Inquiry's proceedings or in the report, or in any interim report; and

(b) the applicant would be prejudiced in seeking representation if they were to be in any doubt about funds becoming available and there are no other means by which such representation can be funded; and

(c) it is fair, necessary, reasonable and proportionate to make an award.

8. Awards will generally not be made, therefore, in respect of the legal expenses of substantial bodies, or those of individuals who could reasonably expect those expenses to be met by such bodies, unless there are special circumstances which justify a call on public funds.

The scope for legal representation in the Inquiry at public expense

9. Where the Chairman determines to make an award, it will normally be limited to a recognised legal representative having a role in relation to some or all of only the following matters:

(a) considering initial instructions;

(b) advising the client in relation to the making of a witness statement, and/or otherwise providing evidence to the Inquiry, in accordance with any request made by the Inquiry under Rule 9 of the Rules;

(c) considering the material contained in the Inquiry Bundle(s) (or any limited Bundle in the case of an individual witness who is not a Core Participant) so far as is necessary properly to represent the client's interests;

(d) advising the client in relation to any warning letter issued by the Chairman under Rule 13 of the Rules;

(e) making an opening statement, where permitted;

(f) representing the client during their oral evidence (and the evidence of others, should that be necessary);

(g) making an application to be permitted to examine any witness giving oral evidence in the circumstances specified by the Chairman.

(h) making final submissions, where necessary.

Applications for awards and the procedures for agreeing the level of funding

10. Further to paragraph 2.4 of the Minister's Determination, an applicant who wishes to apply for an award relating to legal expenses to be incurred should submit an application to the Chairman in writing specifying the following:

(a) the reason(s) why legal representation is considered necessary;

(b) the extent of the applicant's financial resources and confirmation that there are no other means by which such representation can be funded;

(c) the nature of the public interest that will be served by an award being made from public funds (see Rule 21(2)(b) of the Rules);

(d) the nature and function of the legal representation for which the award is sought;

(e) the size and composition of the team that the applicant's recognised legal representative proposes to engage, including the

seniority and proposed hourly charging rate for all solicitors and paralegals to be so engaged, subject to the maximum hourly rates specified in paragraph 3 of the Minister's Determination;

(f) where it is thought necessary to instruct counsel, the reasons for so doing, the date of call of that counsel and proposed hourly rate, subject to the maximum hourly rates specified in paragraph 3 of the Minister's Determination. (Note that the employment of counsel will be funded only on the basis of payment for time spent; it will not be acceptable to submit general claims along the lines of a 'brief fee', 'refresher' or 'preparation'.);

(g) the estimated duration of the recognised legal representation (for example, whether in relation to one or more of the four Modules of the Inquiry indicated in the Chairman's opening statement given at the Preliminary Hearing.);

(h) the number of hours each week for which it is anticipated that the recognised legal representative's team will be engaged on Inquiry work, having regard to the interest of the applicant and the Modules in which they wish to participate;

(i) the number of hours each week for which it is anticipated that counsel (if permitted at public expense) will be engaged on Inquiry work;

(j) the amount of time that it is anticipated will be spent in conference at the end of each day of the oral hearings;

(k) particulars of any other foreseeable expenses relating to legal representation.

11. Subject to the cap on the maximum number of hours that can be charged by an applicant's recognised legal representative, as provided in paragraph 2.7 of the Minister's Determination (see paragraph 13(d) below) –

    (a) the representative will agree with the Inquiry Solicitor in advance the hourly rates that are to apply to them and/or to any other qualified lawyer who, if the Chairman approves their involvement, will be appointed to assist them in the discharge of their function; but

    (b) in the event that no agreement can be reached regarding hourly rates, the Chairman will determine such rates as he considers appropriate upon receipt of representations in writing on behalf of the applicant.

Determination of applications by the Chairman

12. Having regard to the provisions of the Act, the qualifications and conditions set out in the Minister's Determination, the Rules and the provisions set out in this Protocol, the Chairman will determine an application for an award within a reasonable time.

13. The Chairman will notify the applicant and, where applicable, his recognised legal representative in writing of his determination and, where an award is made, the terms of the award. Such terms may include (but are not limited to) the following:

    (a) the nature and scope of the work that is to be funded, as agreed in advance with the Inquiry Solicitor; this is likely to be in relation to some or all of the matters set out in paragraph 9 of this Protocol. (Normally, an applicant's recognised legal representative will not be reimbursed for investigative work as this is the role of the Inquiry. Similarly, payment will not be made for obtaining items such as expert reports, unless previously authorised by the Inquiry Solicitor);

(b) the size and composition of the recognised legal representative's legal team to be engaged, including the seniority and number of counsel where that is agreed to be necessary;

(c) the hourly rates for all counsel, solicitors and paralegals to be engaged;

(d) any capping of legal fees that is to be applied whereby legal teams (including counsel) will be capped as to the maximum number of hours that can be charged for any working day or working week, even though the number of hours actually worked exceeds that maximum;

(e) that disbursements in excess of £100 (net of VAT) will not be paid unless authorised in advance by the Inquiry Solicitor. Disbursements under £100 will only be paid where the expenditure is adjudged to have been reasonable and necessary and where they are supported by evidence of payment;

(f) that the award is subject to the condition that payment will only be made for work that is properly evidenced and can be identified as having been done in an efficient and effective manner, avoiding unnecessary duplication and making the best use of public funds;

(g) the form in which bills relating to legal expenses are to be submitted;

(h) the frequency with which bills are to be submitted.

14. Expenditure incurred before the making of an award will not normally be recoverable, except where it has been expressly agreed in advance by the Inquiry Solicitor on behalf of the Chairman.

15. It will be open to the Chairman, either initially or at any time after making an award, to impose further conditions on the award. In particular, he may determine that a lower cap should be imposed in relation to legal expenses that may be incurred at public expense. This may amount to an overall financial limit and/or a limit on the number of hours to be spent on Inquiry business.

Billing procedures

16. An applicant in relation to whom the Chairman has decided in accordance with this Protocol that an award should be made, should submit bills relating to their legal expenses at monthly intervals to the Chairman at the address stated in paragraph 28 below. Such bills are to be received no later than 7 days immediately following the end of the month to which they relate, with a final account to be submitted no later than one month after final submissions are made

17. Bills submitted in accordance with paragraph 16 above should contain the following information:

    (a) a breakdown of the number of hours worked by each person on each day specifying, in each case, details of the work undertaken and the time spent on it;

    (b) the hourly rates charged for each person. These will be those specified by the Chairman in his original determination of the application for expenses to be incurred in relation to legal representation;

    (c) a list of all disbursements claimed;

    (d) where work has been undertaken by counsel, details of counsel's fees (supported by fee notes which must specify precisely which work was done and how much time was spent on it).

Procedure for the assessment of amounts payable under an award

18. The relevant part of the United Kingdom for the purposes of the assessment of an award shall be England and Wales.

19. Where an applicant in relation to whom the Chairman has determined that an award should be made submits a bill relating to their legal expenses, the Chairman will refer it to the Inquiry Solicitor as soon as practicable for an assessment to be made of the amount to be awarded.

20. In assessing the amount that is to be awarded pursuant to the application the Inquiry Solicitor will have regard to all the circumstances, including in particular whether the expenses –

    (a) were proportionately and reasonably incurred; and

    (b) are proportionate and reasonable amount.

21. Any work undertaken by an applicant's recognised legal representative which relates to matters outside the Inquiry's terms of reference and/or the issues it identifies for investigation, or which otherwise does not comply with the terms of the award notified to the applicant under paragraph 13 of this Protocol, will be disallowed.

22. Where the Inquiry Solicitor determines that the full amount of an applicant's legal expenses should be paid, that assessment is also the final assessment.

23. If the applicant or his recognised legal representative disagrees with the Inquiry Solicitor's initial assessment of a bill relating to their legal expenses, the procedure set out in Rule 29 shall be followed.

Review of an assessment of an amount payable under an award

24. Where there remains a disagreement following completion of the procedure set out in Rule 29 the Chairman must, in accordance with Rule 31, either -

(a) engage the assistance of a Costs Judge of the Supreme Court of Judicature for England and Wales by referring the assessment together with all relevant evidence and documentation to that Costs Judge; or

(b) require the Solicitor to issue a final assessment of the disputed Bill of Costs.

Making an award

25. Where –

(a) the Chairman decides further to Rule 31(1)(b) that an award is not to be reviewed in accordance with sub-paragraph (1)(a) of that Rule, or

(b) the Inquiry Solicitor and the applicant agree on the amount of the assessment at any time after the Chairman's referral of the application to the Costs Judge and before the date of the review hearing,

the Chairman will make an award and arrange for payment of the final assessment in accordance with Rule 34(1).

26. Where the amount of the award has been reviewed by the Costs Judge in accordance with Rule 31, the Chairman will make an award and arrange for payment of the Costs Judge's assessment in accordance with Rule 34(2).

27. All payments will be made by a Bankers' Automated Clearing System (BACS) transfer. To enable payment to be made, a Costs Claimant will be required to complete the appropriate documentation which will be provided by the Inquiry.

When completed and signed, the documentation should be returned to the Deputy Secretary (Administration), Frances Currie, to whom any queries relating to the processing of payments should also be directed. Her direct line is 0207 242 9631.

28. The Inquiry's contact details are as follows:

The Baha Mousa Public Inquiry
Finlaison House
15/17 Furnival Street
London EC4A 1AB

Tel: 020 7242 1841

Fax: 020 7404 6953

Email: info@bahamousainquiry.org

29. It should be noted that failure to adhere to, and comply with, any of the matters or procedures set out in this Protocol could result in payment being delayed or refused.

Issued under the authority of the Chairman on 23 October 2008.

Annex A

Notice of Determination by the Secretary of State for Defence to the Chairman of the Baha Mousa Public Inquiry under section 40(4) of the Inquiries Act 2005

1. The Secretary of State for Defence has determined under section 40(4) of the Inquiries Act 2005 ("the Act") that the power of the Chairman of the Baha Mousa Public Inquiry to award amounts in respect of legal representation under section 40(1) and (2) of the Act to persons eligible for an award under section 40(3) shall be subject to the qualifications and conditions set out below.

2. The qualifications and conditions are:

   2.1 The Chairman shall only make an award relating to a person's costs of legal representation in relation to the Inquiry where he considers it necessary, fair, reasonable and proportionate to make such an award.

   2.2 An award shall be subject to the condition that payment will only be made for work that is properly evidenced and can be identified as having been done in an efficient and effective manner, avoiding unnecessary duplication and making the best use of public funds.

   2.3 An award shall be made only in respect of legal work undertaken by an applicant's legal representative whom the Chairman has designated under either rule 6 or rule 7 of the Inquiry Rules 2006 to be that person's recognised legal representative in relation to the Inquiry.

   2.4 The Chairman shall approve the size and composition of any legal team to be engaged by an applicant's recognised legal representative, including the number and seniority of counsel whose retention he agrees to be necessary.

   2.5 In determining whether to make an award the Chairman shall specify the broad areas of work that are to be covered by the award and the hourly rates applicable to all members of the applicant's approved legal team, subject to the maximum hourly rates specified at paragraphs 3 and 4 below.

2.6 Having regard to the inquisitorial nature of the Inquiry, an award shall not be made in respect of investigative work undertaken by an applicant's recognised legal representative or in relation to obtaining an expert's report unless the Chairman has given his express written permission in advance for such work to be undertaken.

2.7 An award shall limit the maximum number of hours that can be charged by any member of an applicant's legal team in any week to 40 save that, exceptionally, the Solicitor to the Inquiry may authorise an increase to a maximum of 60 hours during the eight-week period immediately preceding the commencement of the oral hearings and during the oral hearings where he is satisfied that such increase is justified in all the circumstances. For the purposes of this paragraph a week shall be taken to commence on a Monday and end on the following Sunday, and no unused hours below the maximum in any one week may be set-off against any other week.

3. The maximum hourly rates for legal work by the members of an applicant's legal team shall be:

Leading Counsel (whether a member of the Bar or a solicitor acting in the role of advocate)	£200
Junior Counsel (whether a member of the Bar or a solicitor acting in the role of advocate)	£100
Solicitors:	
Solicitors with over eight years post-qualification experience	£150
Solicitors and legal executives with more than four years' experience	£125
Other solicitors, legal executives and fee-earners of equivalent experience	£100
Trainee solicitors, paralegals and other fee-earners	£75

4. The maximum hourly rates for travel and waiting by the members of an applicant's legal team shall be half of the agreed hourly rate relating to legal work specified at paragraph 3.

5. Expenditure incurred by an applicant in respect of legal representation before an award is made by a Chairman shall not be recoverable except where (and to the extent that) they have been incurred with the prior agreement of the Solicitor to the Inquiry.