CHAPTER 4: PROCEDURAL ISSUES

1. Undertakings from the Attorney General and Heads of Services

1.144 On 18 January 2011 the Inquiry received an undertaking from the Attorney General in respect of any person providing evidence to the Inquiry relating to a matter within its terms of reference (where evidence is defined to include oral evidence, any written statement made preparatory to the giving of evidence, and any document or information produced to the Inquiry solely by that person) that:

> *"No evidence...will be used in evidence against that person in any criminal proceedings or for the purpose of deciding whether to bring such proceedings against that person (including any proceedings for an offence against military law, whether by court martial or summary hearing before a commanding officer or appropriate senior authority)..."*

1.145 The terms of the undertaking expressly exclude a prosecution for giving false evidence in the course of the Inquiry or having conspired with or procured others to do so, and proceedings where a person is charged with an offence under s35 of the Inquiries Act 2005 (or having conspired with or procured others to commit such an offence).

1.146 The Attorney General further undertook that:

> *"...in any criminal proceedings brought, or in any decision as to whether to bring such proceedings, against any person who provides such evidence [as defined] to the Inquiry, no reliance will be placed upon evidence which is obtained during an investigation as a result of the provision by that person of evidence to the Inquiry. This undertaking does not preclude the use of information and/or evidence identified independently of the evidence provided by that person to the Inquiry."*

1.147 Similar undertakings were thereafter also obtained from the Director of Public Prosecutions ("DPP") for Northern Ireland and from the Lord Advocate.

1.148 The Permanent Under-Secretary of State at the Ministry of Defence ("MoD") and the heads of each of the three Armed services provided undertakings covering former or current MoD civil servants and members of those Armed services respectively. Those undertakings are each in similar terms and state that:

> *"If written or oral evidence given to the Inquiry by a witness who is a former or current [civil servant or member of that Armed Force] may tend to indicate that:*
>
> *1. The same witness previously failed to disclose misconduct by himself or some other person, or*
>
> *2. The same witness gave false information on a previous occasion in relation to such misconduct,*
>
> *then I undertake that the [MoD or Armed Force in question] will not use the evidence of that witness to the Inquiry in any [disciplinary proceedings for civil servants, or administrative action for members of the Armed Forces] where the nature of the misconduct alleged is the failure to give a full, proper or truthful account on that previous occasion."*

1.149 It was intended that the obtaining of such undertakings would encourage all witnesses to give full and truthful accounts, free from any concern that might otherwise have caused witnesses to refuse to give evidence and/or to answer questions by invoking the privilege against self-incrimination. In this manner, the Inquiry endeavoured to ensure that it would receive the unqualified assistance of all witnesses in carrying out its task of establishing the true facts relating to the matters it was required to investigate by its terms of reference.[31]

2. Protective measures for witnesses

1.150 On 21 June 2010 the Inquiry held a hearing in order to determine generic legal issues that it was judged were likely to arise in relation to applications for anonymity and other protective measures. In due course, I made a ruling on 19 July 2010 ("Ruling on Generic Legal Issues following that First Directions Hearing").[32] That ruling has been applied to all applications made on behalf of witnesses for protective measures.

1.151 By protective measures, I mean steps taken to protect a witness's identity. In some cases this meant that a witness's name was not made available to the public, or to the Inquiry's participants. Instead, that person was known by a designated cipher. In other cases the protective measures granted, consisted of the witness's appearance being screened from public view in the hearing room.

1.152 It is of course important that a Public Inquiry is, so far as possible, open and transparent. Consequently, in determining applications for protective measures I had to balance the significant public interest in investigating these matters as openly and transparently as possible with the personal security considerations put forward by each applicant. Protections were granted in a small number of cases where the applicant made out proper and sufficient grounds and where the openness of the Inquiry process would not be hindered in any significant way by the granting of those measures. Such protective measures were kept under review throughout the Inquiry process. In total, I granted 59 protective measures applications.

3. Identifying recommendations

1.153 I was conscious that the number, and nature, of recommendations to be made in this Inquiry was likely to be limited by the fact that (i) the focus of this Inquiry is principally upon fact finding, rather than making recommendations and (ii) the extensive review of doctrine, policy and training undertaken by Sir William Gage in the Baha Mousa Inquiry had already covered most of the issues upon which this Inquiry might be expected to make recommendations.

1.154 Nonetheless, I considered that there were some important areas on which recommendations could be made in order to effect enduring change. These are outlined in the body of the Report itself. I confine myself here, to a brief explanation of the process adopted by the Inquiry for identifying those recommendations.

1.155 The Solicitor to the Inquiry began by writing to the Ministry of Defence ("MoD") in March 2014, in the final weeks of the oral hearings, to ask for an account of the extent to which each of Sir William Gage's recommendations had been (i) accepted and (ii) if accepted, implemented and (iii) if not accepted, a statement of the reasons why not.

[31] The various undertakings are included in Appendix 6 to this Report

[32] The written ruling is included in Appendix 6 attached to this Report

1.156 The MoD responded promptly to outline that all but one of the 73 recommendations made by Sir William in the Baha Mousa Inquiry report had been implemented. The MoD had felt unable to accept Recommendation 23 (use of the "*harsh approach*" in interrogation/tactical questioning) for operational reasons, although the "*harsh approach*" had been replaced by the "*challenging direct*" technique. This was then the subject of a Court of Appeal decision on the legality of this technique in June 2014.[33] The Court came to the clear conclusion that the policy which the appellant sought to challenge does not involve any violation of the duty of humane treatment or any other relevant standard under the Geneva Convention.

1.157 In addition, whilst the MoD had formally complied with Recommendation 44 (that it should consider Her Majesty's Chief Inspector of Prisons ("HMCIP") inspections of operational detention facilities), it had subsequently decided against introducing such inspections on the basis that the current inspection regime, involving regular inspections by the Provost Marshal (Army) and the International Committee of the Red Cross ("ICRC") was sufficient.

1.158 In the light of this response, I was satisfied that the MoD had accepted and implemented those of Sir William Gage's recommendations that might have formed the subject of my own. Having heard and read closing submissions and closing written reply submissions, the Inquiry began to formulate a list of topics and issues on which its own recommendations might be made, omitting from that list any issue about which Sir William Gage had made a recommendation and which had been accepted and implemented. The Solicitor to the Inquiry wrote to the MoD, copied to the Inquiry's other Core Participants, at the end of August 2014 with a list of those issues asking the MoD to provide witness and documentary evidence of the current position in relation to each, for the purposes of determining what recommendations, if any, I should make.

1.159 That evidence was received by mid September 2014 and circulated to all Core Participants. A response to that was received from Public Interest Lawyers ("PIL"), the lawyers for the ICPs, at the end of September. The Inquiry then began its own analysis of the evidence supplied concluding that given the limited number of issues identified and the substantive response and evidence in relation to those issues supplied by the MoD, no further oral hearings to consider that evidence or to invite oral submissions from other Core Participants were needed. Instead, I formulated the 9 recommendations which will appear throughout the report having given regard to, amongst other things, the degree to which they could be implemented. The full list of recommendations is also included as Appendix 7 to this Report.

[33] *R* (*Haidar ali Hussein*) v Secretary of State for Defence [2013] EWCA (Civ) 0892 (Tomlinson LJ, Lloyd Jones LJ, Ryder LJ)