

CHAPTER 5: STANDARD OF PROOF

- 1.160** My approach to the Inquiry's terms of reference was discussed in Chapter 1 of this Introduction. As I made clear in that chapter, I am required to make appropriate findings of fact, based on all the evidence that I have heard, seen and read, in order to fulfil the Inquiry's terms of reference. I am also required to make recommendations, where appropriate, based on those findings of fact.
- 1.161** In carrying out my task of finding the facts, it is inevitable that I have had to resolve many conflicts of evidence. I have therefore had to consider the level of certainty that I should achieve before making each such finding of fact or, to put the matter another way, the standard of proof that I should apply when reaching any conclusion about what actually happened.
- 1.162** The Inquiries Act 2005 ("2005 Act") makes no express provision as to the standard of proof to be applied by an Inquiry when making findings of fact or recommendations. Section 17 of the 2005 Act states that the procedure and conduct of the Inquiry are to be such as the Chairman of the Inquiry may direct, although the Inquiry must act with fairness and with regard to the need to avoid unnecessary cost. As it seems to me therefore, in the absence of any direct guidance from the 2005 Act, it is for me to determine what standard of proof I should apply.
- 1.163** In order to resolve this particular issue, I have considered the different standards of proof that are applied in civil and criminal trials and the various approaches that have been adopted in previous Inquiries.
- 1.164** Broadly speaking, the criminal and civil courts each apply a single but different standard of proof. In criminal cases a high standard of proof is required, so that the jury must be satisfied so that they are sure before making a finding of guilt. In civil cases, the standard of proof is less demanding; it is for the judge to decide what happened on the balance of probabilities. In practice, this means that the judge will decide each issue of fact on the basis of which version of the disputed fact or facts is more likely than not to be the correct one.
- 1.165** In making findings as to relevant facts, a Public Inquiry is in a very different position from a court of law. In both criminal and civil courts of law, findings are made in relation to specific allegations, where all parties are entitled to call evidence in support of their case. Importantly, the decisions in such cases also lead to findings of criminal or civil liability on the part of one or more of the parties, with an appropriate sanction/order being imposed by the Court on the party or parties as a result.
- 1.166** By contrast, a Public Inquiry is tasked with establishing the facts as to what has happened, rather than making a decision upon competing cases. An Inquiry uses an inquisitorial process in order to reach its findings of fact. Its primary task is to conduct an appropriate investigation in order to make the relevant findings of fact and consequent recommendations. Importantly, although this may mean that individuals or organisations may be subject to express criticism as a result, none of the Inquiry's findings are determinative of any form of liability. This is clear from the terms Section 2 of the 2005 Act, which specifically prohibits an Inquiry from determining civil or criminal liability, as follows:

"No determination of liability"

(1) An inquiry is not to rule on, and has no power to determine, any person's civil or criminal liability.

(2) But an inquiry panel is not to be inhibited in the discharge of its function by any likelihood of liability being inferred from the facts that it determines or recommendations that it makes.”

1.167 In my opinion, a certain amount of flexibility is needed with regard to the standard of proof that I should apply in this Inquiry, given that the entire emphasis of the Inquiry is on achieving an appropriate determination of the facts and in making recommendations. I can discern no good reason for my being limited to one set standard of proof, the application of which would not allow the sort of flexibility in standard that will be required to enable me to make appropriate determinations of fact in respect of the many and widely varying factual issues which I am called upon to decide in this Inquiry.

1.168 In reaching that conclusion, I have been greatly assisted by a consideration of the approach taken to the same question in two previous major Public Inquiries, namely the Baha Mousa Inquiry and the Shipman Inquiry. In each of those Inquiries, the Chairman also decided to adopt a flexible approach to the standard of proof.

1.169 Like this Inquiry, the Baha Mousa Inquiry was required to investigate events that involved allegations of misconduct by British soldiers in Iraq. In particular, it was required to investigate the circumstances surrounding the death of an Iraqi civilian, Baha Mousa, and the treatment of those who had been detained with him. The chairman of that Inquiry, Sir William Gage, adopted what he referred to as a “flexible and variable” approach to the standard of proof. In this way he made provision for findings to be made to both the civil and criminal standard of proof. Sir William Gage also allowed for appropriate comment, where he felt unable to make any finding of fact as such, as follows:

“...where in this Report I use such expressions as ‘I am sure’ or ‘I have no doubt’ I will have found a fact to the criminal standard. When I state simply ‘I find’ the standard of proof will have been the ordinary civil standard of proof, namely the balance of probabilities. Where it is obvious that I have found a fact but have not used the words ‘I am sure’ or ‘I find’, the standard will have been the civil standard. All other expressions, such as an expression of ‘suspicion’ will not be a finding of fact, but will indicate my state of mind in respect of the issue being considered.”³⁴

1.170 The “flexible and variable” approach to the standard of proof taken by Sir William Gage in the Baha Mousa Inquiry was one that he had adapted from that which had been adopted in the earlier Shipman Inquiry.³⁵ The approach taken by the Chairman of that Inquiry, Dame Janet Smith, was not to apply an across-the-board standard of proof to her findings, but instead to make findings indicating which standard of proof had been met.

1.171 In my view the “flexible and variable” approach is an entirely appropriate one that allows for appropriate findings of fact to be made with varying degrees of certainty. I have therefore also decided to adopt a “flexible and variable” approach to the findings of fact made in this Report. This has enabled me to make findings, to whatever degree of certainty I have felt able, on each of the issues that I have determined. In this way I have made findings of fact to both the civil and criminal standards of proof.

1.172 When making findings to the civil standard of proof, I have borne in mind that matters of a serious nature will generally require evidence of sufficient weight to enable me properly

³⁴ Baha Mousa Report at volume I, Part I, [1.114]

[https://www.gov.uk/government/uploads/system/uploads/attachment_data/file/279190/1452_i.pdf]

³⁵ http://webarchive.nationalarchives.gov.uk/+http://www.bahamousainquiry.org/linkedfiles/baha_mousa/key_documents/rulings/standardofproof7may2010.pdf; at [1] and [19]

to make a finding on the balance of probabilities. This is not to impose a higher standard of proof, or to elevate the standard in any way, but rather to reflect the principle that a matter of greater gravity than the norm is likely to require more cogent evidence for an appropriate finding of fact to be made on the balance of probabilities.

- 1.173** I have it very much in mind that it is important that any findings that I do make are readily and easily understood. I have also considered that it is in the interests of all witnesses open to criticism that they are aware of the nature and extent to which I have made my findings. Thus, I have sought in the Report to explain both the evidence that I have relied upon in reaching any conclusion and the standard to which I have determined the matter to be proved by reference to the language that I have used.
- 1.174** I have adopted the civil standard of proof, namely the balance of probabilities, as the basic starting point for the findings that I have made. Thus, all the findings of fact in this Report are made to the civil standard of proof, unless the language I have used clearly indicates otherwise. Thus, in a significant number of instances I have been able to decide the issue in question to such a degree of certainty that I am sure that it was so. Where I have made a finding to such a level of certainty, I have either stated in the Report that *"I am sure"* or that *"I am certain"* or *"I have no doubt"* of the finding in question. In such a case, I have made the finding to the criminal standard of proof. However, expressions such as *"I am satisfied"*, *"I accept"*, *"It is likely"*, *"I believe"*, *"It seems"*, *"I agree"*, *"I have come to the conclusion that"* or *"this suggests"* – whether or not qualified by an adverb such as *"completely"* or *"entirely"* – are all expressions used in connection with a finding that has been made to the civil standard of proof. Expressions such as *"I suspect"* will not be a finding of fact as such, but will indicate my state of mind about the issue being considered at the time.