The Baha Mousa Public Inquiry

Inquiry Chairman: The Right Honourable Sir William Gage

Open Ruling (Second Directions Hearing)

Detainees' anonymity applications

Introduction

1. This ruling concerns an application by seven of the detainees for a restriction order in respect of their identities. This is an open ruling which will be made public. In order not to defeat the purpose of the application, I permitted submissions to be made by the applicants which were circulated to the other Core Participants but not made public. A shorter open version of their application has been published by the Inquiry. For the same reason, the full reasons for my ruling are set out in a closed ruling provided to the Core Participants but not to be made public. This open version of my ruling makes public as much of my reasoning as possible without giving rise to the very risks to the seven applicant detainees against which the application sought to guard.

2. The application is for an order under s.19(2)(b) of the Inquiries Act 2005 (the Act). The background to the Inquiry is set out in my Opening Statement of 15 October 2008 and in rulings made by me dated 6 January 2009. It needs no repetition in this ruling. At the Directions Hearing on 19 January 2009, at which the application was made, I made an interim restriction order to take effect from that date until the publication of this ruling. I now confirm this order, which will remain in force in precisely the same form as the interim order until further order.

History of other proceedings and media attention

3. The following short history is relevant to the applications. The incident, the focus of the Inquiry, occurred in September 2003. In 2004 proceedings were instituted on behalf of six deceased Iraqis, one of whom was Baha Mousa, seeking an inquiry into their deaths. The proceedings ended in a decision of the House of Lords (*R (al Skeini) v Defence Secretary* 2008 1 AC 153).

4. Arising out of the incident Court Martial proceedings were instituted against seven members of the Queen's Lancashire Regiment. The Court Martial trial took place in the United Kingdom, starting in September 2006 and concluding in March 2007.

The basis of the applications for anonymity

5. The applicants claim that they and their families are at risk of abduction, kidnapping, ransom and physical harm including death. In support of their

application they rely on evidence contained in a witness statement made in these proceedings by Sapna Malik, a partner in the firm of Leigh Day & Co, solicitors acting for the applicants together with Public Interest Lawyers, and witness statements made by them individually.

6. In her witness statement, Ms Malik refers to the security situation in Iraq and to certain factors which she says would put the applicants at particular risk.

7. It is common knowledge that since the fall of the Saddam Hussein regime in 2003 the security situation in Iraq has been extremely volatile. In this respect, I have considered the statement of Ms Malik, the reports of NGOs to which she refers, and the detainees' own witness statements. In their own witness statements, the applicants for the most part accept that the situation has improved. However risks remain. I have addressed the evidence relating to the nature and level of the risk more fully in my closed ruling.

The statutory framework

8. The applications are made under s.19 of the Act. For the purposes of this application the following statutory provisions contained in the Act are material and relevant:

> "**17 Evidence and procedure**
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> (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.
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> (2) …
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> (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).
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> **18 Public access to inquiry proceedings and information**
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> (1) Subject to any restrictions imposed by a 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 –
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> (a) …
>
> (b) to obtain or to view a record of evidence and documents given, produced or provided to the inquiry or inquiry panel.
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> (2) No recording or broadcast of proceedings at an inquiry may be made except –
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> (a) …

(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) …

19 Restrictions on public access etc

(1) Restrictions may, in accordance with this section, be imposed on –

(a) …

(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) …

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

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

(a) death or injury;
(b) …
(c) …
(d) …

9. Further statutory provisions in the Act provide for enforcement of restriction orders made by the chairman.

The legal submissions on generic legal issues

10. Although this ruling concerns an application made by the seven detainees, in the course of the Directions Hearing I heard submissions on issues of law made on behalf of not only the seven detainees but also on behalf of soldiers represented by the Treasury Solicitor, the Ministry of Defence and by Kingsley Napley. It is anticipated that a number of these soldiers will wish to make applications for some form of restriction order. In the circumstances, it seemed sensible for me to hear submissions from all parties on generic issues of law. In the result, there is a degree of unanimity in the legal submissions, but one issue remains open for debate.

11. It is clear from the submissions of all counsel, including counsel to the Inquiry, that the chairman of an inquiry, as a public authority, has an obligation to act compatibly with Convention Rights, including Articles 2, 3 and 8 of the European Convention on Human Rights. The decision of the European Court of Human Rights in *Osman v UK* [1998] 29 EHRR 245 sets out the necessary circumstances in which a violation of a duty under Article 2 will 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 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."

12. In relation to applications for anonymity for witnesses giving evidence at a Public Inquiry there are a number of decisions arising out of the Bloody Sunday Inquiry (BSI). However, the most recent decision is the decision of the House of Lords *In re Officer L* [2007] 1 WLR 2135. Miss Tessa Hetherington, who represents the applicants in this application, relies on this decision in support of the application. Counsel for the Treasury Solicitor, Mr Neil Garnham QC, whose submissions were adopted by counsel for the MoD and Kingsley Knapley, accepts the main thrust of

Miss Hetherington's submissions but differs in respect of submissions on the appropriate test at common law.

13. It is to be noted that the decision in *In re Officer L* was a decision arising out of rulings made by an inquiry held in accordance with the provisions of the Act. *In re Officer L* makes it clear that the issue of whether or not a witness should be granted anonymity protection may be considered on two bases: first, in respect of Convention rights and secondly, on common law principles. In a speech, with which all other members of the House agreed, Lord Carswell gave guidance on both these two bases and suggested a test designed to combine consideration of both together.

14. Dealing with Convention rights, Lord Carswell, having referred to the positive duty on contracting States to take steps to prevent the loss of life at the hands of others than the State, said (para 20):

> "20. Two matters have become clear in the subsequent development of the case law. The first, this positive obligation arises only when the risk is 'real and immediate'. The wording of this test has been the subject of some critical discussion, but its meaning has been aptly summarised in Northern Ireland by Weatherup J in *In re W's Application* [2004] NIQB 67, at [17], where he said that 'a real risk is one that is objectively verified and an immediate risk is one that is present and continuing'. It is my opinion that the criteria is and should be one that is not readily satisfied: in other words, the threshold is high.
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> …
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> In my opinion the standard is constant and not variable with the type of act in contemplation, and is not easily reached. Moreover, the requirement that the fear has to be real means that it must be objectively well-founded. In this respect the approach adopted by Morgan J was capable of causing confusion when he held that the tribunal should have commenced by assessing the subjective nature of the fears entertained by the applicants for anonymity before going on to assess the extent to which those fears were objectively justified. That is a valid approach when considering the common law test but in assessing the existence of a real and immediate risk for the purposes of article 2 the issue does not depend on the objective concerns of the applicant, but on the reality of the existence of the risk."

15. Lord Carswell went on to deal with the principle of proportionality, the second of the two matters to which he referred in para 20 above.

> "21. Secondly, there is a reflection of the principle of proportionality, striking a fair balance between the general rights of the community and the personal rights of the individual, to be found in the degree of stringency imposed upon the state authorities in the level of precautions which they have to take to avoid being in breach of article 2. As the European Court of Human Rights stated in *Osman v United Kingdom* 29 EHRR 245, para 116, the applicant has to show that the authorities failed to do all that was reasonably to be expected of them to avoid the risk to life. The standard accordingly is based on reasonableness, which brings in consideration of the circumstances of the case, the ease or difficulty of taking precautions and the resources available."

16. Miss Hetherington submits, and all counsel agree, that the test of applicability for both Article 2 and 3 is the same as that described by Lord Carswell, namely that of a real and immediate risk to life or the risk to the freedom from torture, cruel and inhuman or degrading conduct. Miss Hetherington and Mr Garnham further submit that Lord Carswell's reference to the test as setting a high threshold is merely adjectival and not part of the legal test.

17. I accept these submissions, although describing Lord Carswell's reference to a high threshold as adjectival does not seem to me to add anything of substance to assist in the application of the test. The words "real and immediate risk" demonstrate, as Lord Carswell states, that the test is not readily satisfied.

18. Turning to the common law test, Lord Carswell said:

> "22. The principles which apply to a tribunal's common law duty of fairness towards the persons whom it proposes to call to give evidence before it are distinct and in some respects different from those which govern a decision made in respect of an article 2 risk. They entail consideration of concerns other than the risk to life, although as the Court of Appeal said in para 8 of its judgment in the *Widgery Soldiers* case [2002] 1 WLR 1249, an allegation of unfairness which involves a risk to the lives of witnesses is pre-eminently one that the court must consider with the most anxious scrutiny. Subjective fears, even if not well-founded, can be taken into account, as the Court of Appeal said in the earlier case of *R v Lord Saville of Newdigate.* Ex p A[2000]1 WLR 1855. 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."

19. Finally, Lord Carswell went on to suggest a combined test:

> "29. In pursuit of this end, 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 one 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)".

20. It is in respect of the common law test that counsel differ. Mr Garnham submits that the common law in certain circumstances requires a court to find that there must be compelling justification for not granting anonymity. He relies on a passage in the judgment of Lord Woolf in *R v Lord Saville of Newdigate and others ex parte A and others* [2000] 1 WLR 1855 (see para 68(5)). He submits that this passage of Lord Woolf's judgment is not inconsistent with, nor has it been overruled by, *In re Officer L* and applies where the tribunal has found that although the test required for Article 2 and 3 has not been satisfied, the risk will be increased if the witness gives evidence without the protection of anonymity. In those circumstances, it is submitted, there must be some compelling justification for not granting anonymity. Mr Garnham accepts that if the tribunal finds that there is no increased risk it must carry out a balancing exercise of all factors when deciding whether or not to grant a restriction order.

21. Miss Hetherington submits that the test set out by Lord Carswell in *In re Officer L* does not require the court to find some compelling justification before refusing to grant anonymity when applying the common law test.

22. For reasons which will become apparent it is, in my judgment, not necessary for the purposes of my decision on the application of the seven detainees to resolve this issue. It may become necessary to do so when I deal with applications for a restriction order in respect of the soldiers, but in respect of this application I do not find it necessary to do so.

The applicants' submissions specific to the application of the seven detainees

23. Miss Hetherington submits that the applicants have Convention rights under Articles 2, 3 and 8. She further submits that the applicants are able to satisfy the common law test of fairness in seeking a restriction order. Her submissions in summary are that the applicants are able to demonstrate that if their identities are not protected by a restriction order there will be a material increase in the risk to their lives. It is submitted that the publicity which the Inquiry is likely to attract will cause the risk to the applicants to be increased unless the restriction order sought is made.

24. It is submitted that the evidence in the witness statements of the applicants and Ms Malik show that the test of a real and immediate risk is objectively satisfied. Further, the limited scope of the order sought is reasonable and seeks no further protection than is necessary. It is conceded that if the order is made it may not be fully effective outside the United Kingdom, but it will substantially reduce the prospect of foreign media accessing relevant information from media sources in this country.

25. In the alternative it is submitted that if the test of real and immediate risk is not satisfied, there are wider considerations which ought to persuade me that the common law test is satisfied. Miss Hetherington submits that subjecting the applicants to fear and risk and the resultant incursion into their private and family lives is avoidable without a disproportionate restriction on the public nature of the Inquiry and without any inhibition of the allaying of public concern. Reliance is placed upon the fact that all core participants will know the identity of the applicants. The applicants will give evidence in public. Each of them has a real subjective fear for his life and the well-being of his family. In all the circumstances it is submitted that I ought to make the order sought in respect of each applicant.

My findings and conclusions

26. I preface my findings of fact by observing that this application with its supporting documents was circulated to all parties before the hearing and the application was considered in an open hearing. It is relevant to note that no other evidence was put before me by any party other than the applicants and no attempt was made by any party to challenge that evidence.

27. As far as these applicants are concerned I make the following findings of fact. From the witness statements of each, I have no doubt that each has genuine subjective fears for the safety of himself and his family. I also have no doubt that, viewed objectively, the evidence supports a finding

that there is a general threat to their safety and that of their families. Further, in my judgment, there can be little doubt that the evidence given by them and others at this Inquiry will generate considerable media interest in both this country and Iraq. I have gone on to consider whether such publicity would increase the risk to the safety of the applicants and their families. I find that if no restriction order is made it will make it more likely that they would be subjected to an increased risk of death and of Art.3 mistreatment. In making this finding I have not left out of account the fact that a restriction order may not be observed by foreign media and in particular in Iraq. A restriction order will however prevent a flow of publicity in respect of the detainees from the British media being taken up by media in Iraq.

28. Having reached these conclusions on the facts, in my judgement it is unnecessary for me to decide whether or not the test of "real and immediate risk" is satisfied. On these findings I conclude that the common law test is satisfied for reasons set out below. Accordingly I do not propose to embark on "an excursion … into the territory of article 2".

29. I accept that under the common law principle wider considerations come into play. Although it is by no means determinative in objectively assessing the level of risk in the common law balancing exercise, I note that with one exception there is no evidence of a specific threat having been made to any of the detainees. I am also conscious of the importance of the principle that there should be as far as possible complete transparency in the proceedings of the Inquiry and the right to report those proceedings as fully as possible.

30. The other factors which in my opinion are important are the following. I have found that the detainees have subjective fears for the safety of themselves and their families. Further, these fears are well-founded and I have found that without the protection of a restriction order there is an increased risk to their lives and that they may suffer torture or inhuman treatment. There is evidence that the detainees have suffered psychiatric injury from the incident itself. Medical reports dated October 2007 show the extent of the psychiatric injury in each case. The injuries sustained vary in intensity but in each case are said to require ongoing treatment. The restriction order being sought is one which is limited in scope. The detainees will give evidence in public without being screened. Their identities will be known to the core participants and their representatives. Without the protection of the restriction order which they seek, in my opinion, there is a risk that they may be inhibited when giving evidence by their fears for the safety of themselves and their families, thus frustrating the Inquiry in its quest for the truth. In addition, although their own conduct may be scrutinised, the focus of this inquiry will be principally on the

conduct of the soldiers who seized and detained them. Finally, although the procedure being inquisitorial this issue is one for me to decide, it is to be noted that no party has in fact raised any objection to the order.

31. Assessing all these factors and considerations I am satisfied that the balance comes down firmly in favour of making the restriction order sought by the applicants in respect of detainees A-F. It will be clear from the above that on the findings which I have made, the common law test is satisfied whether on the basis contended for by Mr Garnham or that submitted by Miss Hetherington. I would add that it is also unnecessary for me to deal with Miss Hetherington's Article 8 submissions.

32. I have considered further whether detainee G should also be the subject of a restriction order. He is in a slightly different position to the other applicants for the reasons set out in my closed ruling.

33. In his case I have concluded that he also should have the protection of a restriction order. In his case, as in the case of the other applicants, in my opinion publication of his name and identity in the proceedings of the Inquiry will increase the risk to him and his family. In the circumstances I see no reason to differentiate between him and the other applicants.

34. Accordingly, I make the restriction order in the same terms as the interim order. I am satisfied that granting the restriction order sought will not at present interfere with the fundamental purposes of the Inquiry. However, if, as the Inquiry proceeds, the restriction order appears to be an impediment to the Inquiry's task it may be necessary for me to reconsider the grant of it. In this sense, therefore, the order is not necessarily a final order.

THE RT HON SIR WILLIAM GAGE
CHAIRMAN, BAHA MOUSA PUBLIC INQUIRY
5 February 2009