Appendix 6: The Chairman's Key Rulings & Directions

1. Ruling regarding the terms of reference
2. Direction concerning the deceased who did not enter Camp Abu Naji
3. Ruling regarding James Lawrence E-mails
4. Ruling regarding the calling of military witnesses
5. Ruling on generic application for Protective Measures
6. Ruling on immunities following the 1st directions hearing
7. Ruling on legal issues relating to anonymity
8. Amended general restriction order (non-witnesses)
9. Note of guidance for general restriction order (witnesses)
10. Undertaking from the Lord Advocate 18 April 2011

11 Undertaking from the Director of Public Prosecutions for Northern Ireland dated 31 January 2011

12 Letter from the Attorney General's Office dated 18 January 2011

13. Letter from the Attorney General's Office dated 10 January 2011

14 Attorney General's Proposed Undertaking 10 November 2010

IN THE MATTER OF THE INQUIRIES ACT 2005

AND IN THE MATTER OF THE INQUIRY RULES 2006

THE AL SWEADY INQUIRY

RULING RE: TERMS OF REFERENCE

Introduction

1. Yesterday, on 11th March 2013, Leading Counsel for the Ministry of Defence ("the MoD") made a submission to the effect that:
   (1) The Inquiry is restricted by its terms of reference to investigating the *specific* allegations of ill-treatment made by the five claimants in the judicial review proceedings;
   (2) Thus, the Inquiry may not investigate either (i) allegations of ill-treatment now made by the five claimants if they were not made in the judicial review proceedings or (ii) allegations of ill-treatment made by four men who were not claimants in the judicial review proceedings but who were captured, detained at CAN and then detained at the DTDF at the same time as the five men who were claimants in the judicial review proceedings, *unless* those allegations are relevant in either case to the specific allegations that were made by the five claimants in the judicial review proceedings;
   (3) I should accordingly require the legal representatives of the Iraqi Core Participants (Public Interest Lawyers – "PIL") to draw up a list of allegations that their clients make which they say should be investigated under the terms of reference (whether because they come directly within the terms of reference or because, although outside the terms of reference, they are relevant to matters that are within the terms of reference); that counsel to the inquiry should indicate which of those allegations they believe fall within the terms of reference and which allegations fall outside it but which are relevant to those allegations that fall within the terms of reference; the core participants can then indicate whether they agree or disagree with this approach; and in the event of disagreement, then I should rule on the issue.

2. Although the points are capable of being elided, it seems to me that there are two separate issues. The first is whether the Inquiry is restricted to investigating the *specific* allegations of ill-treatment made in the judicial review proceedings by the five claimants, or whether it is permitted to consider all of the allegations of ill-treatment that are now made by those five men. The second is whether the Inquiry is restricted to investigating the allegations of ill-treatment made by the five claimants, or whether it is permitted to consider the allegations of ill-treatment made by the four non-claimant detainees.

First issue

3. In my view the Inquiry is not restricted to investigating the *specific* allegations of ill-treatment made in the judicial review proceedings by the five claimants. Instead, I am permitted by my terms of reference to investigate and report on all of the allegations of ill-treatment that are now made by those five men.

4. There are three reasons for this.

5. The first is the terms of reference themselves. These require me "to investigate and report on the allegations made by the claimants in the judicial review proceedings against British soldiers of (1) unlawful killing at Camp Abu Naji on 14 and 15 May 2004, and (2) the ill-treatment of five Iraqi nationals detained at [CAN] and [the DTDF]" (my emphasis). Whilst the use of the definite article in the first part of these terms of reference ("the allegations") might at first be thought to limit my investigation to only the specific allegations of ill-treatment made by the claimants in the judicial review proceedings, it is clear that is not so. This is because the terms of reference require me to investigate "the allegations...of....the ill-treatment of five Iraqi nationals": these words require me to investigate the general allegation made by each of the claimants in the judicial review proceedings of the ill-treatment of five Iraqi nationals, not the specific way in which the general allegation of ill-treatment was put in the judicial review proceedings. In short, what I am required to investigate and report on are allegations that the five Iraqi nationals in the judicial review proceedings were ill-treated. Had the approach that the MoD now advocates been that which the Secretary of State for Defence wished, then no doubt he would have framed the terms of reference accordingly, perhaps along the lines of: "To investigate and report on whether five Iraqi nationals detained at [CAN] and [the DTDF] were ill-treated by British soldiers in the manner alleged by the Claimants in the judicial review proceedings".

6. Second, in the judicial review proceedings the claimants *did* make general allegations of "abuse and mistreatment" at both CAN and the DTDF (see e.g. paragraphs 7(g) and 7(o) of the Amended Grounds) – even if the MoD was correct in its restrictive approach, then these generalised allegations fall to be investigated by me (and therefore permit, indeed require, an investigation of the specificity of the generalised allegations that is now given in the claimants' Inquiry witness statements).

7. Third, if the MoD is correct in its proposed approach, then there would require to be detailed argument over the extent to which an allegation was or was not made by a claimant in the judicial review proceedings, the extent to which an allegation made by such a claimant is now the same as or different to the allegation that he made in the judicial review proceedings and / or whether it fell within the general allegations of "abuse and mistreatment", and therefore the extent to which the allegation that he now makes is properly considered by me. So, for example, is an allegation now made by a claimant that he was hit on the right hand side of his face, whereas in the judicial review he alleged that he was hit on the left hand side of his face, an allegation that is within or outside my terms of reference? I would imagine that every sensible person would agree that the allegation being made was one of assault (a sub-category of ill-treatment), and therefore I am able to investigate and report on the allegation that the claimant now makes of being hit on the right hand side of his face (albeit, of course, the change in account *may* be relevant to an assessment of whether the allegation is made out).

8. For all of these reasons, I shall investigate and report on all of the allegations of ill-treatment made by those detainees that were claimants in the judicial review proceedings, whether they made such allegations at the time of the judicial review proceedings or subsequently.

Second Issue

9. It seems to me that there is a simple answer to the MoD's apparent concern. That is that the four detainees who were not claimants in the judicial review were captured in the course of the same battle as those that were claimants, they were taken to CAN at the same time as those that were claimants, they were detained at CAN alongside those that were claimants, they were transferred to the DTDF with those that were claimants, were processed with those that were claimants, were detained and interrogated in the JFIT at the same time as those that were claimants, and were detained until September 2004 in the DTDF at the same as those that were claimants. In short, these 9 men were part of a group. In these circumstances, the evidence of the 4 non-claimants – *and* the allegations that they make – form part of the *res gestae* and are likely to be relevant to my consideration

of the allegations made by the 5 claimants in the judicial review proceedings. It is accordingly likely that not only will I hear their evidence about the events that they describe, including their own allegations of ill-treatment, but that I will find it necessary to report on those allegations as a necessary part of my duty to report on the allegations of ill-treatment made by the five detainees who were claimants in the judicial review proceedings. Certainly at this stage of the Inquiry (before any oral evidence from the Iraqi witnesses has been heard), and in the context of what is intended to be an entirely inquisitorial process, it would be entirely wrong for me to require the drawing of what amounts to an indictment and then to require the indictment to be severed so that some allegations of ill-treatment made by the 4 non-claimant detainees cannot be led in evidence.

Sir Thayne Forbes
12.3.13

IN THE MATTER OF THE INQUIRIES ACT 2005

AND IN THE MATTER OF THE INQUIRY RULES 2006

THE AL SWEADY INQUIRY

DIRECTIONS PURSUANT TO PARAGRAPHS 166 – 227 of COUNSEL TO THE INQUIRY'S OPENING STATEMENT – EVIDENCE CONCERNING THOSE WHO DIED BUT WHO DID NOT ENTER CAMP ABU NAJI ON 14-15 MAY 2004

---

1. The Inquiry, Core Participants and the Treasury Solicitor's Department shall hereafter work on the basis that the eight deceased Iraqis* died on the battlefield and their bodies were not taken to Camp Abu Naji.

2. Witnesses who give evidence in relation to the cause date and time, place manner and cause of the deaths of those eight Iraqi gentlemen and the movement of their bodies after their deaths, will not be called to give oral evidence to the Inquiry but will in due course be taken as read, unless they need to be called in relation to some other issue or issues with which this Inquiry is concerned.

3. I further direct that if any of the Core Participants wish to oppose this course of action or object to it, they should, by close of business on **Friday 15 March 2013,** make written submissions setting out in detail why it is suggested that any or all of those eight deceased Iraqis did not die on the battlefield and /or were taken to CAN.

Sir Thayne Forbes
11.3.13

* ASI29 - Rahma Abdelkareem Al-Hashimi
ASI30 - Muhammad Abdelhussain Al-Jeezani
ASI13 - Muhammad Maleh Ghleiwi Atiya Obeid Al- Malki
ASI21 - Majed Jubair Suweid Edayyem Al Shweili
ASI10 - Firas Radhi Kahyoush Shazar Al-Grawi
ASI25 - Nissan Rasem Jabbar Al- Abbadi Al-Ruhaimi
ASI19 - Atheer Abdelameer Ja'far Sarout Al- Shweii
ASI23- Ali Dawood Aleiwi Al-Malki

IN THE MATTER OF THE INQUIRIES ACT 2005

AND IN THE MATTER OF THE INQUIRY RULES 2006

THE AL SWEADY INQUIRY

RULING RE: MR JAMES LAWRENCE EMAILS

1. On 16 September of this year, Day 68 of this inquiry, the witness who was then giving evidence, Mr James Lawrence, undertook to produce copies of the email traffic which had passed between himself and Mr Paul Kelly, a witness who had given evidence on an earlier occasion to this Inquiry.

2. Mr Lawrence fulfilled his undertaking immediately. He provided copies of the emails in question to the Inquiry, and copies of those emails were provided by the Inquiry to the various core participants and to the Treasury Solicitor on 18 September.

3. It can be therefore seen that the matter was dealt with extremely promptly.

4. On 19 September, Public Interest Lawyers produced a note addressed to me in which they submitted inter alia that the messages sent by Paul Kelly to James Lawrence on 11 September 2013 were:
   "... capable of falling within section 35(2)(a) and/or (b) of the 2005 Inquiries Act, and of constituting a criminal offence."

5. The note then, in effect, went on to enquire what, if any, action I was proposing to take in the light of the contents of that email traffic. Section 35(2) of the 2005 Act

provides as follows:

"(2) A person is guilty of an offence if during the course of an inquiry he does anything that is intended to have the effect of -

"(a) distorting or otherwise altering any evidence, document or other thing that is given, produced or provided to the inquiry panel, or

"(b) preventing any evidence, document or other thing from being given, produced or provided to the Inquiry panel, "or anything that he knows or believes is likely to have that effect."

6. For a number of reasons set out in the carefully composed and moderately expressed written note produced by Public Interest Lawyers, it was, as I have already indicated, submitted that there was reason to believe that an offence under section 35(2) may have been committed.

7. In the circumstances, I considered it appropriate to invite written submissions from both the Treasury Solicitor and from the Ministry of Defence on the matters raised by Public Interest Lawyers in their note. I received carefully expressed and very helpful written submissions from both those parties within seven days of my request.

8. I have considered all the written material placed before me very carefully. I have come to the conclusion that, in very broad terms, I agree with the views expressed by Mr Garnham QC in the written submissions prepared on behalf of the Treasury Solicitor.

9. In my view, the overall tone and content of the messages sent by Paul Kelly to James Lawrence appear to be ones of general reassurance and about the process of giving evidence to the Inquiry.

10. As things presently stand, I am not persuaded that the messages disclose any attempt on the part of Paul Kelly to discuss the substance of James Lawrence's evidence, or to distort, alter or inhibit Lawrence's evidence in any way.

11. However, that said, I will keep the matter under review in the sense that I am

prepared to reconsider the issues raised by this application in the light of my conclusions reached on all the evidence that I hear at this Inquiry. It seems to me that it will be then that I will be in a position to come to an appropriate conclusion with regard to these and any other exchanges between witnesses, as to whether any of those exchanges bear the sort of interpretation that Public Interest Lawyers have expressed concern about with regard to these particular exchanges.

12. In all the circumstances, therefore, I do not propose to take any further action at this stage.

13. I would, however, sound a note of caution. I accept that there is no legal reason preventing witnesses from communicating with each other or discussing in general the nature of the hearing which they are attending and matters such as that.

14. However, in an inquiry of this sort with some very highly charged issues that require determination by me in due course, it seems self-evident that witnesses should refrain from becoming involved in exchanges with each other which may be misconstrued by others who may come to read them in due course.

15. I say that only as a note of caution. I am not issuing any form of prohibition. However it seems to me that witnesses at this Inquiry would be well advised not to enter into any form of communication with each other about either their evidence or the nature, conduct and progress of the Inquiry.

16. As I say, I merely sound that note of caution. It should not be treated as in any way a suggestion that I have come to a conclusion that anything improper has occurred so far.

Sir Thayne Forbes

3.10.13

IN THE MATTER OF THE INQUIRIES ACT 2005

AND IN THE MATTER OF THE INQUIRY RULES 2006

THE AL SWEADY INQUIRY

RULING REGARDING THE CALLING OF MILITARY WITNESSES

---

1. On 4th June 2013 the Solicitor to the Inquiry sent to the Core Participants a list of military witnesses which Counsel to the Inquiry were considering calling to give oral evidence, along with a list of those military witnesses whose statements Counsel to the Inquiry were proposing should be read. The Core Participants were invited to make written representations on that list if they wished to; the Treasury Solicitor (TSol) and the Ministry of Defence (MOD) by Friday 28th June 2013, and Public Interest Lawyers (PIL) on behalf of the Iraqi Core Participants to make any representations and respond to the submissions made by TSol and the MOD by Friday 5th July 2013. At their request I granted PIL a partial extension until Wednesday 10th July.

2. I have received written submissions as follows:

   (1) First, from TSol on behalf of the majority of the military witnesses, who propose that the Inquiry takes a 'modular' approach to the calling of military witness evidence, that is to call the evidence "topic-by-topic". I am invited to take account of "the nature and quality" of the evidence I have heard so far, and to adopt this approach to avoid "*unnecessary cost*" in accordance with my obligations under s17(3) Inquiries Act 2005. The result would be to call far fewer military witnesses than are presently under consideration to be called.

   (2) Second from the MOD, whose submissions are twofold. The MOD's primary position is to agree with and adopt the submissions made by TSol. In the alternative, the MOD submits that many of those witnesses whom Counsel to the Inquiry are considering calling need not be called. I have received a list of those witnesses to which have been added comments from the MOD as to why they submit that the witnesses need not be called.

(3) Third, from PIL on behalf of the Iraqi Core Participants, who initially made their submissions in sections, addressing various groups of military witnesses, both on the battlefield and at the DTDF. For the most part those submissions are limited to asserting that Counsel to the Inquiry should consider calling a number of the witnesses who it is proposed should have their statements read. I have also seen a letter from PIL to the Solicitor to the Inquiry, dated 5th July 2013, in which are set out a number of 'global observations' about which witnesses should and should not be called. The written submissions contain a request that, should the Inquiry be minded not to call any of those "identified as giving live evidence" [sic – in fact, as the list itself made plain, it was a list of those whom Counsel the Inquiry were *considering* calling], a further opportunity should be afforded to the Iraqi Core Participants to make submissions as to whether or not a witness should be called. On 8th and 9th July 2013 PIL submitted further lists of military witnesses along with their comments on whether particular witnesses should be called. On 10th July 2013 2 further sets of submissions were received. The first responds to the submissions of the MoD and TSol on their "modular" approach (to which they have appended a list of names). The second seeks a moratorium of at least 2 months before the military evidence be heard in the absence of the electronic material from the IHAT databases.

3. TSol and the MoD have been asked for their written responses to the application for a moratorium. Once those are received I will consider them and produce a Ruling on that application. Nothing in this Ruling is or should be taken as any indication of my attitude to that application. I will consider it on its merits at the end of July. However I am anxious that the current Ruling is not delayed pending my consideration of that application because if I refuse that application, I do not want any delay on my part to prejudice the parties' preparations for September.

Preliminary Observations

4. I have considered all of the written representations carefully and am grateful to the Core Participants for their assistance. I do not consider it necessary to hear oral submissions on this topic.

5. For the reasons set out below, I am not minded to adopt the 'modular' approach suggested by TSol, and supported by the MOD. It is my view that that approach is too restrictive to allow me fully to discharge my Terms of Reference, and it is not required in order to ensure that unnecessary cost is avoided. I do not accept the implication apparent in the submissions received from TSol that in order to avoid unnecessary cost I must do only that which I consider "necessary" to fulfil my Terms of Reference; it seems to me that there may be witnesses from whom I consider it

desirable to hear, and, so long as a proportionate approach is taken, the cost of calling those witnesses will not be "unnecessary" within the meaning of s17(3) Inquiries Act 2005.

6. I have given very careful consideration to the approach suggested in the alternative by the MOD. I am persuaded that, in part, it is appropriate to adopt the reasoning set out in the MOD's written submissions such that the number of military witnesses to be called to give oral evidence will be fewer than appeared on the 'consider calling' list that was circulated on 4th June 2013. I note, however, that the reasoning set out in the MOD's comments on individual witnesses does not always coincide with the reasoning set out in the main body of their written submissions. I have therefore instructed that each of those comments be considered, and each witness on the list be reconsidered individually, and that a new version of the 'composite list' first circulated on 4th June 2013 be prepared in accordance with the reasoning that I am prepared to adopt, as set out in more detail below. In the preparation of that "composite list" the Inquiry will also take into account the comments made by the Iraqi Core Participants in the list of names received from them on 10th July 2013. The new list will be circulated following the promulgation of this ruling. In this ruling I confine myself to setting out a number of broad propositions on which decisions will be based when that list is compiled, and when any future decisions are taken concerning which witnesses should be called.

7. It was unfortunate that the written submissions made on behalf of the Iraqi Core Participants failed to address fully the submissions made by TSol and the MOD. The timetable set down for the making of written submissions was intended to allow PIL time to respond to those submissions. When the first of PIL's written submissions were received – on 1st July and on 5th July 2013 – the Solicitor to the Inquiry wrote to PIL requesting a response to the substance of the submissions made by TSol and the MOD. The Inquiry received the letter of 5th July 2013 containing 'global observations' by way of response. The Inquiry then received, on 8th and 9th July 2013, comments from PIL on whether individual battlefield and DTDF witnesses should be called. The submissions received on 10th July 2013 still do not address in terms the submissions made on behalf of the other Core Participants save in relation to the "modular" approach.

8. In preparing this ruling I have considered the written submissions and in particular the 'global observations' set out in PIL's letter of 5th July. I agree in part with those observations.

9. Although the list of military witnesses to be called will be kept under review, this was intended as the main opportunity for Core Participants to make submissions as to

the calling of those witnesses whose names appear on the composite list circulated on 4th June 2013. I was disappointed that the representations received from PIL called for an opportunity to make further submissions, rather than making those submissions now.

10. Those assisting the Iraqi Core Participants will be all too well aware – having themselves provided the Inquiry with extensive and very helpful assistance over the past few months in relation to the calling of Iraqi witnesses – that in order to ensure the smooth and efficient running of oral hearings whilst large numbers of witnesses are called, it is necessary to make arrangements for the attendance of those witnesses a reasonable time in advance. The receipt of further submissions as the time for the calling of military witnesses draws near has the potential significantly to disrupt the progress of the Inquiry, and thereby to lead to the incurring of unnecessary cost. That is a factor that I will have to take into account should further submissions be made at a later stage, although in the light of the list of names served on 10th July 2013 it may be that there has been a reconsideration of that approach.

11. The submissions made by PIL concerning individual witnesses who might be called rather than have their statements read will be taken into account by those reviewing and amending the composite list at my request. I address the 'global observations' below.

TSol's suggestion of a 'modular' approach

12. Although TSol's submissions (at paragraph 6) state that I am not being invited to make any final determinations of fact, it seems to me that that is a necessary implication of the approach TSol proposes. Indeed, the submissions made at paragraphs 8-15 invite such a conclusion:

> *"When the whole body of Iraqi evidence on the allegations of murder [sic] is considered, it becomes clear that there is no concrete evidential basis which could substantiate the allegations".* (paragraph 15)

13. In other words, it is suggested that I might come to the conclusion at this stage that the evidence I have heard concerning the allegations of unlawful killing at CAN is so unreliable as to be unworthy of further consideration, and therefore to relieve me from further investigating the first half of this Inquiry's Terms of Reference. As it seems to me, this is to all intents co-extensive with the sort of 'half time' or *Galbraith*[1] submission that TSol concede at paragraph 16 is not appropriate in the context of

[1] R v Galbraith (George Charles) [1982] 1 W.L.R. 1039

inquisitorial – as opposed to adversarial – proceedings, such as this Inquiry. I agree with the proposition that such a submission is ill-suited to inquisitorial proceedings.

14. That being so, I am not prepared to proceed on the basis proposed by TSol for the calling of military witness evidence. To do so would be to consider and accept, in all but name, a submission of 'no case to answer' of the sort commonly made in adversarial criminal proceedings, to which there are parties, and in particular a prosecutor who (in the majority of cases) bears the burden of proving his case 'beyond reasonable doubt'. My role in this Inquiry is markedly dissimilar to that of a jury in a criminal case. I am not charged with deciding whether I am sure to the criminal standard of any particular allegations, but to conduct a thorough investigation and consider all relevant evidence before coming to conclusions about what happened in accordance with my Terms of Reference. That does not mean that I am required to hear oral evidence from every individual with some evidence of relevance to the Terms of Reference, but it does mean, in my view, that I should not exclude hearing from a particular witness based only on an assessment of the reliability of evidence I have heard so far. In the light of that conclusion I do not need to add to length of this Ruling by setting out in extenso what is said by the Iraqi Core Participants in response to that submission.

15. That conclusion should not be taken to mean that I intend to ignore the nature and quality of the evidence that has thus far been heard when deciding which witnesses should be called. I do not exclude the possibility that, in deciding which witnesses I should hear from, the extent to which evidence heard thus far may have caused certain issues to assume a greater or lesser degree of relevance or importance to the Terms of Reference may be taken into account. It is also likely to be a factor relevant to the extent and nature of evidence that I consider should be explored with particular military witnesses. But I do consider it appropriate to approach with caution a request that involves reaching conclusions on the evidence before all of the evidence has been heard.

16. Having rejected the 'modular approach' I do not consider it necessary to address in this ruling the submissions made by TSol as to the possible modules that could be used and the witnesses that should be called as part of those modules. I note, however, that a comparison of the lists submitted by TSol indicating who they consider should be called under the modular approach with the list submitted by the MOD as to who they consider should be called, reveals significant differences. Of a total of 53 witnesses who TSol propose should be called, the MOD submits that 22 need not be called at all, even taking a more expansive approach. In my view this tends to support the view that adopting a restrictive approach to the calling of military

witnesses is unlikely to ensure that evidence of relevance to my Terms of Reference is adequately and properly explored during oral hearings.

17. Before moving on to deal with the other submissions received, I note that the MOD's primary position was to support the submissions made by TSol. I therefore necessarily reject the MOD's primary submission also. I address the MOD's secondary submission below.

Submissions received from PIL – the 'global observations'

18. By letter of 5th July 2013 PIL made the following 'global observations' as to which witnesses should be called from the battlefield and DTDF groups.

19. First, in relation to the battlefield, PIL submit that I need not hear from witnesses who "only give broad evidence as to the battle". I agree. As rehearsed previously, the circumstances of the battle are not encompassed within the Terms of Reference of this Inquiry. They are relevant only insofar as they may shed light on the time and place at which the Iraqi dead, who were handed over at CAN on 15 May 2004, actually died and the treatment of the live detainees.

20. I therefore disagree with point 2(ii) of PIL's observations that it is necessary to call witnesses who "exchanged fire with Iraqis whether or not any deaths were seen to result". The simple fact that fire was exchanged, and the circumstances in which soldiers fired their weapons, is firmly outside the Terms of Reference of this Inquiry. These topics need not be explored in oral evidence.

21. I also disagree that it is necessary to call every witness who can give some evidence in relation to the number of bodies seen (point 2(iv)). There are witnesses who were present at the time and place of the battle whose observations of the Iraqi dead were fleeting and/or made from a significant distance. Most such witnesses are unable to assist with regard to questions as to the overall number of dead said to have been recovered from the battlefield or the identities of those who died on the battlefield. These are "battlefield" issues the resolution of which should assist me in determining whether the men handed back dead on 15 May 2004 actually died at CAN or before they arrived there. I am therefore not persuaded that every witness who observed Iraqi dead on the battlefield, however briefly or incompletely, need be called to give oral evidence. That is not to say that I will ignore what is said in their written statements, but it does not seem to me necessary to explore the evidence further by questioning in every case.

22. Second, in relation to the DTDF; I am not presently persuaded that a lack of opportunity to receive legal advice or the release procedure, in particular the use of the term 'happy bus', are issues that are central to the fulfilment of my Terms of Reference. However, I need not – and do not - make any final finding as to their relevance or significance at this stage because it seems to me that very few of the witnesses at the DTDF are in a position to give evidence about such matters, and those witnesses are likely to be called under one of the other headings set out in PIL's letter in any event. I agree with the remaining observations made by PIL as to which witnesses from the DTDF should be called to give oral evidence.

23. As set out above, it is unnecessary to rehearse what is said on behalf of the Iraqi Core Participants in respect of the "modular" approach".

Submissions from the MOD

24. I address here the secondary submission made by the MOD having already rejected TSol's proposal, which the MOD supported, that the Inquiry adopt a 'modular approach'. As explained above, the annotated composite military witness list provided by the MOD will be taken into account in accordance with this ruling when the composite list is amended by my legal team.

25. By way of general submission the MOD assert that time spent on military witness evidence, and on different component parts of that evidence, should bear a proportionate relationship to the time spent on the evidence from the Iraqi witnesses, and on the importance, seriousness and complexity of the issues. I agree. However, it is incorrect to say that only a relatively small proportion of the Iraqi witnesses identified were called to give evidence – the Inquiry obtained written statements from 96 Iraqi witnesses, of whom 61 were scheduled to give oral evidence. The Inquiry has identified 521 military witnesses to date, of whom around half were listed as under consideration to be called to give oral evidence on the first composite list circulated on 4th June 2013.

26. The MOD further submits that

> "Where a number of witnesses give very similar evidence from a very similar perspective on a particular issue, it may not normally be necessary to call all of the witnesses (or more than 1 or 2 of them) to give the same evidence." (paragraph 8)

27. I do not accept that this ought to be the decisive factor in respect of any witness. There may be areas of the evidence of relatively limited significance where such a principle might be applied in order to ensure that the approach to the calling of

witnesses remains proportionate. But in respect of any significant issue, it seems to me that all witnesses who are able to give relevant evidence should be considered regardless of whether others can give the same or similar evidence.

28. Insofar as the MOD's submissions address the three main groups of witnesses:

Battlefield

29. I do not agree with the suggestion that those "who are able to give evidence about the broad circumstances of the battle" should be called. As I set out above in relation to an opposite suggestion from PIL, the broad circumstances of the battle are not the subject of the Terms of Reference of this Inquiry.

30. Nor do I agree with the assertion that the issue of whether detainees sustained injuries during the battle or following their detention no longer arises based on evidence given by the detainees themselves. Whilst I accept that the scope for those injuries having been caused at CAN has to a significant extent been limited by some of the evidence from some of the detainees, it does not follow that there is no longer any issue in relation to their injuries for me to consider and reach conclusions about in due course (for example, the extent to which they appeared to be injured at the time of their arrival at CAN to the soldiers who detained them and the adequacy of the medical attention/treatment afforded to them on their arrival at that camp). Further, as I set out in some detail in relation to the submissions received from TSol, I am not prepared to form conclusions on the evidence before all the evidence has been heard. I am therefore minded to hear from all the soldiers who were directly involved in detaining and handling the nine known live detainees on 14 May 2004 prior to their arrival at CAN.

CAN

31. The Inquiry has obtained a large number of statements from witnesses who were at CAN on 14 May 2004 but who took no direct or active role in relation to the handling of either the detainees or the Iraqi dead. I agree that it is not necessary to call every individual who happened to be at CAN during the period 14-15 May 2004, and in particular those in this category.

32. There are similarly a significant number of witnesses who were at CAN that night who have little or no recollection of events. I do not propose that their lack of recollection be treated as a decisive factor when considering whether they should be called. There are witnesses who were clearly involved in, for example, handling the detainees, based on contemporaneous records and/or photographs, who have stated that they have no particular recollection of the events of 14-15 May 2004 or the detainees. In my view the fact that they were there – and therefore likely to be the

subject of or a witness to the misconduct alleged by the detainees – means that it is important that they be called to give oral evidence, notwithstanding their stated lack of recollection.

33. As to the witnesses who handled the Iraqi dead at CAN, I do not propose that every individual who took any part in this process should be called to give evidence, but equally I do not accept the MOD's proposition that none of the witnesses who assisted in unloading corpses need be called. I set out below what I consider to be the appropriate approach to these witnesses.

JFIT/DTDF

34. The MOD is correct to assert that I will wish to establish the facts about what took place in the JFIT in respect of the nine known live detainees. To that end, I intend that all those who were involved in interrogating the detainees should be called to give oral evidence, as well as those who can be identified as having taken part in guarding them during their time in the JFIT. A significant number of allegations of mistreatment have been made relating to this period, which should be thoroughly investigated.

35. There is a similarly high incidence of allegations made concerning the arrival of the detainees at the DTDF on 15 May 2004 and their initial processing. Again, I intend that those who took a direct part in this process and/or a supervisory role on the day should be called to give oral evidence so that those allegations can be properly explored.

36. As for the remainder of the time spent at the DTDF by these nine detainees it is the case the number and, for the most part, seriousness of the allegations made is limited. I am therefore content that for the majority of witnesses working at the DTDF during the relevant time period reading their statements will be sufficient to enable me to fulfil my Terms of Reference. Where allegations of mistreatment have been made however, I intend that any witness who may be the subject of or a witness to that alleged mistreatment should be called to allow the allegations to be fully explored.

Approach to the calling of military witnesses

37. To the extent that I accept in part submissions made by the MOD, and some of the 'general observations' made by PIL, I have instructed my legal team to review the composite list of witnesses issued on 4th June 2013 and make amendments accordingly. In that task they will also take into account the comments made in the list of witnesses from Mr O'Connor QC on 10th July 2013. Drawing together the

submissions I have accepted and rejected they will apply the following general principles, all of which should be regarded as presumptions that may be displaced should the evidence of a particular witness require that he be called/read notwithstanding the general principle. However, I emphasise that the list will remain under review.

38. Battlefield witnesses should generally be called where they (i) were directly involved in the capture of a detainee, or (ii) observed the capture or handling of a detainee, or (iii) were directly involved in the collection and loading into vehicles of Iraqi dead or (iv) are otherwise able to comment upon the overall number of dead loaded into vehicles and/or their identities or injuries.

39. Witnesses at CAN should generally be called where they (i) were (or might reasonably be expected to have been) directly involved in the handling/treatment of a detainee or detainees, or (ii) observed the handling/treatment of a detainee or detainees, or (iii) had a supervisory role in relation to the handling/treatment of detainees on 14-15 May 2004 (or should have performed such a role), or (iv) handled the dead that were at CAN on 14-15 May 2004 (save where they played only a very minor role and are unable to speak to the injuries or identities of those handled), or (v) played a significant role in the handing over of the dead on 15 May 2004, or (vi) can be considered as having a senior and/or supervisory role at CAN in general and were involved in the events of 14-15 May 2004 which are the subject of the Terms of Reference.

40. JFIT & DTDF witnesses: should generally be called where they (i) took part in the processing of the nine detainees when they arrived at the DTDF on 15 May 2004 (including in a supervisory role), or (ii) were involved in the interrogation and/or detention of the detainees in the JFIT (including in a supervisory role), or (iii) played a supervisory role within the DTDF (i.e. those in charge), or (iv) can reasonably be identified as the subject of or a witness to allegations of mistreatment made more generally at the DTDF.

Sir Thayne Forbes
Chairman, Al Sweady Inquiry

15th July 2013

IN THE MATTER OF THE INQUIRIES ACT 2005

AND IN THE MATTER OF THE INQUIRY RULES 2006

THE AL SWEADY INQUIRY

RULING ON GENERIC APPLICATION FOR PROTECTIVE MEASURES

---

1. This is my ruling in relation to the application made by the Treasury Solicitors that I should determine applications for protective measures for witnesses[1] on a generic, as opposed to individual, basis.

2. On 19th July 2010 I distributed a ruling in relation to the legal issues that arose in relation to applications for protective measures ("the Ruling"). The Ruling followed the delivery of extensive written submissions and oral submissions made by Counsel at the First Directions Hearing on 21st June 2010. The Ruling specifically concerned:
   (1) the legal test to be applied, and the considerations that are relevant, in relation to any application for protective measures that relies on Articles 2 or 3 of the European Convention on Human Rights ("the ECHR");
   (2) the legal test to be applied, and the considerations that are relevant, in relation to any application that asserts that there is a risk of death or injury, but where Articles 2 or 3 of the ECHR are not relied on (the so-called "Common Law test");

[1] Which, in *gener*al terms, means permitting them to be known in the Inquiry and give evidence by way of cipher and / or to give oral evidence from behind a screen.

(3) the legal test to be applied, and the considerations that are relevant, in relation to any application that relies on Article 8 of the ECHR (hereafter "the Article 8 test"); and

(4) the legal test to be applied, and the considerations that are relevant, in relation to so-called "public interest" applications for protective measures (hereafter "the Public Interest test").

3. I refer to, but do not repeat here, the decisions that I made in relation to these four issues.

4. On 17th March 2011 the Solicitor to the Inquiry wrote to the legal representatives of Core Participants[2], and to the Treasury Solicitors[3], in the following terms:

> The Inquiry has to date identified between 400-500 present or former military personnel, or present or former civilian employees of the Ministry of Defence, who may be witnesses. Of these we have so far been able to locate approximately 180, and we may now have contact details for a further 60. No applications for protective measures have as yet been received. The potential factors involved, and the issues arising in relation to protective measures may delay progress by the Inquiry.
>
> The Chairman wishes to avoid delay wherever possible and in seeking to do this he has decided to invite by way of closed written submissions, the assistance of the Treasury Solicitor, PIL and the Secretary of State for the purposes of enabling him to reach an understanding of what factors you consider he should have in mind when considering protective measures for witnesses falling within the above category. You may disregard for these purposes applications founded on public interest grounds which are relatively well developed. The Chairman considers it would be very helpful if these closed written submissions covered the following:
>
> (A) Representations as to the Articles of the European Convention on Human Rights which should be considered and why. It may be that Articles 2, 3, 6, 8 and 10 all require consideration.

[2] Namely to (i) Public Interest Lawyers, who represent some of those persons detained as a result of the Battle of Danny Boy on 14th May 2004, the relatives of some of those persons who either died in the course of the Battle of Danny Boy or at Camp Abu Naji (where and how they died is one of the central issues in the Inquiry), and certain witnesses; and (ii) to the Ministry of Defence's Directorate of Judicial Engagement.

[3] The Treasury Solicitor represents former or serving soldiers who are or may be witnesses in the Inquiry. Although these former or serving soldiers have not been designated as Core Participants pursuant to the Inquiry Rules 2006, the Inquiry has treated them in the same way as those who have been so designated.

> (B) whether it would be appropriate to have an Inquiry Protocol for generic applications by soldiers or former soldiers for a certain level of protective measures.
> (C) if so the criteria to be applied and
> (D) the level of protective measures which would follow, if those criteria are met.
>
> The Chairman is aware that some information which may be contained in these submissions may itself be highly sensitive and hence he invites them in closed form. He requests that you please highlight any information contained within your submissions which you consider should be protected from further disclosure. He will regard such highlighted information as being subject to a duty of confidentiality, provided the essential elements of such a duty existing are met. He reserves the right to disclose it, should circumstances be such that the public interest in its disclosure outweighs any private interest in its non-disclosure. Such a decision would only be reached following consultation with the provider of the particular information and any other identified person with a proper interest in the information remaining private. You should also highlight any information which falls to be protected from public disclosure as a matter of law and indicate (perhaps by footnote and key) the reason why. These closed written submissions may be followed by a closed oral hearing, should the Chairman consider this necessary. The Chairman requests your submissions by 4.30 p.m. on Wednesday 20 April 2011. This letter is written without prejudice to the exercise by the Chairman of his discretion in the consideration of any application, or protective measure, he may consider appropriate to put
> in place.

5. By written submissions dated 20th April 2011 Public Interest Lawyers ("PIL") responded to the Inquiry's letter.

> 3. ...On behalf of the Complainants it is submitted that only applications actually received by the Inquiry should fall for consideration. Generic applications should be discouraged, with the consequence that each individual application should fall for consideration on its own merit. Protective Measures should only be considered appropriate for any individual witness who is able to establish proper grounds justifying such measures.
>
> 4. Accordingly, it would be inappropriate for the Inquiry to adopt a Protocol in anticipation of generic applications by soldiers or former soldiers for a certain level of Protective Measures.
>
> 15. ...Consideration of a generic application for Protective Measures for a group of witnesses before the Inquiry would be antithetical to the guidance already provided and set out in the Ruling.
>
> 16. In relation to any application based on either Article 2 and 3 of the ECHR, the Ruling provides that a 'rigorous and objective assessment of the totality of the relevant information' must be carried out in determining whether a 'real and immediate' risk threshold has been met for 'the witness in question'.9

17. Notwithstanding any generic risk assessment, before Protective Measures are granted there will need to be (i) consideration of whether the generic assessment provides evidence of a 'real and immediate' risk to any potential witness, 'low' and 'moderate' risk of attack is unlikely to cross the 'real and immediate' threshold, (ii) each individual witness relying upon the generic risk assessment will need to satisfy the Chairman that they properly fall within the category of person identified as at risk in the generic assessment, and (iii) any generic risk assessment is likely to be but one aspect of the assessment of the risk faced by the witness concerned.

18. In relation to point (iii), the Complainants submit that the Chairman should also take into account, individually for each witness, the following (non-exhaustive) factors when assessing risk:
    a. The degree to which preventative measures to reduce or remove the risk have been and/or could be taken by the witness;
    b. The extent to which the name/image of the witness is already in the public domain and if yes to what extent and in what connection;
    c. Whether the witness has given evidence unprotected in any other capacity, if yes whether any adverse consequences were suffered as a result;
    d. Whether the witness has for any other reason already been subject to any previous threats or attacks, and if yes the nature and seriousness of those attacks and the reason for them;
    e. The likelihood of anyone posing a threat to the witness already knowing the witness by name or image;
    f. The broad nature of the evidence the witness is likely to give, and the likely level of publicity which will be given to that evidence;
    g. The past, current and future deployments and/or occupations of the witness;
    h. The area in which the witness works and lives.

19. In relation to any application for Protective Measures based on common law principles, the Ruling makes clear that the common law requires fairness to the 'individual witness in all the circumstances of the case'. 'How the balance is struck in individual cases will, of course, be fact specific': applying *Re A and others (Nelson Witnesses)*.

20. The detailed guidance provided by Girvan LJ in *Re A and others (Nelson Witnesses)* is illustrative of how and why individual assessments are required. Para. 29(viii) and (ix) show why each witness needs separate and individual consideration. The extent to which any individual witness' evidence is 'contentious' or the 'tendency on the part of the witness to be dishonest' are obviously factors to be taken into consideration and could justify open and public scrutiny in cross-examination. Thus, the character of the witness and the nature of their evidence will need to be taken into account when considering any application for Protective Measures. This can plainly only be done on an individual basis.

21. For the above reasons, it is submitted that generic applications for Protective Measures will be inappropriate. Generic risk assessments may, in some cases, be properly relied upon by an individual as part of their individual application for Protective Measures, but such generic risk

assessments must be considered as being only part of the overall picture. Many other factors will potentially be at play.

6. By written submissions dated 20th April 2011 the Ministry of Defence responded to the Inquiry's request. By their submissions, the MoD suggested that representations regarding the approach to be taken to application for protective measures based on private interest grounds are more appropriately advanced by the Treasury Solicitor's Office (and for that reasons did not advance submissions in relation to point A in the Inquiry's letter. The MoD did, however, "tentatively offer" views in relation to points B to D reflecting its vicarious interest as the current or former employer of this group of witnesses and by way of assistance to the Inquiry. So far as is relevant, these submissions stated as follows:

> 3. **Point B:** The MoD acknowledges that it would be an unusual step to produce an Inquiry Protocol for generic applications by military witnesses for a certain level of protective measures but agrees in principle with the suggestion if it would aid the Chairman in considering applications. It is respectfully suggested that any protocol should take into account both what is sensitive about the evidence and its relevance to the Inquiry's Terms of Reference. This is because the need for protective measures will depend not just on the particular circumstances of the individual witness, but also on the evidence that the witness is being asked to provide: for example a witness who happened to be involved in sensitive work at some point in their career might not require protective measures if the sensitive aspects of the witness' work are irrelevant to the issues before the Inquiry and the witness is not asked to provide evidence about that work.
>
> 4. **Point C**: The MoD is grateful to the Inquiry for providing fictitious Rule 9 requests by way of example of the sorts of questions that may be addressed to military witnesses. These were requested to assist the MoD's understanding of the ambit of the evidence that is being sought by the Inquiry. Without knowing the potential factors alluded to in the Inquiry's letter of 17 March, consideration of the R9 requests read in conjunction with the generic threat assessments for potential witnesses to the Inquiry leads the MoD to offer the following observations and suggestions that may be of assistance to the Inquiry:
>
> (i) Evidence relating to involvement in other military engagements. It is likely that many of the witnesses will have served on previous operations including in the Balkans and Northern Ireland and there may be specific security risks associated with disclosure of the details of those deployments.
>
> In a small number of cases, it could also result in witnesses having to disclose service of a sensitive nature that would not

otherwise have been in the ambit of the Inquiry's Terms of Reference.

(ii) Evidence relating to previous arrest or detention following military engagement.

(iii) Evidence relating to other tours during Operation Telic. Some witnesses may have undertaken sensitive work as part of another deployment during Operation Telic.

(iv) Evidence relating to interrogation training. Some witnesses who were trained interrogators did not deploy in that role. Unless the individual relied on this training in their evidence , it would not otherwise be released in public.

(v) Evidence that publicly identifies a witness as having killed Iraqi(s) or having mutilated or mistreated bodies post mortem. Such questions could place individuals more at risk if they publicly admit to such action.

5. MoD respectfully submits that the question types outlined above will elicit evidence that is likely to precipitate a significant number of applications for protective measures on private interest grounds by military witnesses. This will correspondingly increase the administrative burden on the Inquiry. In the interests of reducing applications for protective measures which might not otherwise be necessary, the MoD respectfully invites the Inquiry to give consideration to whether, if questions on the background of individual witnesses (particularly of the type identified at 4(i) to 4(iv) above) are necessary as part of the initial Rule 9 requests, the information could be provided in a separate annex with the draft statement. Should the Inquiry consider the information to be evidence, the witness would then have the option to indicate whether or not they wished to make an application for protective measures. It is considered that redacting the information from signed witness statements represents an imperfect solution as it would draw attention to aspects of a witness's military service or training that were of a sensitive nature, thereby potentially putting them at greater risk.

7. By written submissions dated 20th April 2011, the Treasury Solicitors also responded to the Inquiry's request. So far as is relevant, they submitted as follows:

14. In principle, it would be appropriate to have an Inquiry Protocol for generic applications by soldiers or former soldiers for a certain level of protective measure. This suggestion is to be welcomed.

15. It is anticipated that there will be classes of witnesses that are capable of identification and that would be capable of being dealt with by way of a protocol for generic applications. There is merit in having a generic protocol where certain classes or groups of military witnesses are identified and face identical or broadly similar risks to their rights under

Articles 2 or 3, or where a group of witnesses faces the same unjustified interference with their rights under Article 8 (for example, where they face a detriment to their professional lives or careers or there is a risk of significant damage to their reputations). One example of such a group which appears to be capable of being identified and for which a generic application may be capable of being made is the class of Intelligence Officers. Another group may be those officers involved in Tactical Questioning.

16. For those witnesses, it would be sensible for the applications for protective measures to be considered as a class, rather than individually. This is mutually beneficial as it prevents TSol from having to make multiple applications for protective measures on the same basis for witnesses who are affected by identical or similar considerations. In turn, it prevents the Inquiry from repeatedly having to apply the same principles in carrying out the same evaluation of risk in relation to Articles 2 or 3, or in carrying out the same balancing exercise in relation to Article 8 on a large number of occasions. Given that the Inquiry has identified close to 500 military witnesses, any method of streamlining the process of applications for protective measures is to be welcomed, subject to the following observations:
    a. The existence of a generic protocol or the ability to make an application for protective measures on behalf of an identified class of witnesses does not preclude and indeed cannot replace the assessment of risk in each individual case. For example, the fact that an application has been made for reporting restrictions for a class of witnesses does not preclude or predetermine an application for a higher level of protective measures (such as evidential restrictions) by an individual whose particular circumstances merit greater protection if he meets the tests under Articles 2 and/or 3 as set out above.
    b. The existence of a generic protocol for classes of witnesses does not affect the right of individual witnesses, including those who do not fall into an identified class, to make applications for protective measures under the existing Protective Measures Protocol (as amended on 6 September 2010) by which any Core Participant or other person concerned in the Inquiry could apply for protective measures or non-disclosure of any information beyond that identified in the Restriction Order of 3 August 2010.

8. However, when the Treasury Solicitors turned to the criteria that might be applied to such generic applications, the submissions continued:

17. Whilst there is virtue in generic applications by classes of military witnesses and a protocol for such generic applications, it is respectfully submitted that it is impossible and undesirable at this stage of the proceedings to set out the criteria to be applied in either identifying those classes of witnesses or in dealing with the generic applications. Such an exercise would be premature for the following reasons:
    a. The current allegations made by the claimants in the Al Sweady judicial review proceedings are of (1) unlawful killing at Camp

Abu Naji ("CAN") on 14 and 15 May 2004, and (2) ill-treatment of five Iraqi nationals at CAN and subsequently at Shaibah Logistics Base between 14 May and 23 September 2004. However, the Inquiry has already obtained 43 witness statements from Iraqi nationals and is scheduled to interview a further 40 Iraqi nationals. The nature and scope of the allegations that the military witnesses face are currently unclear. It is only following disclosure of the Iraqi evidence that it will be possible to take a final view about any applications for protective measures on the basis of specific allegations that may be made against individuals or classes of military witnesses.

b. The identities of the Iraqi nationals who will give evidence at the Inquiry is not known, nor is it known how their participation in the Inquiry will be secured, i.e. whether they will be present at the Inquiry or there will be live streaming of the evidence instead.

c. There is currently no specific threat assessment available for classes of witnesses. There is only a generic threat assessment.

d. Of the 470 military witnesses, just over 60 have been interviewed. It is essential that a significant number of these witnesses is interviewed and is able to give instructions as to the level of risk faced on an individual level before any assessment can be made as to whether there are common principles that can be identified and applied to classes of witnesses in order to justify generic applications by classes of military witnesses.

18. Therefore although it is envisaged that generic applications may be made for classes of military witnesses in due course, it is too early to provide a clear or definitive list of the classes of witnesses for whom applications for protective measures may be made and the criteria that should be applied. Any submissions on those matters could only be generic in nature, would be formulated in the abstract and would be of little assistance to the Inquiry at this stage.

19. The precise formulation of the classes of witnesses, the levels of protective measures appropriate for each identified class, and the applicable criteria will only be possible once the allegations that are being levelled against the military witnesses are made clear and once instructions on appropriate protective measures applications have been obtained from a sizeable number of individual witnesses.

9. Counsel to the Inquiry made the following submissions in relation to the Treasury Solicitor's submission that applications for protective measures should be determined on a generic basis:

1. In light of active opposition from those representing the Iraqi complainants, and the practical obstacles raised by TSol, which would to a great extent undermine the usefulness of the process, Counsel to the Inquiry do not submit that the Chairman should invite applications for protective measures on a generic basis.

2. However, insofar as the submissions made by TSol tend to suggest that military witnesses will not be able to make any applications for protective measures until disclosure has been made of the Iraqi evidence, the submissions of TSol are not accepted.

3. Inquiry Counsel submit that applications for protective measures on behalf of individual soldiers can and should be made as soon as possible for the following reasons:

    a. First, individual military witnesses do not need to know the substance of specific allegations that may be made against them in order to be in a position to submit an application for protective measures. Should that be the case, no applications could be made until all of the Iraqi witnesses had concluded their evidence.
    b. The military witnesses are aware of the general nature of the allegations being made by virtue of the Inquiry's Terms of Reference. Military witnesses should proceed on the basis that they may be the subject of such allegations:

        '...(1) unlawful killing at Camp Abu Naji on 14 and 15 May 2004, and (2) the ill-treatment of five Iraqi nationals detained at Camp Abu Naji and subsequently at the divisional temporary detention facility at Shaibah Logistics Base between 14 May and 23 September 2004...'

    c. On the basis of the evidence so far received by the Inquiry, allegations made by the Iraqi complainants and witnesses in respect of which an identification of one or more individual soldiers has been made (by description), are few and far between. To delay the submission of an application for protective measures until after all specific allegations made against an applicant become known would, in these circumstances, be to delay such a submission until the occurrence of an event that is, on the basis of past experience, unlikely to occur.

    d. Insofar as individual soldiers have been identified by Iraqi complainants and witnesses as having been involved in, or having witnessed, alleged misconduct, such allegations have been included in soldiers' Rule 9 requests for written statements. Therefore those military witnesses most likely to be identified as the subject of the allegations contained within the Inquiry's Terms of Reference will be on notice of those allegations from the time they receive a Rule 9 request from the Inquiry.

4. Counsel to the Inquiry accept that, following disclosure of the Iraqi evidence, military witnesses should nonetheless be provided with a reasonable opportunity to *renew* applications for protective measures, should that be considered necessary in light of the material disclosed, and in particular in light of any specific allegations that may be made within that material. In the intervening period the interests of military witnesses in this regard can be fully protected by the provision of renewed undertakings by Core Participants to prevent onward disclosure of Inquiry material until such time as witnesses have had the opportunity to consider their position in respect of renewed applications.

5. I set aside time at the Inquiry's Third Direction Hearing on 11th May 2011 at which further submissions in relation to the issue of generic applications for protective measures could be made. At that Third Directions Hearing, however, Leading Counsel to the Inquiry summarised the position that had then been reached as follows:

> Mr O'Connor, on behalf of his clients, is firmly against any suggestion of protective measures being considered on a generic basis. The Treasury Solicitor professes not to be firmly against them, but puts in their path a number of practical obstacles. The only purpose in suggesting a generic approach to protective measures was to save the Inquiry time and resources. If experienced lawyers are of the view that they are impracticable, we accept that view. But when criticisms are made of the speed of the Inquiry work, this was an attempt to save the expenditure of what hopefully will be unnecessary time and expense.

6. Leading Counsel for those represented by the Treasury Solicitor said as follows in relation to this issue:

> On the question of restrictive measures applications, we, of course, accept what [Leading Counsel to the Inquiry] has said and what you have indicated in that regard. It may well be that as these applications are made, there has developed sufficient familiarity on both sides as to enable the matters to be streamlined. But if we may say respectfully, what [Leading Counsel to the Inquiry] has said thus far seems sensible.

7. Accordingly, I agreed at the Third Directions Hearing not to further pursue the issue of applications for protective measures being made and determined on a generic basis.

8. On 20th May 2011, consistent with the outcome of the Third Directions Hearing, the Solicitor to the Inquiry wrote to the Treasury Solicitor requiring that any applications for protective measures made on behalf of clients that the Treasury Solicitor represented should be made by the close of business on 3rd June 2011.

9. By letter dated 3rd June 2011 the Treasury Solicitor replied to the Inquiry's request and raised a number of discrete issues, as follows:

(1) The letter referred to concerns that the Treasury Solicitor had about some outstanding issues, namely (i) concern that witnesses had expressed that their evidence may be broadcast to the detainees (and a request was made that the Inquiry should confirm what arrangements would be made to enable the detainees and the families of the deceased to follow the proceedings), (ii) concern that witnesses had expressed as to the nature of the allegations being made by the Iraqis – it was said that, until the Inquiry disclosed the witness statements of the Iraqis, the Treasury Solicitor did not feel able to take final instructions from witnesses who have raised such concerns (I note that this is a reprisal of the point previously made by the Treasury Solicitor, rejected in clear terms by Counsel to the Inquiry, and not pursued at the Third Directions Hearing), and (iii) the extent to which the Inquiry would require the sensitive career history of a witness to be included in a statement (such histories presently being included in a separate document). The Treasury Solicitor stated that they were instructed not to make an application for protective measures in respect of a list of clients who they set out in their letter (there were 85 clients on the list) if the details of their sensitive career history was not to be included in their witness statement. If it was to be included, then they reserved the right to review the position.

(2) The letter identified a small number of witnesses (at that stage, 7 in number) who were clients of the Treasury Solicitor in respect of which the MoD intended to make an application for protective measures in the public interest by 10th June 2011.

(3) A number of witnesses were also identified for whom the Treasury Solicitor had instructions to make applications for protective measures (at that stage, only 7 in number), but in respect of whom it was also stated that "Unfortunately we are not in a position to lodge these application today, due primarily with [sic] the difficulties in having these applications signed, however we anticipate lodging three applications for varying protective measures next week".

(4) The letter also went on to specify that in respect of the remainder of the witnesses represented by the Treasury Solicitor, it had not been possible to take instructions as to whether they wished to apply for protective measures.

10. In June 2011 the Treasury Solicitor made individual applications for full protective measures (*viz* for anonymity and screening) on behalf of 3 witnesses. Those applications were re-submitted in July 2011, followed by a further such application made on behalf of a 4th witness in October 2011.

11. On 10th June 2011 the MoD made individual applications for full protective measures (*viz* for anonymity and screening) on behalf of 9 witnesses. These applications were based on public interest grounds. Since that time the MoD has made a further applications for screening for 4 witnesses and has notified the Inquiry that of its intention to make a further 25 applications (albeit 1 such notification was subsequently abandoned; and 10 of the witnesses in respect of which notifications were given are not witnesses from whom the Inquiry has sought information or evidence). It follows that of the 39 applications notified or made, there are 28 outstanding.

12. On 3rd September 2011 the Treasury Solicitor sent the present application, described as a *Generic Application for Protective Measures*, to the Inquiry.

13. The application is made under s19, alternatively s17, of the 2005 Act on behalf of the following classes of witnesses:
    (1) Those who used weapons against the Iraqis;
    (2) Those who killed or injured Iraqis;
    (3) Those who applied any physical force to Iraqis;
    (4) Those who detained Iraqis;
    (5) Those who escorted or guarded Iraqi detainees;
    (6) Those who processed or handled Iraqi detainees;

(7) Those who questioned Iraqi detainees;

(8) Those who provided medical treatment to Iraqis;

(9) Those who handled, moved or examined dead bodies; and

(10) Those who are alleged to fall within any of these classes.

14. A list of the witnesses who are said by the Treasury Solicitor to fall within one or more of the categories set out above is annexed to the application – this gives their names and which category or categories they were said to fall within. There are 55 names on the annex and therefore 55 applications to be granted protective measures on a generic basis. Significantly, of the 55 applicants, 31 of them were amongst the names set out in the Treasury Solicitor's letter of 3rd June 2011 - i.e. those whom the Inquiry was informed were <u>not</u> applying for protective measures).

15. The applicants seek the following protective measures:

a. An order that his evidence be given under cipher and that he be known only by that cipher in all his dealings with the Inquiry; and / or
b. An order that he give evidence behind a screen so that:
    (i) Only the Chairman, counsel to the Inquiry, Inquiry staff and his own legal representatives can see his face; or
    (ii) Only the Chairman, counsel to the Inquiry, Inquiry staff and legal representatives of core participants can see his face;
    (iii) Only the Chairman, counsel to the Inquiry, Inquiry staff, core participants and his legal representatives can see his face; and / or
c. An order restricting publication of his name;
d. An order restricting publication of any image of the witness or any description of his appearance;
e. An order restricting publication of his past and / or current occupation;
f. An order restricting publication of the personal and / or professional address of the witness;
g. An order restricting publication of the names, addresses, image or descriptions of the witness's immediate family.

16. I note that, although the application clearly seeks the protective measures set out in paragraphs c. – g., it does not state which of the measures in paragraphs a. and b. are sought in relation to each applicant, or whether both measures are sought in relation to each applicant (see the use of the words "and / or" at the end of paragraphs a. and b.).

17. The application states that it is made on the basis that, unless the orders sought are granted, "(a) there would be a present and continuing risk of death or bodily injury to the witness, contrary to the Inquiry's obligations under Articles 2 and / or 3; or (b) the witness would be exposed, wrongly and unfairly, to a risk of harm and / or would fear that he was at risk of such harm to the fear [*sic.*] contrary to the Inquiry's obligations under common law; or (c) there would be a disproportionate breach of the witness's Article 8 rights".

18. The application does not state which of these three legal bases are said to apply to each of the 55 applicants. This is in my view significant. As I explain below, the specific legal test that is found to be satisfied in the particular case of an individual applicant is very important in determining the nature and extent of the protective measures that ought to be applied to him/her. I further note that, in the case of some of the individual applications referred to in paragraph 10 above, the applications do <u>not</u> claim that there would be a present and continuing risk of death or bodily injury to the witness, contrary to the Inquiry's obligations under Articles 2 and / or 3, if the protective measures sought were not granted – indeed, some of the applicants expressly accept that it cannot be argued that, in their case, these tests are satisfied. Those individual applicants are nonetheless amongst the 55 applicants who now seek the imposition of protective measures on a generic basis, in part on the basis that those tests *are* satisfied.

19. The application suggests that the applicants would each face similar risks should they be identified publicly as having been directly involved in the military engagement on 14th May 2004 and / or the subsequent handling of detained and / or deceased Iraqis and that, accordingly, the generic application seeks to avoid the costs associated with having to make multiple applications for protective measures on the same basis for witnesses who are affected by identical or similar considerations [6]. The application notes that it is not suggested that the generic application precludes separate or individual applications being made [7]. The application then proceeds to set out the legal basis for it [8-10] and to rehearse the

relevant legal tests that require to be applied in applications for protective measures [11-13] (my approach to these legal tests was of course set out in my ruling of 21st June 2010). The application then seeks to argue, by reference to the facts, that all of the bases (i.e. under Arts. 2 and 3, under the common law, and under Art.8) are satisfied in the case of all of the 55 applicants.

20. The Inquiry considered it important that other Core Participants in the Inquiry had the opportunity to make written (and, if necessary, oral) submissions on the application, in particular the propriety of approaching the issue of protective measures on a generic basis, by reference to the class or classes into which an applicant was alleged to fall. In order to be able to disclose the *Generic Application for Protective Measures* to all of the other Core Participants, however, it was necessary to disclose it to intelligence agencies first so that they could satisfy themselves that information emanating from them, and which was included in the application, could properly be so disclosed.

21. The Inquiry received a reply from the intelligence agencies on 13th January 2012 that some information in the *Generic Application for Protective Measures* required to be removed before it could be disclosed to other Core Participants. That information was communicated to the Treasury Solicitor who on 23rd January 2012 re-submitted the *Generic Application for Protective Measures* with that information removed.

22. On 25th January 2012 the Inquiry distributed the *Generic Application for Protective Measures* to the MoD and to PIL and requested written submissions in reply to be made by 16th February 2012.

23. By written submissions dated 15th February 2012 PIL argued that generic applications for protective measures should be discouraged, because (in summary): (i) such an application does not allow for the necessarily detailed and balanced assessment required for each individual application to be carried out, (ii)

the generic approach would be antithetical to the guidance that I had already given in my ruling of 21st June 2010, and (iii) an important aspect of a public inquiry is to ensure public accountability – this purpose might be frustrated if wide ranging protective measures were to be granted to a large number of applicants on a generic basis.

24. By letter dated 13th February 2012 the MOD informed the Inquiry that it did not intend to file any written submissions.

25. PIL's written submissions were distributed to the Treasury Solicitor (and to the MOD), who responded by written submissions dated 22nd February 2012. These submissions suggested that the Inquiry must seek to balance four overlapping and sometimes conflicting concerns, namely (i) the importance of creating an atmosphere in which witnesses feel safe and confident in coming forwards to give evidence, (ii) the need for public accountability, (iii) the Inquiry's common law and statutory duties to act fairly, and (iv) the Inquiry's statutory duty to avoid unnecessary cost. The Treasury Solicitor argued that, were the last of these four elements absent (i.e. where, in an ideal world, cost was not an issue), then anxious scrutiny could be given to each and every witness's specific concerns when assessing his application for any specific measures. However, cost is an issue - as recognised by the Inquiry in adopting a general rule applicable to all witnesses that personal information such as private addresses and telephone numbers will not be disclosed without good reason. In these circumstances, it was argued that the approach that the Inquiry had taken to the disclosure of personal information as capable of wider application. The Treasury Solicitor sought to argue that its approach did not include any element of consideration of the individual circumstances of each applicant. The Treasury Solicitor then sought to argue that PIL were wrong to seek to draw an analogy between this Inquiry and the Baha Mousa Inquiry, and that the better analogy was with the Bloody Sunday Inquiry (which, it was said, had approached the issue of applications for protective measures on a generic basis, albeit recognising that in individual cases the generic

approach did *not* apply). The Treasury Solicitor then made additional submissions as to what it said the effect of the decision of the Supreme Court in *Rabone v Pennine NHS Foundation trust* [2012] UKSC 2 had on the applicable test on what constitutes a "real and immediate" risk under Art.2 ECHR.

26. Given the issues raised in the Treasury Solicitor's reply submissions, they were again distributed by the Inquiry to the Core Participants. On 20th March 2012 PIL replied to those submissions in writing. PIL argued that the Treasury Solicitor's reply submissions raised three new issues, namely: (i) the impact of cost and the need to consider whether systems can be adopted that allow for a more efficient process; (ii) an attempt to compare the Al-Sweady Inquiry with the Bloody Sunday Inquiry, and (iii) the impact of *Rabone* on the "real and immediate" test.

27. Having given the matter careful consideration, I have come to the firm conclusion that it is neither appropriate nor necessary for me to make any order pursuant to this particular generic application. Accordingly, my order on the application is that there shall be No Order on the *Generic Application for Protective Measures dated 3rd September 2011*. There are eight main reasons for my having reached that conclusion. I set out those reasons in the paragraphs that follow.

28. First, were I to determine the application on the material that the Treasury Solicitor has presented to me, I would be unable properly to determine it, and certainly unable to determine it in favour of all of the applicants. This plainly has the potential to cause unfairness and injustice to the applicants, or to some of them – *viz* certain individuals amongst the cohort of 55 who would, if their individual circumstances were examined in detail, be deserving of the grant of protective measures, but who would not be granted such measures because they were being considered as part of a large and mixed group of applicants.

29. Second, in my judgment the authorities make it abundantly clear that applications for protective measures of the kind sought here require to be considered by reference to the individual circumstances of each applicant – see, for example, *Re*

Officer L [2007] 1 WLR 2135 at [20] and [22] and *Re A and others (Nelson Witnesses)* [2009] NICA 6 [17] – [24]. It may be, for example, that when I come to determine individual applications I shall have to bear in mind *inter alia* (by way of a non-exhaustive list): the extent to which the identity of an applicant, and his association with the events under consideration, is already in the public domain (including where the applicant has himself revealed such identity and association by the publication of articles, journals or books); the extent to which the applicant has previously given evidence openly about these or other similar events, the effect of which is to reveal his identity or association with such events; the extent to which adverse consequences have already occurred because of such publications or open evidence-giving (or otherwise); the home and professional addresses of an applicant and the extent to which that puts them at risk; the past, current and future occupation(s), and deployments, of an applicant; and the nature and extent of allegations made against an applicant.

30. Third, approaching the issue of applications for protective measures on a generic basis would be inconsistent with the approach that I identified in my ruling of 21st June 2010 – see [26] in particular.

31. Fourth, and as I have alluded to above, the *Generic Application for Protective Measures* does not, by its nature, make it clear which legal basis or bases each of the 55 applicants claims to be satisfied in their case. Instead, it suggests that two or three of the bases are satisfied, without specifying which basis or bases applies in each individual's case (see paragraph 4 of the *Generic Application for Protective Measures* and the use of "and / or" between paragraphs 4a and 4b and the use of "or" between paragraphs 4b and 4c). It may be the case, therefore, that some of the applicants claim that they Art.2/3 ECHR test is satisfied, whilst others of them only claim that the Art.8 test is satisfied. Yet the approach that I would take to their application would vary according to which basis on which it was put - so, by way of example only, I would not carry out a balancing exercise if I took the view that the Art.2/3 ECHR test was met in the case of an individual applicant (he would

be granted the measures sought that were necessary to see to prevent or minimise the risk that I had identified to exist from materialising), whereas I would carry out such an exercise in the case of the common law basis or the Art.8 basis.

32. Fifth, and relatedly, as I have already noted above, some of those witnesses who have made individual applications have expressly stated in the body of their applications that they accept that the Art.2/3 test for granting protective measures is not satisfied in their cases. Yet they are now included within a group of people who – as a group – claim that those tests *are* satisfied.

33. Sixth, as I have noted above, the *Generic Application for Protective Measures* is unspecific as to what protective measure or measures is sought in the case of each applicant (in particular it does not distinguish in the case of each applicant whether anonymity *and* screening is sought; or whether anonymity *or* screening is sought (and, in such a case, which of them)). Yet the nature of the measure sought, and the extent to which it would interfere with the obligation under s18 of the 2005 Act to take such steps as I considers reasonable to secure that members of the public (including reporters) are able to attend the inquiry or to see and hear a simultaneous transmission of proceedings at the inquiry, are likely to be highly material considerations in deciding – where a balancing exercise falls to be performed – whether to grant an application for protective measures (and, if so, the nature of the protective measure to be applied).

34. Seventh, although I have regard to the duty under s17(3) of the 2005 Act that the applicants draw my attention to, it is important to note that that s17(3) provide sin full as follows: "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)" (emphasis added). Two important points emerge: (i) I must act with fairness – as I have explained above, it would not be fair to anyone to determine these applications on a generic basis; and (ii) the obligation is to avoid *unnecessary* -

although I recognise that determining each application individually will involve additional cost, in my judgment that is an entirely necessary cost.

35. Eighth, as noted above, a high number of the group of 55 applicants who seek protective measures under the *Generic Application for Protective Measures*, some 31 witnesses, have previously advised the Inquiry through the Treasury Solicitor that they do not apply for any protective measures. This change in approach plainly requires to be further investigated and is an additional reason why I cannot accede to the application presently made to me.

36. In the circumstances, the Inquiry will continue to process the individual applications for protective measures that it has received. I should stress that no-one is prejudiced in any way by my decision with regard to the Generic Application in question – the individual applicants for protective measures will each have their applications determined on their individual merits. Last, it has not been necessary, in order to determine the issue before me, to resolve the differences between PIL and the Treasury Solicitor over whether the Baha Mousa Inquiry or the Bloody Sunday Inquiry is the better comparator to this Inquiry, nor the impact that *Rabone* had on the Art.2 test, as neither issue assisted me in determining the correct approach to take to the question of whether applications could be determined generically or needed to be determined individually. It may be necessary to address the former issue in individual rulings; the latter issue will be addressed in my rulings on individual applications.

Sir Thayne Forbes

25.5.12

Al Sweady Inquiry

RULING ON GENERIC LEGAL ISSUES RELATING TO IMMUNITIES AND RELATED UNDERTAKINGS FOLLOWING THE FIRST DIRECTIONS HEARING ON 21ST JUNE 2010

Introduction

1. At a directions hearing on 21 June 2010 I heard submissions from the Treasury Solicitor (TSol), Public Interest Lawyers (PIL) and the Ministry of Defence (MoD) on generic legal issues with regard to two matters, namely:
   (i) Applications for anonymity and other protective measures; and
   (ii) Immunities and related undertakings.

2. Having heard those submissions, I indicated that I would take time to consider the submissions in relation to those matters and would in due course promulgate rulings in writing. This is my ruling with regard to the generic legal issues concerning the second of those matters, namely Immunities and related Undertakings. The first matter, i.e. applications for anonymity and other protective measures, is the subject of a separate ruling.

Background

3. In summary, this Inquiry arises out of allegations that, following a fire-fight between British soldiers and insurgents in Iraq in May 2004, a number of Iraqi nationals who had been consequently detained by British troops were unlawfully killed at a British Army camp and that others were mistreated at that camp and later at a detention facility.

4. On 25 November 2009 the then Secretary of State for Defence announced that there would be a public inquiry into the allegations. I was invited to chair the Public Inquiry. The Inquiry's Terms of Reference are:

> To investigate and report on the allegations made by the claimants in the Al-Sweady judicial review proceedings against British soldiers of (1) unlawful killing at Camp Abu Naji on 14 and 15 May 2004, and (2) the ill-treatment of five Iraqi nationals detained at Camp Abu Naji and subsequently at the divisional temporary detention facility at Shaibah Logistics Base between 14 May and 23

> September 2004, taking account of the investigations which have already taken place, and to make recommendations.

Immunities and Undertakings

5. I readily accept that a primary obligation of this Inquiry is to carry out a full and thorough investigation of the allegations summarised within the Terms of Reference. In order to fulfil that obligation, it is plainly necessary to make such proper and appropriate provision as ensures that witnesses are not constrained from giving a full and frank account in giving their evidence and in providing documents and/or information to the Inquiry. At an early stage, I decided that, as a matter of general principle, it was neither necessary nor in the public interest that I should seek some form of general immunity against prosecution for witnesses to the Inquiry in order to achieve that objective. However, I did form the view that I should seek appropriate undertakings to protect witnesses from the risk of their evidence or information being used against them in criminal proceedings and, possibly, in administrative or disciplinary procedures falling short of criminal proceedings. As it seemed to me, such a provision would properly serve to achieve the full and frank accounts from witnesses that the Inquiry requires. Accordingly, on 11 May 2010 the Inquiry Solicitor wrote to TSol, PIL and MoD, informing them of my proposed approach to such undertakings, and inviting representations on the nature and extent of any undertakings that I should seek in relation to the subsequent use of evidence, documents and/or information given by any person to the Inquiry.

6. The letter set out the form of undertaking I was then minded to seek from the Attorney-General, namely:

> An undertaking in respect of any person who provides evidence to the Inquiry that no evidence he or she may give before the Inquiry, whether orally or by written statement, nor any written statement made preparatory to giving evidence, nor any document or information produced by that person to the Inquiry, will be used in evidence against him or her in any criminal proceedings (including any proceedings for an offence against military law, whether by court martial or summary hearing before a commanding officer or appropriate superior authority), except:
> (a) A prosecution (whether for a civil or a military offence) where he or she is charged with having given false evidence in the course of this Inquiry or having conspired with or procured others to do so, or
> (b) In proceedings where he or she is charged with any offence under section 35 of the Inquiries Act 2005 or having conspired with or procured others to commit that offence.

7. The parties to whom the letter was addressed were invited to answer the following questions:
   (i) Do you agree that the Chairman should seek such an undertaking?
   (ii) If so, why?
   (iii) If not, why not?
   (iv) Do you suggest that an undertaking of a different kind ought to be sought from the Attorney-General (and, if so, what form of words do you suggest and why)?
   (v) In particular, do you suggest that the undertaking set out above should be extended to prevent the use of the evidence etc of a witness *in the investigation* of an offence, as well as in evidence in any future proceedings (and, if so, why)?
   (vi) Do you agree that it is sufficient to seek such an undertaking from the Attorney-General, and not all from the Director of Public Prosecutions (and, if not, why not)?

8. The letter also asked the parties to indicate whether they would suggest seeking an undertaking from the MoD in relation to the subsequent use of evidence, documents and/or information given by any person to the Inquiry. If so, they were asked to indicate in what form, why and from whom; if not, they were asked to indicate why not.

9. Finally the three parties were asked whether they suggested any other undertaking should be sought, and if so, in what form, why and from whom.

10. Written responses were received from all three parties; having considered those responses carefully I asked the parties to produce written skeleton arguments addressing the following issues:

    (i) Whether I should seek an undertaking from the Attorney General in the form sought by Sir William Gage in the Baha Mousa inquiry and set out in Annex A to his ruling of 6 January 2009 (as suggested by TSol). In particular, assistance was sought on the following points:

        i. Does the privilege against self-incrimination extend to evidence which may inform towards the case which the prosecution may wish to establish and the material upon which the prosecution may wish to rely in deciding whether to prosecute?

ii. What are the relevant considerations for this Inquiry in relation to whether such an undertaking should be sought?

(ii) Whether I should seek an undertaking from the MoD in the form sought by Sir William Gage in the Baha Mousa Inquiry and set out in Annexes C-F of his Ruling of 6 January 2009 (as suggested by TSol). Particular assistance was sought in relation to identifying relevant considerations that I ought to take into account in deciding whether to seek such an undertaking.

11. Before setting out the representations made by each party and my rulings upon them, I set out the relevant statutory provisions and legal principles, which are not in dispute.

Statutory Provisions

12. The Inquiry's approach to evidence and procedure is governed by section 17 of the Inquiries Act 2005 ("the 2005 Act"), the material terms of which are as follows:

> "**17 Evidence and procedure**
>
> (1) Subject to any provision of this Act or of the rules under section 41, the procedure and conduct of an inquiry are to be such as the chairman of the inquiry may direct.
>
> (2) ...
>
> (3) In making any decision as to the procedure of conduct of an inquiry the chairman must act with fairness and also with the need to avoid any unnecessary cost (whether to public funds or to witnesses or others)."

13. Section 21 of the 2005 Act provides powers to a chairman to require production of evidence. Its material parts are as follows:

> "**21 Powers of chairman to require production of evidence etc**
>
> (1) The chairman of an Inquiry may by notice require a person to attend at a time and place stated in the notice –
>
> (a) to give evidence
>
> (b) to produce any documents in his custody or under his control that relate to a matter in question at the inquiry;

(c) to produce any other thing in his custody or under his control for inspection, examination or testing by or on behalf of the inquiry panel.

(2) ...

(3) ...

(4) A claim by a person that –

(a) he is unable to comply with a notice under this section;

(b) it is not reasonable in all the circumstances to require him to comply with such a notice is to be determined by the chairman of the inquiry, who may revoke or vary the notice on that ground.

(5) In deciding whether to revoke or vary a notice on the ground mentioned in subsection 4(b), the chairman must consider the public interest in the information in question being obtained by the inquiry, having regard to the likely importance of the information."

14. Section 22 of the 2005 Act preserves the right of a witness to refuse to give evidence or produce documents which may incriminate him. It reads as follows:

"**22 Privileged information etc**

(1) A person may not under section 21 be required to give, produce or provide any evidence or document if –

(a) he could not be required to do so if the proceedings of the inquiry were civil proceedings in a court in the relevant part of the United Kingdom, or

(b) the requirement would be incompatible with a Community obligation.

(2) ..."

Ruling on the Written and Oral Representations

15. I now turn to deal with each of the issues identified in paragraph 10 above.

16. **First Issue: Self Incrimination**. It is common ground that the undertaking provided by the Attorney General to Sir William Gage in the Baha Mousa Inquiry as set out in Annex A to his ruling of 6th January 2009 is concerned with the issue of self incrimination and is expressed in the following terms (my emphasis):

> "1 No evidence a person may give before the Inquiry, will be used in evidence against that person in any criminal proceedings ***or for the purpose of deciding whether to bring such proceedings*** (including any proceedings for an offence against military law, whether by court martial or summary hearing before a commanding officer or appropriate superior authority), save in such proceedings as are referred to in paragraph 2 herein:
>
> 2. Paragraph 1 does not apply to:
>
> (i) A prosecution (whether for a civil offence or a military offence) where the person is charged with having given false evidence in the course of this Inquiry or having conspired with or procured others to do so, or
>
> (ii) Proceedings where the person is charged with any offence under section 35 of the Inquiries Act 2005 or having conspired with or procured others to commit such an offence.
>
> ***3. Where any such evidence is provided to the Inquiry by a person, it is further undertaken that, as against that person, no criminal proceedings shall be brought (or continued) in reliance upon evidence which is itself the product of an investigation commenced as a result of the provision by that person of such evidence.***"

17. It is therefore apparent that the undertaking relating to self incrimination provided to Sir William Gage in the Baha Mousa Inquiry by the Attorney General ("the AG/BMI undertaking") goes further than that originally proposed for this Inquiry (as set out in paragraph 6 above) in the following important respects:

(i) Paragraph 1 of the AG/BMI undertaking includes words that prohibit the use of the evidence in question for the purpose of deciding whether to bring criminal proceedings against the witness (see the highlighted words); and

(ii) Paragraph 3 of the AG/BMI undertaking (also highlighted by me) is an additional provision which ensures that evidence produced by any investigation commenced as a result of a witness's evidence to the Inquiry cannot be used to bring criminal proceedings against that witness.

18. It is therefore clear that, when compared with the form of undertaking as originally proposed in the letter of 11th May 2010, the AG/BMI undertaking can properly be described as an extended undertaking and I will hereafter, from time to time, refer to it as such.

19. As it seems to me, an important initial question that requires to be answered is whether the AG/BMI undertaking, as well as being an extended undertaking (when compared with that originally proposed), has the effect of giving wider protection to the witness than would otherwise be afforded to him by his reliance upon the privilege against self-incrimination – or whether it is, in effect, co-extensive with it.

20. It is common ground that the privilege against self incrimination was given statutory force in relation to civil proceedings by virtue of section 14 of the Civil Evidence Act 1968 ("the 1968 Act"). Section 14 is declaratory of the position at common law (see, for example, the decision of the Court of Appeal in *Blunt v Park Lane Hotel Ltd* [1942] 2 KB 252 at 257) and, so far as relevant, provides as follows (as amended):

> "**14 Privilege against incrimination of self or spouse or civil partner**
>
> (1) The right of a person in any legal proceedings other than criminal proceedings to refuse to answer any question or produce any document or thing if to do so would tend to expose that person to proceedings for an offence or for the recovery of a penalty ...
>
> (a) shall apply only as regards criminal offences under the law of any part of the United Kingdom and penalties provided for by such law; ..."

21. As indicated above, the principles contained in section 14 of the 1968 Act have been duly incorporated into the Inquiry process by means of section 22 of the 2005 Act which, so far as material, is in the following terms (quoted above in paragraph 14, but repeated for convenience):

> "**22 Privileged information etc**
>
> (1) A person may not ... be required to give, produce or provide any evidence or document if –
>
> (a) he could not be required to do so if the proceedings of the inquiry were civil proceedings in a court in the relevant part of the United Kingdom, or
>
> (b) the requirement would be incompatible with a Community obligation.
>
> (2) ..."

22. It is also common ground between the parties that the scope of the privilege against self-incrimination, as formulated under the common law and enacted in section 14 of the 1968 Act is sufficiently broad to encompass: (i) evidence which may inform towards the case which the prosecution may wish to establish and (ii) material upon which the prosecution may wish to rely in deciding whether to prosecute. Having considered the relevant authorities as outlined below, I am satisfied that this is correct. Thus, in *Rank Film Distributors Ltd v Video Information Centre* [1982] AC 380, Lord Wilberforce stated the relevant principles in the following terms (see page 443):

> " ... whatever direct use may or may not be made of information given, or material disclosed, under the compulsory process of the court, it must not be overlooked that, quite apart from that, its provision or disclosure may set in train a process which may lead to incrimination or may lead to the discovery of real evidence of an incriminating character. In the present case, this cannot be discounted as unlikely: it is not only a possible but probably the intended result. The party from whom disclosure is asked is entitled, on established law, to be protected from these consequences."

23. In the course of his judgment in *Sociedade Nacional de Combustiveis de Angola UEE v Lundqvist* [1991] 2 QB 310, Beldam LJ stated the position in relation to section 14 of the 1968 Act in the following terms (see page 324):

> "It is significant that Parliament referred to a "tendency to expose" and to proceedings and not merely to conviction. Thus, in my judgment, it is sufficient to support a claim to privilege against self-incrimination that the answers sought might lead to a line of inquiry which would or might form a significant step in the chain of evidence required for a prosecution."

24. In the course of his judgment in *Den Norske Bank ASA v Anonatos [1999] QB 271*, Waller LJ summarised the principles governing what is meant by the privilege against self-incrimination, as follows (see page 289):

> "Thus, it is not simply the risk of prosecution. A witness is entitled to claim the privilege in relation to any piece of information or evidence on which the prosecution might wish to rely in establishing guilt. And, as it seems to me, it also applies to any piece of information or evidence on which the prosecution would wish to rely in making its decision whether to prosecute or not."

25. Finally, in *Saunders v United Kingdom* (1996) EHRR 313, the European Court of Human Rights ("the ECtHR") made it clear that the privilege against self-

incrimination, which was said to form part of the concept of fairness enshrined in Article 6 of the ECHR, extended beyond evidence that was directly incriminating. At paragraphs 70-71 of its judgment in that case the ECtHR said this:

> "70. ... However, the Government have emphasised, before the Court, that nothing said by the applicant in the course of the interviews was self-incriminating and that he had merely given exculpatory answers or answers which, if true, would serve to confirm his defence. In their submission only statements which are self-incriminating could fall within the privilege against self-incrimination.
>
> 71. The Court does not accept the Government's premise on this point since some of the applicant's answers were in fact of an incriminating nature in the sense that they contained admissions to knowledge of information which tended to incriminate him ... In any event, bearing in mind the concept of fairness in Article 6 ... , the right not to incriminate oneself cannot reasonably be confined to statements of admission or wrongdoing or to remarks which are directly incriminating. Testimony obtained under compulsion which appears on its face to be of a non-incriminating nature – such as exculpatory remarks or mere information on questions of fact – may later be deployed in criminal proceedings in support of the prosecution case, for example to contradict or cast doubt upon other statements of the accused or evidence given by him during the trial or to otherwise undermine his credibility. Where the credibility of an accused must be assessed by a jury the use of such testimony may be especially harmful. It follows that what is of the essence in this context is the use to which evidence obtained under compulsion is put in the course of a criminal trial."

26. Accordingly, on behalf of TSol Mr Sheldon submitted that it was apparent from the foregoing analysis that a witness will be able to invoke the privilege against self-incrimination, not only in respect of evidence that might be regarded as directly incriminating of that witness, but also in respect of evidence that might subsequently be used to his detriment in the course of subsequent criminal proceedings. Having regard to the principles expressed in the authorities to which I refer in the previous paragraph, I agree with that submission. I also agree with Mr Sheldon's further observation that the scope of a witness's right not to answer questions or to produce documents in reliance upon the privilege against self-incrimination is therefore very wide indeed.

27. I am therefore satisfied that, although the AG/BMI undertaking does go wider than the undertaking originally proposed in the letter of 11th May 2010 and is thus, in that sense, an extended form of undertaking, it is clear from its terms that it does not go wider than the scope of the privilege against self-incrimination. In my view, the AG/BMI form of undertaking gives protection to the witness that is, to

all intents, co-extensive with the protection that would otherwise be afforded to that witness by the wide scope of the privilege against self incrimination.

28. On behalf of the MoD, Mr Johnson suggested that it had not yet been demonstrated that an undertaking in the extended terms of the AG/BMI undertaking was actually necessary in the circumstances of this Inquiry. However, he went on to make clear that there was no objection in principle to my seeking such an undertaking if I considered it appropriate.

29. On behalf of PIL, Mr O'Connor QC pointed out that paragraphs 4.5-4.7 of the current CPS Code for Crown Prosecutors make it clear that only admissible evidence may be taken into account when deciding whether to prosecute a prospective defendant. He suggested that this rendered unnecessary any extension to the undertaking as originally proposed in the letter of 10th May 2010. He also questioned whether any such extension to the undertaking would actually enhance the Inquiry's fact finding role. He suggested that it would not and went on to submit that it would, instead, have the effect of imposing an unnecessary constraint upon the taking of appropriate measures for ensuring proper accountability in respect of any established infringement of Article 2 and/or Article 3 (hereafter "Article 2 or 3 accountability") on the part of the witness in question. It was therefore Mr O'Connor's submission that I should not seek an undertaking in the extended form of the AG/BMI undertaking.

30. Mr Sheldon submitted (correctly in my view) that the effect of the analysis set out in paragraphs 22 to 26 above is to demonstrate that the scope of the original proposed undertaking as set out in the letter of 11th May 2010 is not sufficiently wide to provide protection to witnesses to the Inquiry against self-incrimination that is equivalent to that afforded by principles of the common law and by sections 14 and 22 respectively of the 1968 and 2005 Acts. He pointed out that, in particular, the original proposed undertaking clearly does not provide any protection to a witness in respect of either of the following: (i) use by the prosecuting authority of evidence given by the witness to the Inquiry in deciding whether to bring a prosecution against that witness and (ii) a prosecution of the witness based on evidence obtained during an investigation commenced as a result of evidence provided to the Inquiry by that witness.

31. It was Mr Sheldon's uncontroversial submission that the primary obligation of the Inquiry is to ensure that it conducts a full and thorough investigation within its Terms of Reference. I have no hesitation is accepting that this is so. He then

submitted that, unless the scope of the proposed undertaking is extended so as to provide the witness appropriate protection in respect of the two matters to which I have referred in the previous paragraph, there will be a real risk that a witness's willingness to co-operate with the important work of the Inquiry will be tempered by a justifiable concern that, by giving evidence, he will expose himself to a risk of prosecution. Such a witness would then be likely to invoke his privilege against self-incrimination, with the result that the Inquiry would then be deprived of the information (possibly of a critical nature) that could, and would otherwise, have been provided by the witness. As a result, the Inquiry's ability to conduct a full and thorough investigation would clearly be impaired, possibly to a significant degree. I agree with those submissions and, for my part, do not accept that such a witness could realistically be expected to accept (even if it were the case – which I doubt) that an appropriate application of the CPS Code for Crown Prosecutors, taken in conjunction with the terms of an undertaking as originally proposed in the letter of 11th May 2010, would provide him with protection against prosecution equivalent to that provided by the full extent of the privilege against self-incrimination.

32. Mr Sheldon therefore submitted that I should seek an undertaking from the Attorney General in the same terms as that provided to Sir William Gage in the Baha Mousa Inquiry, as set out in Annex A to his ruling of 6th January 2009. It was his submission that such an undertaking would be, in effect, co-extensive with the privilege against self-incrimination and that thus a witness could be confident that, in giving his evidence to the Inquiry, he would not be losing the benefit of the protection against prosecution that would otherwise be afforded to him by the privilege against self-incrimination. In short, the Inquiry would have the benefit of receiving relevant information from the witness, in circumstances where the witness still remains protected against the risk of that information being used against him by the prosecuting authorities, the protection being afforded by the undertaking instead of the privilege against self incrimination. By this means, the Inquiry will be able to receive information from a witness that (as seems very likely) would not otherwise be provided, because of the witness's right to invoke the privilege against self-incrimination in respect of that information.

33. I agree with Mr Sheldon's submissions as summarised in the previous paragraph. Accordingly, for those reasons, I am satisfied that I should seek an undertaking from the Attorney General in the same terms as that provided to Sir William Gage in the Baha Mousa Inquiry as set out in Annex A to his ruling of 6th January 2009.

34. **Second Issue: Administrative or Disciplinary Action**. The undertakings provided to Sir William Gage in the Baha Mousa Inquiry by the Permanent Under-Secretary of State for the MoD and the various Heads of the Armed Services, as set out in Annexes C to F of his ruling of 6th January 2009, are concerned with the issue of possible administrative or disciplinary action, falling short of criminal proceedings, being taken against witnesses. The general nature and wording of those undertakings is clear from the terms of the undertaking given by Sir Bill Jeffrey KCB on behalf of the MoD by letter dated 19th December 2008, as follows:

> "When we spoke last week you indicated your belief that an undertaking in respect of possible administrative or disciplinary action against witnesses will assist you to fulfil your terms of reference.
>
> In recognition of this, I give the following undertaking:
>
> If written or oral evidence given to the Inquiry by a witness who is a former or current MoD civil servant 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 will not use the evidence of that witness to the Inquiry in any disciplinary proceedings against that witness where the nature of the misconduct alleged is the failure to give a full, proper or truthful account on that previous occasion.
>
> I enclose similar undertaking from the Commander-in-Chief Fleet, on behalf of the Chief of the Naval Staff, for the Royal Navy, the Chief of the General Staff for the Army and the Chief of the Air Staff for the Royal Air Force."

35. Although Mr O'Connor accepted that an undertaking in these terms, which is limited to administrative action in respect of a witness's failure to give a full or truthful account on a previous occasion, did not give rise to any concerns with regard to Article 2 or 3 accountability, both he and Mr Johnson submitted that no such undertaking should be sought by this Inquiry. In essence, they advanced the following two reasons in support of that submission, namely (i) that the privilege against self-incrimination does not extend to administrative sanctions that fall short of criminal proceedings and (ii) that, in contrast to the Baha Mousa Inquiry, there has been no previous formal occasion such as a Court Martial upon which

any potential witness has been obliged to give an honest account of his own misconduct.

36. Mr Sheldon readily accepted that the privilege against self-incrimination does not extend to the type of administrative action and or disciplinary procedures that are the subject matter of this form of undertaking. However, he pointed out the limited nature of the misconduct that would be covered by the undertaking (i.e. failure to give a full or proper account on an earlier occasion). He submitted (correctly, in my view) that, although there has been no Court Martial in this case, that did not mean that there had been no obligation on the part of a witness to give an honest account when required to do so on an earlier occasion (e.g. during the 2004 and 2008 Royal Military Police investigations). He stressed that the limited nature of the undertaking would not restrict the authorities from holding accountable by disciplinary or administrative proceedings those who had been guilty of any wrongdoing or misconduct revealed by the witness's evidence. In this he was plainly correct and there was no submission to the contrary effect by counsel for either of the other two parties. Mr Sheldon then emphasised again that the Inquiry's primary obligation is to investigate fully the allegations within the Terms of Reference. He submitted that this form of undertaking would make a contribution to the proper fulfilment of that obligation – in short, that witnesses would be more likely to give truthful and complete evidence if their evidence was protected from use in disciplinary proceedings against them, albeit in the very limited way envisaged. This, he contended, should be the decisive factor. I agree.

37. Accordingly, I am wholly satisfied that Mr Sheldon's submissions on this issue are correct. For those reasons and like Sir William Gage (see paragraph 35 of his ruling of the 6th January 2009), I have come to the conclusion that it would be appropriate for me to seek the same limited form of undertaking as that sought by Sir William and with which he was provided by Sir Bill Jeffrey KCB and each of the various Heads of the Armed Services: see Annexes C to F to Sir William's ruling of 6th January 2009.

38. Once again, I would like to express my gratitude to all counsel for their very helpful written and oral submissions on the above issues.

Sir Thayne Forbes

Sir Thayne Forbes,

Chairman, Al-Sweady Inquiry, 27th July 2010

Al Sweady Inquiry

APPLICATIONS FOR ANONYMITY AND OTHER PROTECTIVE MEASURES: RULING ON GENERIC LEGAL ISSUES FOLLOWING THE FIRST DIRECTIONS HEARING ON 21ST JUNE 2010

Introduction

1. At a directions hearing on 21 June 2010 I heard submissions from the Treasury Solicitor (TSol), Public Interest Lawyers (PIL) and the Ministry of Defence (MoD) on generic legal issues with regard to two matters, namely:
   (i) Applications for anonymity and other protective measures; and
   (ii) Immunities and related undertakings.

2. Having heard those submissions, I indicated that I would take time to consider the submissions in relation to those matters and would in due course promulgate rulings in writing. This is my ruling with regard to the generic legal issues relating to Anonymity and other Protective Measures.

Background

3. In summary, this Inquiry arises out of allegations that, following a fire-fight between British soldiers and insurgents in Iraq in May 2004, a number of Iraqi nationals who had been consequently detained by British troops were unlawfully killed at a British Army camp and that others were mistreated at that camp and later at a detention facility.

4. On 25 November 2009 the then Secretary of State for Defence announced that there would be a public inquiry into the allegations. I was invited to chair the Public Inquiry. The Inquiry's Terms of Reference are:

> To investigate and report on the allegations made by the claimants in the Al-Sweady judicial review proceedings against British soldiers of (1) unlawful killing at Camp Abu Naji on 14 and 15 May 2004, and (2) the ill-treatment of five Iraqi nationals detained at Camp Abu Naji and subsequently at the divisional temporary detention facility at Shaibah Logistics Base between 14 May and 23 September 2004, taking account of the investigations which have already taken place, and to make recommendations.

Anonymity and other protective measures

5. At the Preliminary Hearing on 9 March 2010 I made an opening statement in which I indicated that, having regard to s18 of the Inquiries Act 2005, the Inquiry's proceedings would be conducted in public and in an open and transparent manner.

6. Accordingly, as a general rule, all witness statements and other documents considered relevant by the Inquiry will be distributed to Core Participants and other persons concerned in the Inquiry, referred to in the Inquiry's public hearings and thereafter published on the Inquiry's website.

7. On 11 May 2010 the Solicitor to the Inquiry wrote to the parties named in paragraph 1 above, informing them of my intended approach to applications for anonymity and other protective measures for witnesses, including the procedure I intended to adopt in relation to applications for such measures.

8. The letter also invited the parties to make written submissions in relation to the law I should apply when deciding applications for anonymity or other protective measures. In particular, I asked that submissions should address four issues:

   (1) What is the legal test to be applied, and what considerations are relevant, in relation to any application that relies on Articles 2 or 3 of the European Convention on Human Rights ("the ECHR")? Hereafter I will refer to this as "the Articles 2 and 3 test".
   (2) What is the legal test to be applied, and what considerations are relevant, in relation to any application that asserts that there is a risk of death or injury, but where Articles 2 or 3 of the ECHR are not relied on (the so-called "Common Law test")? Hereafter I will refer to this as "the Common Law test".
   (3) What is the legal test to be applied, and what considerations are relevant, in relation to any application that relies on Article 8 of the ECHR (hereafter "the Article 8 test")?
   (4) What is the legal test to be applied, and what considerations are relevant, in relation to so-called "public interest" applications for protective measures (hereafter "the Public Interest test")?

9. Written submissions were received from all three parties named in paragraph 1 above. Having considered the written representations made, it was clear that there were two main sub-issues between the parties and upon which oral submissions were required:

(1) First, in paragraph 14 of its skeleton argument TSol submitted that, when determining an application for anonymity based on Articles 2 and/or 3 of the ECHR, the Inquiry must ask itself: 'Does a rigorous and objective assessment of the totality of the relevant information available to the Inquiry reveal reasonable grounds for believing (or a real risk) that, if anonymity is not granted, the witness will face a real and immediate risk of death or bodily injury?' – I invited submissions on whether this was correct.
(2) Second, whether it is part of the Common Law test that, once it has been found that an applicant's subjective fears are based on reasonable grounds, there must be a compelling justification for naming the applicant (i.e. was *In re A and others* [2009] NICA 6 wrongly decided)?

10. It was upon those two sub-issues that counsel for the three parties made oral representations at the Directions Hearing on 21 June 2010.

11. Before setting out the specific representations made by each party in relation to the four issues identified in paragraph 8 above and my rulings upon them, I set out the relevant statutory background, which is not in dispute.

Statutory Provisions

12. The Inquiry is set up under s1 of the Inquiries Act 2005 ("the 2005 Act"). It is being conducted by me as Chairman, without other members. It was set up on 25 November 2009 with terms of reference as set out above.

13. Section 18 of the 2005 Act provides for public access to proceedings and information and, so far as material, is in the following terms:

> **18 Public access to inquiry proceedings and information**
>
> (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 –
>
> (a) To attend the inquiry or to see and hear a simultaneous transmission of proceedings at the inquiry;
> (b) To obtain or to view a record of evidence and documents given, produced or provided to the inquiry or inquiry panel...

14. Section 19 of the 2005 Act provides for restrictions to be placed on the public access guaranteed by s18 of the Act. The relevant terms of s19 are as follows:

> **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 ... order must specify only such restrictions –
(a) ...
(b) as 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).

(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 have been 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) damage to national security or international relations
(c) ..."

Ruling on the Written and Oral Representations relating to Anonymity and other Protective Measures.

15. I stress that the Inquiry procedure is inquisitorial and not adversarial. Therefore, even where there is agreement between counsel for all parties, it is not appropriate for me to simply accept the agreed position. I have to be satisfied that, within the statutory framework, what is being proposed is appropriate. For convenience, in this ruling I will refer to all forms of protective measures by the single term "anonymity" and I will address in turn each of the four issues set out in paragraph 8 and, where it arises, each of the related sub-issues identified in paragraph 9.

16. **First issue**: **The Articles 2 and 3 test**. I accept that it is clear that, as a public authority, the chairman of an inquiry such as the present has an obligation to act compatibly with Convention Rights, including those enshrined in Articles 2, 3 and 8 of the ECHR: see section 6 of the Human Rights Act 1998. Furthermore, as is clear from their terms and as has often been emphasised in the relevant case law, Article 2 (the right to life) and Article 3 (the right to freedom from torture or inhuman or degrading treatment) are both fundamental rights and neither is subject to any form of qualification.

17. It is common ground that the decision of the European Court of Human Rights ("the ECtHR") in *Osman v UK* (1998) 29 EHRR 245 ("*Osman*") clearly establishes that Article 2 covers not only the negative obligation not to take the life of another person but that it also imposes on contracting states a positive obligation to take certain steps towards the prevention of loss of life at the hands of others than the state, as well as stating what must be established in order to prove a violation on the part of the authorities of that positive obligation, as follows (see paragraphs 115 and 116 of the judgment in *Osman*):

> "115. The court notes that the first sentence of article 2(1) enjoins the state not only to refrain from the intentional and unlawful taking of life, but also to take appropriate steps to safeguard the lives of those within its jurisdiction. It is common ground that the state's obligation in this respect extends beyond its primary duty to secure the right to life by putting in place effective criminal law provisions to deter the commission of offences against the person backed up by law-enforcement machinery for the prevention, suppression and sanctioning of breaches of such provisions. It is thus accepted by those appearing before the court that article 2 of the Convention may also imply in certain well-defined circumstances a positive obligation on the authorities to take preventive operational measures to protect an individual whose life is at risk from the criminal acts of another individual. The scope of this obligation is a matter of dispute between the parties.
>
> 116. In the opinion of the Court, where there is an allegation that the authorities have violated their positive obligation to protect the right to life in the context of their above-mentioned duty to prevent and suppress offences against the person (see paragraph 115 above), it must be established to its 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."

18. The significance of *Osman*, as a definitive statement of the relevant Strasbourg jurisprudence, is expressly recognised in *In re Officer L* (2007) UKHL 36 and [2007] 1 WLR 2135 ("*Re Officer L*"), the leading domestic decision on the appropriate legal test to be applied under Article 2. Again, it is clear from both their written and oral submissions that this is common ground between the parties. In the course of his speech in *Re Officer L*, Lord Carswell stated the relevant principles in the following terms (see paragraphs 19 and 20):

> "19. The right to life is simply and briefly expressed in the first sentence of article 2 of the Convention: "Everyone's right to life shall be protected by law." As the Strasbourg jurisprudence has laid down, this covers not only the negative obligation, not to take the life of another person, but imposes on contracting states a positive obligation, to take certain steps towards the prevention of loss of life at the hands of others than the state. The locus classicus of this doctrine is *Osman v United Kingdom (2000)* ...
>
> ...
>
> 20. Two matters have become clear in the subsequent development of the case law. 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 *Re W's Application (2004) NIQB 67*, 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 in my opinion clear that the criterion is and should be one that is not readily satisfied: in other words the threshold is high. There was a suggestion in paragraph 28 of the judgment of the court in *R (A and others) v Lord Saville of Newdigate (2002) 1WLR 1249, 1261* (also known as the *Widgery Soldiers* case, to distinguish it from the earlier case with a very similar title) that a lower degree would engage article 2 when the risk is attendant upon some action that an authority is contemplating putting into effect itself. ... but I do not think that this suggestion is well founded. 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 subjective concerns of the applicant, but on the reality of the existence of the risk.
>
> 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 ECtHR stated in paragraph 116 of *Osman*, 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. In this way the state is not expected to undertake an unduly burdensome obligation: it is not obliged to satisfy an absolute standard requiring the risk to be averted, regardless of all other considerations ..."

19. Accordingly, as was effectively submitted by counsel for each of the parties, I am satisfied that the appropriate legal principles/test to be applied in respect of an application for anonymity based on Article 2, can be summarised as follows.
    (i) Article 2 covers not only the negative obligation not to take the life of another, but it also imposes upon contracting states a "positive obligation" to take certain steps towards the prevention of loss of life at the hands of others than the state: see *Osman* at paragraphs 115 to 116.
    (ii) This positive obligation arises only where the risk is "*real and immediate*", i.e. "*a real risk is one that is objectively verified and an immediate risk is one that is present and continuing*": see *Re Officer L* at paragraph 20 (approving Weatherup J in *Re W's Application*, supra).
    (iii) The threshold required to engage the positive obligation is high, the standard and the fear must be objectively well-founded: see *re Officer L* at paragraph 20.
    (iv) The case law pursuant to Article 2 reflects the principle of proportionality; i.e. the degree of stringency imposed as to the level of precaution required to avoid a breach of Article 2 reflects the need to strike a fair balance between the general rights of the community and the personal rights of the individual: see *Re Officer L* at paragraph 21.

20. As I have already observed (see paragraph 16 above), it is common ground that Articles 2 and 3 are both fundamental rights and are not subject to any form of qualification. It is also common ground that, as well as carrying the negative obligation not to torture or subject an individual to inhuman or degrading treatment, Article 3 also imposes upon a contracting state a positive obligation to take reasonable and effective measures to prevent an individual from being subject to such treatment contrary to Article 3 of which the authorities of that state are, or ought to be, aware. Applying the reasoning of the ECtHR in *Osman* with regard to Article 2 (see paragraph 17 above) to the terms of Article 3, I am satisfied that this is so and none of the counsel for the parties suggested otherwise. I therefore also accept the submission made by counsel for each of the parties that the test of applicability for Article 3 is the same as that described by Lord Carswell in respect of Article 2 (suitably adapted to reflect also the terms of Article 3), namely that of a real and immediate risk to life or to an individual's freedom from torture, cruel

and inhuman or degrading conduct: see also paragraphs 16 and 17 of the Open Ruling (Second Directions Hearing) by Sir William Gage in the Baha Mousa Public Inquiry, dated 5th February 2009, with which I agree.

21. Accordingly, in my view the appropriate legal principles/test applicable to an application for anonymity based on Article 3 can be summarised as follows.

(i) In order for the threat to be "*real and immediate*" so as to engage Article 3, it must be "*objectively verified*" and "*present and continuing*": see *Re W's Application*.
(ii) The threshold required to engage the positive obligation is high. The standard is constant and the fear must be objectively well-founded.
(iii) The principle of proportionality is reflected in the degree of stringency imposed with regard to the level of precaution required to avoid a breach of Article 3 which reflects the need to strike a fair balance between the general rights of the community and the personal rights of the individual.

22. However, as indicated in paragraph 9(1) above, paragraphs 13 and 14 of TSol's skeleton argument are in the following terms:

> "13. In *R (A) v Lord Saville* [2000] 1 WLR 1855 Lord Woolf, when considering the common-law approach to be applied in cases where the evidence fell short of establishing "real and immediate" risk, held that the common-law jurisdiction to order anonymity would be engaged in a case where the fears of the individual concerned were "based on reasonable grounds" (1877B-C). There would be no justification for setting a higher threshold in an Article 2/3 case than in a case falling short of real and immediate risk.
>
> 14. It follows that when determining each application for anonymity based on articles 2 and/or 3, the Inquiry must ask itself the following question: <u>does a rigorous and objective assessment of the totality of the relevant information available to the Inquiry reveal reasonable grounds for fearing (or a real risk) that, if anonymity is not granted, the witness will face a real and immediate risk of death or bodily injury?</u>"

23. This apparent elision of the legal test to be applied in the case of an application for anonymity based on Article 2 and/or 3 with that applicable to an application based on common law principles resulted in the first sub-issue identified in paragraph 9(1) above and was the subject of detailed submissions in paragraph 19 of the MoD's written skeleton argument which merit being quoted in full, as follows:

> "19. The MoD respectfully submits that the test proposed by the Treasury Solicitor at paragraphs 13 and 14 of their skeleton argument is not correct in its entirety. The MoD submits that it is erroneous to import into the test for an anonymity application under Article 2 or 3 of the European Convention on Human Rights ("the Convention") a requirement of "*reasonable grounds*" as opposed to "*real risk*". This is because:

(i) No authority has been cited to support the modification of the conventional approach to the threshold test in Articles 2 and 3 which has been authoritatively stated on a number of occasions;

(ii) The interrelationship between an anonymity application based on Article 2 of the Convention and the common law test for anonymity was analysed extensively by Lord Carswell in *Re Officer L* ... Nowhere in that decision was it suggested that it would be appropriate to import into the Article 2 analysis the (clearly more generous) threshold test applicable in the common law context;

(iii) On the contrary, Lord Carswell in *Re Officer L* at paragraph 20 adopted, in relation to the positive obligation, the summary given by Weatherup J in *In re W's Application* ... at paragraph 17 that:

> "*a real risk is one that is objectively verified and an immediate risk is one that is present and continuing".*

Lord Carswell added (also at paragraph 20) that:

> "*the criterion is and should be one that is not readily satisfied: in other words, the threshold is high.*"

(iv) The Strasbourg Court jurisprudence as to the test to be applied under Articles 2 and 3 is well established. No separate or modified test is applied in relation to anonymity applications and there is no principled reason for doing so. There is no basis for importing into the statutory test under Articles 2 and 3 principles that are applicable to common law applications for anonymity, and there is no requirement or objective justification for the two legal bases for anonymity applications to be aligned. Whilst it may, in certain contexts, be appropriate to develop the common law in alignment with the Convention, it is not permissible to modify the Convention jurisprudence so as to harmonise it with the common law ...

(v) So the fact that it may be appropriate in a particular case, in accordance with the observations of Lord Carswell in *Re Officer L* at paragraphs 27-29, to conduct a common law balancing exercise <u>having regard to</u> Article 2 considerations does not undermine the integrity of the well-established test for establishing a prospective breach of Article 2 (or 3) of the Convention."

24. In the course of his oral submissions on behalf of TSol, Mr Sheldon suggested that paragraphs 13 and 14 of his skeleton argument may have been misinterpreted. He argued that there had been no elision of the common law legal test with that applicable to applications for anonymity based on Articles 2 and 3 and accepted that, for the purposes of Articles 2 and 3, the nature of the risk that must be established is a "*real and immediate risk*". Mr Sheldon went on to submit that paragraphs 13 and 14 of his skeleton argument were actually concerned with the evidential threshold that must be surmounted in order to establish such a risk. In effect, it was his submission that "reasonable grounds" is the appropriate test for that purpose, because there is no obvious reason why a lower evidential threshold

should be set in respect of the common law test with regard to a risk that falls short of real and immediate than the more serious risk that would engage Article 2 or 3.

25. Notwithstanding Mr Sheldon's assertion that paragraph 14 of his skeleton argument is only concerned with defining the appropriate evidential threshold for establishing a "*real and immediate risk*", it is clear that his formulation does have the effect of importing into the legal test applicable to an application for anonymity based on Article 2 and/or 3, terminology that is expressly derived from the legal test applicable to an application based on common law principles – principles that are "*distinct and in some respects different from those which govern a decision made in respect of an article 2 risk*": see Lord Carswell's speech in *Re Officer L* at paragraph 22 (see paragraph 27 below). In my view, given the clear statements of principle to be found in the judgments in both *Osman* and *Re Officer L*, such an approach is not only unnecessary but wrong for the reasons expressed by Mr Johnson on behalf of the MoD (see paragraph 23 above) and, in effect, supported by Mr O'Connor QC on behalf of PIL.

26. Accordingly, I am satisfied that the legal principles/test applicable to an application for anonymity based on Article 2 and/or 3 are as summarised in paragraphs 19 and 21 above. Expressed in one sentence, the test that must be satisfied for such an application to succeed is whether a rigorous and objective assessment of the totality of the relevant information available to the Inquiry has established as well-founded a present and continuing risk to the witness in question of death or bodily injury if the anonymity sought is not granted.

27. **Second issue: The Common Law test**. As counsel for each of the parties submitted, if the Article 2/3 test of real and immediate risk is not met, then the question of whether anonymity should be granted on common law principles will arise. That there are both Article 2/3 and common law grounds for granting anonymity to a witness in a public inquiry was explained by Lord Carswell in *Re Officer L* at paragraph 29 of his speech, as follows:

> "... I suggest that the exercise to be carried out by the tribunal faced with a request of 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 paragraph 22)."

28. It is not disputed that the common law principles relating to witness anonymity derive from a tribunal's common law duty of fairness and that subjective fears can be taken into account, even if not well founded. In paragraph 22 of his speech in *Re Officer L*, Lord Carswell stated the relevant principles in the following terms:

> "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 paragraph 8 of its judgment in the *Widgery Soldiers* case, 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. It is possible to envisage a range of other matters which would make for unfairness in relation of witnesses. Whether it is necessary to require witnesses to give evidence without anonymity is to be determined, as the tribunal correctly apprehended, by balancing a number of factors which need to be weighed in order to reach a determination."

29. However, it was Mr Sheldon's submission that in cases where there are reasonable grounds for the belief that giving evidence without anonymity would give rise to an increased risk to the witness's life, albeit of a degree insufficient to meet the Article 2/3 requirement of a "*real and immediate risk*", the test to be applied is as set out in the judgment of Lord Woolf in *R (A) v Lord Saville* (supra), as follows (see paragraph 68.5 of the judgment):

> "... 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."

30. Accordingly, Mr Sheldon submitted that in any case where the evidence shows that there are reasonable grounds for believing that naming the individual witness

"*would increase the risk*" to his life, the common law requires that there must be a compelling justification for naming the witness in question (i.e. for refusing his application for anonymity). Mr Sheldon contended that nothing said by the House of Lords in *Re Officer L* casts any doubt on the applicability of the test articulated by Lord Woolf in *R (A) v Lord Saville* and, for good measure, he pointed out that Lord Woolf was one of the Appellate Committee in *Re Officer L*. Mr Sheldon went on to submit that, insofar as the Court of Appeal in Northern Ireland held otherwise in the case of *In the Matter of an Application by A and others (Nelson Witnesses) for Judicial Review* [(2009] NICA 6 ("*Re A and Others (Nelson Witnesses)*") (see below), it was wrong to do so. It is this submission that has given rise to the second sub-issue identified in paragraph 9(2) above.

31. Referring to the judgment of Lord Woolf in *R (A) v Lord Saville*, at paragraph 24 of his judgment in *Re A and Others (Nelson Witnesses)*, Kerr LCJ said this:

> "24. ... I have concluded that Lord Woolf did not propound a rule intended to be of general application to the effect that where a risk to life arose, compelling justification was required before a claim for anonymity of witnesses could be refused. Put simply, the context here is different. Whereas in *ex parte A* the decision might well have infringed the applicants' rights under article 2, in the present case it has been determined that this does not arise. I am of the view that a risk falling short of that required to activate article 2 of ECHR falls to be assessed simply as one of a number of factors in an even-handed evaluation of competing interests rather than as a matter which requires to be offset by compelling justification."

32. In paragraph 1 of his judgment (page 16) in *Re A and Others (Nelson Witnesses)*, Higgins LJ agreed with the judgment of Kerr LCJ. For his part, Girvan LJ said this at paragraph 23 (page 32):

> "23. What the common law requires is fairness to the individual witness in all the relevant circumstances of the individual case. The determination of what is fair requires the carrying out of a balancing exercise. The nature of such an exercise necessarily requires putting into the scales the arguments and factors favouring the granting or withholding of anonymity. The passage from Lord Woolf should not be read as stating a broad overriding principle that the common law duty of fairness in any case where a claimed risk to life and subject fears arise requires that anonymity should be granted in the absence of compelling reasons. How the balance is struck in individual cases will, of course, be fact specific. Where there is a risk to the life of a witness the extent of the risk is a highly relevant factor to be put into the scales. Common sense and humanity would lead to the conclusion that the greater the risk the more persuasive the case for anonymity and the more the court would have to be persuaded that the countervailing factors are even more persuasive so as to lead to a refusal of anonymity or, in the words of Lord Woolf, there would have to be some compelling reason for refusing anonymity."

It is to be noted that in paragraphs 29 to 31 (pages 34 to 36) of his judgment, Girvan LJ gives detailed guidance as to how the required balancing exercise should be carried out in determining an application for witness anonymity based on common law principles.

33. For their part, Mr O'Connor QC and Mr Johnson both submitted that the judgment of the Northern Ireland Court of Appeal in *Re A and Others (Nelson Witnesses)* was correct in concluding that the observations of Lord Woolf in *R (A) v Lord Saville,* upon which Mr Sheldon relied, should not be read as propounding a principle of general application to the effect that, where a risk to life arose, compelling justification was required before a claim for anonymity of witnesses could be refused. I agree with that submission for the reasons advanced by Mr Johnson: see paragraph 20 of his skeleton argument, which is in the following terms:

> "20. The MoD submits that the Court of Appeal in Northern Ireland in *In re A and others* was correct in holding that the observations of Lord Woolf in *R (A) v Lord Saville of Newdigate* ... (at paragraph 68(5)) were not of general application. The following matters are relevant:
>
> (i) The pronouncement by Lord Woolf at paragraph 68(5) of *R (A) v Lord Saville of Newdigate* falls to be analysed in its proper context. The context was that at paragraphs 67 to 69. Lord Woolf explained his conclusions by reference to the facts of the particular case and it does not appear that in doing so, he was purporting to lay down any principle of general application.
>
> (ii) In *Re Officer L*, Lord Carswell (at paragraphs 22 and 27-29) analysed at length the common law principles to be applied to an application for anonymity. He did not refer to the observations of Lord Woolf at paragraph 68(5) as representing the principles generally governing such applications, nor, as Girvan LJ observed at paragraph 21 of *In re A and others* did he purport to state any novel proposition on this issue.
>
> (iii) Finally, as Girvan LJ identified in *In re A and others* (at paragraph 23) the conclusions as to the effect do not in any event detract in practical terms from the scope of the common law test. ..."

34. Accordingly, I am firmly of the opinion that Lord Woolf was not purporting to state a principle of general application in paragraph 68.5 of his judgment in *R (A) v Lord Saville*, as suggested by Mr Sheldon. I respectfully agree with the conclusions of the Northern Ireland Court of Appeal in *In re A and Others (Nelson Witnesses)*, in particular paragraph 24 of the judgment of Kerr LCJ and paragraph 23 of the judgment of Girvan LJ. I am therefore satisfied that the legal test applicable to an application for anonymity based on common law principles is as stated by Lord Carswell in paragraph 22 of his speech in *Re Officer L* and as stated by Girvan LJ in paragraph 23 of his judgment in *In re A and Others (Nelson Witnesses)*. Furthermore, in paragraphs 29 to 31 of that judgment, Girvan LJ has

given detailed guidance as to the relevant considerations and factors that need to be taken into account when carrying out the required balancing exercise.

35. **Third issue: the Article 8 test.** There was no dispute between the parties with regard to this particular issue. The relevant legal test can therefore be stated in very brief terms.

36. Article 8 of the ECHR provides that:

> "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 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."

37. I accept that the Inquiry must not act in a way which is incompatible with the Article 8 rights of the witness concerned. If it proposes to act in a way that interferes with the witness's rights under Article 8(1), that interference must be justified on one or more of the grounds identified in Article 8(2).

38. As Mr Sheldon observed, it follows that the test to be applied in respect of an application for evidential restrictions based on Article 8 is as follows:

(i) Absent the order, would the Inquiry's act of calling the witness and/or disclosure of his name/appearance/address/current position etc amount to an interference with his Article 8(1) rights? Relevant to the determination of that question are the type of considerations identified in paragraph 36 of Mr Sheldon's skeleton argument, which I adopt but do not repeat.

(ii) If interference with Article 8(1) is demonstrated, is that interference:

(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 the health or morals, or for the protection of the rights and freedoms of others; and

(b) proportionate in all the circumstances, including taking into account (for example) the right of the press and others under Article 10 of the ECHR to receive and impart information?

39. **Fourth Issue: the Public Interest test**. Again there is no dispute as to the relevant legal principles/test to be applied. The considerations relevant to a public interest application for protective measures under s19 of the 2005 Act are set out in sub-section (4): see paragraph 14 above and repeated for convenience, as follows:

> "(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)."

40. As Mr Johnson observed, the relevant public interest ground relied on in any particular application may vary from application to application. Those representing individuals will be directly concerned with their safety, as will the MoD in a vicarious capacity in respect of service personnel. Furthermore, as Mr Johnson pointed out, the MoD has a distinct and direct interest in protecting national security (see s19(5)(b) of the 2005 Act, quoted in paragraph 14 above). I therefore accept, for example, that protective measures will be justified on public interest grounds where disclosure of the witness's identity or appearance would cause real harm to national security. As Mr Johnson pointed out, this consideration is likely to be engaged, for example, in the cases of soldiers who serve in special units or who are engaged in other sensitive work, such as the gathering or exploitation of intelligence.

41. I am grateful to all counsel for their very helpful written and oral submissions on all the above issues.

Sir Thayne Forbes

Sir Thayne Forbes,
Chairman, Al Sweady Inquiry,
19th July 2010

AL-SWEADY INQUIRY

RESTRICTION ORDER

General Protective Measure – Non-Witnesses

(Amended 28 September 2012)

The Restriction Order of 21st February 2011 concerning General Protective Measures **IS HEREBY AMENDED** as follows and **IT IS ORDERED** that until further order:

1. This order is further to the order of 3rd August 2010 made in relation to the redaction of the personal information of witnesses and binds all natural and legal persons (whether acting by themselves or by their servants or agents or howsoever).

2. Personal information of individuals other than witnesses will not be disclosed and will be redacted by the Inquiry from documents unless such information is – exceptionally – relevant to the discharge by the Inquiry of its Terms of Reference.

3. **Names of service personnel not related to the Terms of Reference of this Inquiry will generally <u>not</u> be redacted. Where the name of a member of service personnel who is not related to the Terms of Reference of this Inquiry appears in a context that gives rise to some apparent sensitivity, also unrelated to the Terms of Reference of this Inquiry, the name of that person may, at the discretion of the Chairman, be redacted.**

4. **Names of civilians not related to the Terms of Reference of this Inquiry will generally be redacted.**

5. Personal information **of individuals other than witnesses** includes (but is not limited to):
    a. A person's name, **subject to the terms of paragraphs 3 and 4 above**;
    b. A private address;
    c. A business or work address;
    d. A telephone number;

e. A fax number;
f. An email address;
g. The service number of a member of the military;
h. Any other information which may identify where a person currently resides.

6. Any person affected by the restrictions set out in paragraphs 2 **to 5** above may apply to the Chairman to vary this order.

Dated this 28th day of September 2012

Sir Thayne Forbes
Inquiry Chairman

AL-SWEADY INQUIRY

NOTE of GUIDANCE

RESTRICTION ORDER

General Protective Measure - All Witnesses

---

1. This note is intended to provide guidance on how the Chairman will interpret a central aspect of the application of the Restriction Order dated 3rd August 2010, namely who the Chairman considers to be a 'witness' in terms of that order. The Inquiry has progressed over a period of two years since the date the Restriction Order of 3rd August 2010 was issued. The Chairman considers it beneficial to core participants, witnesses, recognised legal representatives, and his staff to provide this guidance to ensure the effective running of the Inquiry.

2. In terms of the application of the Restriction Order for General Protective Measures for All Witnesses:
    a. an individual will be considered a 'witness' if that individual was deemed by the Chairman as a person from whom he proposes to take evidence and thus was sent correspondence pursuant to Rule 9 of the Inquiry Rules 2006; and
    b. an individual who was sent correspondence only of a preliminary nature, or to aid the Chairman in deciding whether that individual was a person from whom he proposes to take evidence, will not be considered a 'witness'.

Dated this 28th day of September 2012

Sir Thayne Forbes
Inquiry Chairman

Crown Office and Procurator Fiscal Service
Crown Office, 25 Chambers Street, Edinburgh, EH1 1LA

Mr John A Dunn, Deputy Crown Agent

Jillian Glass
Solicitor to the Al-Sweady Inquiry
The Al-Sweady Public Inquiry
Finlaison House
15 – 17 Furnival Street
London
EC4A 1AB

Tel: 0131 226 2626
RNID Typetalk prefix: 18001

Fax: 0844 561 4070

Your ref:
Our ref:

18 April 2011

Dear Ms Glass

The Al-Sweady Inquiry

Thank you for your correspondence in respect of the above addressed to the Lord Advocate, and to my office. I am grateful to you for sharing the correspondence dated 18 January 2011 from the offices of the Attorney General, outlining the undertaking which he provided to the Chairman to the Inquiry, in conjunction with the explanatory letter from Kristin Jones dated 10 January 2011, which have been considered by the Crown Office and Procurator Fiscal Service (COPFS).

I can confirm, on behalf of the Lord Advocate, that the Lord Advocate is content to provide an undertaking, as requested, to assist the Inquiry to fulfil its terms of reference. The Lord Advocate has agreed that, having regard to the explanatory letter of 10 January 2011 from Kristin Jones, the undertaking will be in the same form as that provided by the Attorney General, save for the reference to military proceedings which falls out with her jurisdiction.

The undertaking which the Lord Advocate proposes to give is as follows:

> *This is an undertaking in respect of any person who provides evidence to the Inquiry relating to a matter within its terms of reference. "Evidence" includes oral evidence, any written statement made by that person preparatory to giving evidence to the Inquiry or during the course of his or her testimony to the Inquiry, and any document or information produced to the Inquiry solely by that person.*
>
> *No evidence a person may give before the Inquiry, nor any evidence as defined above, 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, save that this undertaking does not apply to:*
>
> *(a) A prosecution where the person is charged with having given false evidence in the course of this Inquiry or having conspired with or procured others to do so, or*
> *(b) Proceedings where the person is charged with any offence under section 35 of the Inquiries Act 2005 or having conspired with or procured others to commit such an offence.*
>
> *It is further undertaken that in any criminal proceedings brought, or in any decision as to whether to bring such proceedings, against any person who provides evidence, as defined*

above, 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.

I agree that this letter may be circulated to all interested parties and published on the Inquiry website.

I hope that this is helpful

Yours sincerely

John A. Dunn
Deputy Crown Agent

PUBLIC PROSECUTION SERVICE
BELFAST CHAMBERS
93 CHICHESTER STREET
BELFAST
BT1 3JR

Deputy Director

Jillian Glass
Solicitor to the Al-Sweady Inquiry
The Al-Sweady Public Inquiry
Finlaison House
15 – 17 Furnival Street
London
EC4A 1AB

31 January 2011

Dear Ms Glass

AL-SWEADY PUBLIC INQUIRY

I have seen the letter to you dated 18th January from Kevin McGinty of the Attorney General's Office in London in which he set out the terms of the undertaking agreed to by the Attorney General for England and Wales and the Director of Public Prosecution. I have also seen the letter to you of 10th January from Kristin Jones.

On behalf of the Director of Public Prosecutions for Northern Ireland I agree that an undertaking in precisely the same terms as agreed in that correspondence will apply in respect of prosecutions that fall to be conducted in Northern Ireland.

I agree that this letter may be circulated to all interested parties and published on the Inquiry website.

Yours sincerely

R A Kitson
Acting Deputy Director

AGO
Attorney General's Office

20 Victoria Street
London
SW1H 0NF

Jillian Glass
Solicitor to the Al-Sweady Inquiry
The Al-Sweady Public Inquiry
Finlaison House
15 – 17 Furnival Street
London
EC4A 1AB

020 7271 2412

18th January 2011

Dear Solicitor,

THE AL-SWEADY INQUIRY

I write further to your letter of 12th January and the discussions between the parties and the Chairman of the Inquiry that took place on 12th January. The Attorney General, with the agreement of the Director of Public Prosecutions, has agreed that an amended undertaking may be provided. The final version of the undertaking is as follows:

> *This is an undertaking in respect of any person who provides evidence to the Inquiry relating to a matter within its terms of reference. "Evidence" includes oral evidence, any written statement made by that person preparatory to giving evidence to the Inquiry or during the course of his or her testimony to the Inquiry, and any document or information produced to the Inquiry solely by that person.*
>
> *"No evidence a person may give before the Inquiry, nor any evidence as defined above, 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 superior authority), save that this undertaking does not apply to:*
>
> *(a) A prosecution (whether for a civil offence or a military offence) where the person is charged with having given false evidence in the course of this Inquiry or having conspired with or procured others to do so, or*

(b) Proceedings where the person is charged with any offence under section 35 of the Inquiries Act 2005 or having conspired with or procured others to commit such an offence.

It is further undertaken that in any criminal proceedings brought, or in any decision as to whether to bring such proceedings, against any person who provides evidence, as defined above, 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.

This undertaking should be read in conjunction with the letter of explanation from Kristin Jones to you dated 10th January.

Yours sincerely,

Kevin McGinty

Kevin McGinty
kevin.mcginty@attorneygeneral.gsi.gov.uk

AGO
Attorney General's Office

20 Victoria Street
London
SW1H 0NF

Jillian Glass
Solicitor to the Al-Sweady Inquiry
4th Floor Finlaison House
15/17 Furnival Street
London
EC4A 1AB

General enquiries: 020 7271 2400
Direct line: 020 7271 2416
Fax. 020 7271 2453

Kristin.Jones@attorneygeneral.gsi.gov.uk

10 January 2011

Dear Jillian,

The Attorney General is grateful for the invitation from Sir Thayne to attend through counsel at the hearing on Wednesday at which time the exact scope of the undertaking given by him will be considered. However, he hopes that this explanation renders attendance by counsel unnecessary. He is happy that this letter should be seen as an explanatory addendum to the undertaking and may be published. It has also been copied to the Treasury Solicitor's Department and to the Crown Prosecution Service.

The Attorney General recognises that no person who gives evidence to the Inquiry should be placed at a disadvantage by so doing. In setting up an Inquiry, Government has determined that the importance of getting to the truth of the matter inquired into is such that individuals should be encouraged to give full and frank evidence to the Inquiry, even if the ability to consider prosecutions arising from the matter inquired into is thereby restricted. For that reason it is an essential element in any undertaking that witnesses' rights in respect of self incrimination are protected. However, it is also important to recognise a person should not be unfairly protected from the risk of prosecution, if there is sufficient evidence available independently of the evidence given by that person to bring such a prosecution. Giving evidence to an Inquiry should not provide an immunity from prosecution.

It is the view of the Attorney General that the undertaking as given achieves that balance, protecting the witnesses rights against self-incrimination but allowing for the prosecution of that individual if evidence to support that prosecution is given independently of that person's evidence.

The following explanation may assist:

Where any evidence, as defined by the undertaking, is provided to the Inquiry by a person "A", it is undertaken that, as against "A", no criminal proceedings shall be brought (or continued) in reliance upon any evidence which is itself the product of an investigation commenced as a result of the provision by "A" of evidence to the Inquiry. An investigation into "A" may, however, be started or may continue on the basis of evidence or information provided by any other person or from any other source (or from the product of such information or evidence), even is the evidence or information is in identical terms to the evidence given by "A" to the Inquiry.

I hope this is of assistance.

KRISTIN JONES

RT HON DOMINIC GRIEVE QC MP

AGO
Attorney General's Office

Attorney General

20 Victoria Street
London
SW1H 0NF

020 7271 2460

www.attorneygeneral.gov.uk

Sir Thayne Forbes
The Chairman
The Al-Sweady Public Inquiry
Finlaison House
15-17 Furnival Street
London
EC4A 1AB

10 November 2010

Dear Sir Thayne,

On 20 August 2010 you sought an undertaking from me as to the future use of evidence given to the Inquiry in any future prosecutions. I am grateful to you for setting out in such clear terms the reasons for seeking an undertaking. I have consulted with the Director of Public Prosecutions and the Director for Service Prosecutions.

In granting an undertaking I have to bear in mind two considerations. The first is the public interest in allowing the Inquiry to fulfil its tasks or get to the bottom of what happened. The second consideration is the public interest in ensuring that prosecutions are brought against those who have committed some offence. In practice this means that I should leave the extent of any undertaking to that which is necessary to assist the Inquiry to fulfil its terms of reference whilst protecting, as far as possible, the position of the Director of Public Prosecutions. For that reason I have limited the terms of the undertaking to protect witnesses from self incrimination and what may follow.

I propose to grant an undertaking in the following terms:

> *"This is an undertaking in respect of any person who provides evidence to the Inquiry relating to a matter within its terms of reference. "Evidence" includes oral evidence, any written statement made by that person preparatory to giving evidence to the Inquiry or during the course of his or her testimony to the Inquiry, and any document or information produced to the Inquiry solely by that person.*
>
> *"No evidence a person may give before the Inquiry, nor any evidence as defined above, 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 superior authority), save that this undertaktng does not apply to:

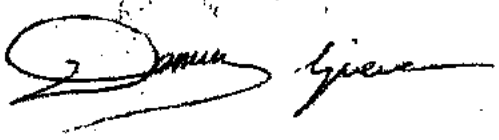
(a) A prosecution (whether for a civil offence or a military offence) where the person is charged with having given false evidence in the course of this Inquiry or having conspired with or procured others to do so, or

(b) Proceedings where the person is charged with any offence under section 35 of the Inquiries Act 2005 or having conspired with or procured others to commit such an offence

(c) Where any evidence, as defined above, is provided to the Inquiry by a person, it is further undertaken, that, as against that person, no criminal proceedings shall be brought (or continued) in reliance upon any evidence which is itself the product of an investigation commenced solely as a result of the provision by that person of evidence to the Inquiry

I am happy for this to be published on your web site.

Yours sincerely



RT HON DOMINIC GRIEVE QC MP