manchester
arena
inquiry

Rulings on restriction orders following the hearing on 23rd July 2020

1. I am grateful for all the work which has been done by the various legal teams in resolving by agreement many of the matters which I would otherwise have had to rule on.

Legal Framework

2. Pursuant to section 17 of the Inquiries Act 2005 ('the 2005 Act'), the procedure and conduct of the Inquiry are a matter for my discretion. This provides a broad discretion which I must exercise fairly and with regard to the need to avoid unnecessary costs. The power to make restriction orders is to be found in section 19 of the 2005 Act. Section 19 has to be read in the context of section 18(1) which provides that as Chairman I must take '*such steps as I consider reasonable to secure'* access by the public and reporters to hearings held as part of the Inquiry and to documents '*given, produced or provided to the inquiry*'. CTI in their submissions have emphasised the inclusion of the word '*reasonable*'. By virtue of section 19(2), I can limit that access by making a restriction order which can restrict attendance at the Inquiry and disclosure or publication of any evidence or documents given, produced or provided to the Inquiry. So far as is relevant to present considerations, section 19(3) provides that a restriction order should only specify such restrictions as I consider '*... to be conducive to the inquiry fulfilling its terms of reference or to be necessary in the public interest'.* In deciding what is conducive to the Inquiry fulfilling its Terms of Reference or to be necessary in the public interest I must have particular regard to the matters in subsection 4, which so far as relevant are:

   (a) the extent to which any restriction ....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) ...

(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…*

3. Section 20 makes further provisions in relation to restriction orders including a provision in subsection 4 which gives me the power to vary or revoke a restriction order by making a further order during the course of the Inquiry.

4. In the course of their submissions the bereaved families urged me to keep the restriction orders under continuous review during the Inquiry, which I shall do.

Operationally Sensitive (OS) Content

5. There are two types of restriction order sought in relation to operationally sensitive content. Type 1 includes the majority of the content (parts of documents or, in a handful of cases, a complete document) over which restriction orders are claimed. Type 2 includes only a few documents, currently 8, which are classified as more sensitive and the means of access to them for Core Participants ('CPs') is more closely controlled. The working definition of OS content is material, '*the publication of which, whether taken alone or based on all the available disclosure (i.e. the mosaic effect), would be capable of assisting those who would wish to carry out future terror attacks'*. OS material would include, for example, plans setting out the actions the emergency services would take in response to a terrorist attack. A comprehensive list of the categories of material considered to be capable of being designated as OS material is to be found at pages 103 to 105 of Bundle 1.

6. All CPs and the media organisations who made submissions agree in principle that material which is operationally sensitive in the way that I have described should be subject of a restriction order as no-one wishes to aid terrorists in planning attacks or making their attacks more deadly.

7. The Inquiry Legal Team ('ILT') have devised and put into effect a protocol for applications for restriction orders, as explained in two Notes dated 7 February 2020 and 14 February 2020. This involves application being made by those who are supplying what they consider to be OS content, identifying what it is and the reason why it is said to be OS. Those who have applied include HMG, GMP, other emergency services, SMG, the operators of the Arena, and Showsec, who supplied security for the Arena. HMG have also been given an opportunity to assess all material to be disclosed to CPs and identify potential OS content. The ILT then consider the material to see whether it appears to be properly described as OS content. If they agree, the material is made available, subject to redactions being applied, to all CPs for their consideration. Documents subject to a Type 2 restriction order have been supplied to CPs in two parts using the Inquiry's electronic disclosure platform, Magnum. Firstly, in one folder the document is disclosed with redactions made to the OS content, and then a second version of the document is disclosed in a separate folder, marked SENSITIVE, which

contains only the material which has been redacted. Putting the two parts together side-by-side electronically enables the complete document to be seen in a secure manner. This has enabled CPs, and in particular the bereaved families, to consider the proposed redactions, make general observations and submit in certain cases that particular redactions should not have been made. The observations and submissions on individual redactions which have been made have either been accepted by the ILT and CP concerned or are the subject of further negotiations. In the case of documents subject to a Type 2 restriction order, the system is the same except the documents which are the subject of the restriction order can only be viewed by lawyers representing CPs at the offices of STI. Those inspections by CPs had not taken place at the time of the hearing on 23 July due to the current health crisis and are timetabled to take place in the next few weeks.

8. None of the CPs has suggested that the protocol is not appropriate or that it has not worked satisfactorily in practice. It seems to me to be an example of everyone working together to achieve the aims of the Inquiry for which I am grateful.

9. I am satisfied that the protocol accords with the principles of sections 18 and 19 of the Inquiries Act 2005. It provides for the greatest possible public access to the work of the Inquiry subject only to restriction orders where necessary to avoid releasing into the public domain information useful for terrorists in planning and carrying out attacks. Such material is contained within documents and statements and no-one disputes that that material should not be referred to in public hearings.

Submissions on behalf of the media

10. While all CPs are content with the procedure which has been adopted, seven media organisations object. I shall refer to them as 'the media' and I note that they include many of the major media outlets. The media complain that they have been excluded from the process of the identification of OS material and have not been sufficiently informed of what has been going on. Jude Bunting, on behalf of the media, submits that they should be entitled to all material now, not by reason of the open justice principle or because there is any legal requirement to do so under the 2005 Act, but rather because the proposed approach represents an interference with the media's common law and European Convention rights. Without seeing the documents and the proposed redactions, the media say, they cannot make any meaningful submissions about whether OS content has been properly identified as such. As a matter of fairness, it is said, that interference must be justified. It is recognised by the media that what fairness requires is a matter for me to decide, as is recognised by my broad discretion under section 17 of the 2005 Act. That concession is properly made; as Chairman I am best placed to determine what fairness requires as I am sighted on all the evidence, procedure and issues in this inquiry in a way in which the media is not.

11. CTI say that that would involve supplying the media with all the documents disclosed to CPs on Magnum and that this would be a huge amount of material, some of which

will not ultimately fall to be adduced in the Inquiry hearings. Mr Bunting argues that it would be sufficient for the media to be supplied with all the documents to which OS redactions have been applied together with the content that has been redacted. For reasons which will become apparent I do not find it necessary to decide this dispute.

12. Unsurprisingly and correctly, the media emphasise the importance of 'open justice' particularly in an Inquiry such as this in which there is a great deal of public interest. I have been referred in written argument to a number of cases which emphasise the central importance of the principle of open justice in any judicial proceedings. These include in particular *R (Guardian News and Media Ltd.) -v- City of Westminster Magistrates Court* [2013] QB 618*; Cape Intermediate Holdings Ltd -v- Dring* [2020] AC 629 and *A -v- BBC* [2015] AC 588. The overriding principle which comes from those cases is that justice should be done openly and that everything that takes place in a court should be reportable in the press subject to very limited exceptions. It is an important constitutional principle that what judges do is open to scrutiny and that the public should be able to understand the reasons for any decision made by a court. There are exceptions to that rule and one of them which applies to this Inquiry is that, for national security reasons, part of the evidence will be held in a closed session and will not be reportable.

13. In the *City of Westminster Magistrates* case the Court of Appeal held that the open justice principle required the production to the Guardian newspaper of written submissions and documents which were referred to in court but not read out. It was part of the material on which the magistrate made her decision. The decision of the Court of Appeal in that case was approved by the Supreme Court in *Dring*. In that case an individual who was not a journalist applied to see all the documents used in a trial relating to personal injury said to have been suffered because of the use of asbestos. The trial had run its course except for judgment but the claim was settled before judgment was given. The applicant was allowed access to some of the documents but not all. The court held that a non-party did not have a right to be granted access automatically to all documents referred to in a court under the inherent jurisdiction of the court but would have to explain why he sought access and how granting him access would advance the open justice principle. The court would then have to carry out a fact specific balancing exercise by weighing the potential value of the information sought in advancing the purpose of open justice against any risk of harm which its disclosure might cause to the maintenance of an effective judicial process or to the legitimate interests of others.

14. In the case of an application on behalf of the media there is a presumption that granting them access will advance the principle of public justice, but it is not an absolute right as was suggested by Mr Bunting in the course of argument.

15. However, as I have already said, I accept that the principle of open justice is an important principle and a broad one.

16. CTI accept the breadth of the open justice principle but say that it does not require, on the facts of this case, that the press should be supplied with all the specific OS content which it is proposed should be made the subject of a restriction order. Rather CTI says the principle can be met if and when the OS content subject to a restriction order is referred to in a restricted hearing. While such a hearing would be closed to the public, CPs and representatives of the media would be allowed to be present. If having heard the OS content, the press wished to argue that a restriction order should not have been made in respect of it, they could do so at that stage. While the restriction order remained in force there would be a prohibition on reporting, but the matter could be considered and I would decide whether it should remain in force.

17. Mr. Bunting is not satisfied with that concession and points out that CPs are encouraged in CTI's submissions to avoid specifically referring to OS content and encouraged to deal with the subject matter in a way which avoids reference to the material the subject of a restriction order. Mr Bunting fears that the practical effect of adopting CTI's submission is that I will take into account the OS content subject to a restriction order without it being mentioned in either a fully public or a restricted hearing.

18. Having considered Mr Bunting's submissions carefully, I do not think that they amount to a valid objection to CTI's proposals. If I follow CTI's proposals, I will not take into account OS content unless it has been specifically considered at a hearing. If the relevant evidence can be explored without relying on OS content subject to a restriction order then that is what will happen. If, in reality, I am being encouraged to take account of OS content subject to a restriction order without it being heard in any hearing, I shall insist on a restricted session so that it can be ventilated in front of the media and CPs, but not the general public. During such a restricted session, any media representative who wishes to argue that the OS content should not be covered by a restriction order can do so. If he or she wishes to have a lawyer to assist with the argument then I shall put off consideration of that issue until a lawyer can attend. This procedure works in criminal cases and I do not see why it should not work in this inquiry. In that way the principle of open justice will be upheld.

19. In order to determine this issue it is important, while recognising the significance of the open justice principle, to recognise its limitations. The media are acting as the ears and eyes of the public who cannot spend all their time watching a live stream of the Inquiry hearings. They also have an important function in relaying non-OS material which may not be heard in public but will contribute to my decisions.

20. The way a great deal of litigation is now conducted is that submissions and documents are put before the court which are read by the tribunal and taken into account in making the decision but are never read out in public. The interests of open justice, subject to consideration of any countervailing interest, require that those documents are made available to the media so that they can properly inform the public. On the other hand there is a great deal of information which is generated in the preliminary stages of

litigation which is not produced in evidence and plays no part in the considerations of the tribunal. Unless that material is adduced in court or taken into account when making a decision, the principle of open justice does not require disclosure to any third party including the media. An example of that would be the unused material in a criminal trial.

21. Rule 12 of the Inquiry Rules 2006 provides that where evidence is the subject of an application for a restriction order it may be disclosed to persons who would not otherwise be permitted to see it, before the application is determined. Rule 12 does not apply directly in the present situation, because I have already made restriction orders in relation to the OS content in order to ensure prompt disclosure to CPs, and particularly the bereaved families. However, it was suggested by both CTI and Mr Bunting that the rule 12 provisions are informative as to the approach I should take to the issue raised by the media now. Mr Bunting submitted that rule 12 allows persons to be granted access to potentially restricted evidence in order to make effective representations about whether it should be restricted, and that I should do so here. However, that is not what rule 12 is primarily concerned with. The purpose of granting access under rule 12 is to ensure that the Chairman can properly and fairly determine an application for a restriction order, and indeed such access is to be granted only where it is 'necessary' to determine the application (see rule 12(4)(b), and the narrow construction of this provision by Pitchford LJ in *R(Metropolitan Police Service) v. Chairman of the Inquiry in the death of Azelle Rodney* [2012] EWHC 2783 (Admin) at [43]). In this Inquiry all CPs have had an opportunity to consider the OS content and have made considered submissions. I have been able to determine the application for a restriction order, and it is not necessary for the media to have the material disclosed to them in order for me to do so.

22. As I have indicated specific provision is made for open justice in section 18 of the Inquiries Act 2005. It provides that: "*Subject to any restrictions imposed by a notice or order under s. 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 and (b) to obtain or to view a record of evidence and documents given, produced or provided to the inquiry.*"

23. For the purposes of section 18 the public and reporters have the same entitlement. This is understandable, as reporters are the eyes and ears of the public. No-one has suggested that members of the public should be supplied with material which has been designated as OS content to consider whether it has been properly so categorised. I am satisfied that section 18(1) does not require what the media seek in requesting access now to OS content. Rather, section 18(1) imposes a duty of reasonable access and does not impose a requirement as to <u>when</u> any access is provided. Discharging that section 18(1) duty through access to the hearings and uploading documents and transcripts to the website

will meet the duty of fairness that is owed to the media. That has been the approach taken in many other inquiries.

24. In writing my report, I will only take into account information that is given in the hearing, or at least relied upon, so that the media can be assured that they will be able to inform the public of the reasons why I have reached the decisions that I reach. That is subject to the material which will be heard at a closed hearing because it is subject to PII. The media will not be able to attend those hearings because of the risk to national security. They have made no application to attend or be supplied with that material because they know, on the basis of a large number of authorities, that such an application would be unsuccessful.

25. The OS content has been made subject to restriction orders because it could assist terrorists in planning attacks or make their attacks more effective by causing death and/or injury to a greater number of people. CPs have been made aware of the OS content and have been involved in the process because they may wish to make applications for restriction orders themselves or, in the case of the bereaved families in particular, they will be involved in the investigatory process which the Inquiry will conduct. As was pointed out by HMG in Cathryn McGahey QC's submissions, the media are not in the same position as CPs. The media carry out a very important function but it is a different one from the one carried out by CPs in the Inquiry. Fairness does not require that I should treat the media in this situation the same as the CPs and grant them access now to material that CPs have received. CPs have passed the threshold for participation set down in Rule 5 and therefore have greater procedural rights and involvement in the Inquiry. CPs are participants in the process. The media are observers.

26. It would have been open to CPs to apply for PII in relation to the OS content which is the subject of the restriction orders. If they did that there could be no doubt that the media would not have been able to see that material in order to make submissions as to whether it was properly classified as PII.

27. As part of his submissions Mr Bunting complained that the ILT had failed to keep the media informed at an early enough stage of their proposals in relation to OS content. CTI disputed this and I do not think that Mr Bunting was inviting me to make any finding on the point as it is not relevant to any decision I make. His complaint is the inability of the media to make sensible submissions on the OS process. He does rely on a passage in the Note supplied by the ILT on 12th June 2020 (found at page 106 of Bundle 1). There ILT say: *"Following the steps above…should any CP or the media consider that (a) content in the SENSITIVE folder has been redacted by the Inquiry on OS grounds that should not have been or (b) any additional requests for OS redactions sought by a CP should be applied or rejected submissions to that effect should be provided by the relevant deadline."*

28. Mr Bunting rightly points out that without seeing the redacted material it was quite impossible for the media to make sensible submissions of the type envisaged in this Note. That rather indicates that the ILT at that time were intending that the material should be supplied to the media.

29. If they were thinking that at that time it would be directly contrary to the submissions made by CTI to me. If the media had been invited to make submissions it should have been limited to general principles and the appropriate categories of OS content.

30. Having taken all those matters into account I am satisfied that CTI's proposals for dealing with OS content are correct. The media should not be supplied with content which has been redacted on OS grounds, but they will be present in any restricted hearing which considers OS content and they can make submissions at that stage if so advised.

31. In those circumstances I consider that the steps proposed by CTI are *reasonable* in the circumstances of this case and are conducive to the Inquiry fulfilling its Terms of Reference. I am satisfied that fairness does not mean it is necessary to supply the media with the redacted OS content before the start of the Inquiry.

Use and handling of OS content during the Inquiry's oral evidence hearings

32. No CP made submissions against the proposals of CTI for use and handling of OS content during the hearings. The media did, in accordance with the submissions that Mr Bunting had made in relation to the making of restriction orders. He argued that if his submissions were accepted on the first matter, it would make the handling of OS content at the hearing easier. While I am not convinced that that is accurate, I make it clear that handling of OS content will be in accordance with the ruling that I have already made.

33. It is also appropriate to allow the press when OS content is considered to discuss the issue of whether submissions should be made with their editors and legal advisors. Of course the media must, and I am sure will, take care to ensure the confidentiality of this information. The media are experienced at dealing with these types of situation. If and when the situation arises the precise terms of any undertakings required can be decided.

34. While Mr Bunting says that there is not much point in having the media at a hearing if they cannot report what they hear or see, that is not the experience of the courts. The media attend not only to report what happens but as representatives of the public to ensure that the courts conduct themselves in a proper judicial manner even when they cannot report everything that is being said.

Delay to the livestream

35. Everyone agrees that there should be a delay to the livestream and a delay to reporting of what is said and happens in the hearing. That is because the hearing will be dealing with sensitive issues and there is always a possibility that things will be said in the hearing which should not be made public. The experience of the courts is that this does happen on a not infrequent basis. It is not done intentionally but is very easy to do inadvertently.

36. The issue is how long should the delay in the livestream and in reporting be. HMG says 10 minutes, as do GMP, SMG and Showsec. The media contend that 10 minutes is too long and 3 minutes should be sufficient. To an objective observer it may seem a somewhat unnecessary argument. It is accepted by the courts that some news is only newsworthy if it is contemporaneous but, even allowing for the growth in online media, a delay of 10 minutes might not seem to be excessive. Nevertheless, any delay should only be a reasonable one. Mr Bunting told me there had never been as long a delay as the 10 minutes being asked for in this case. No doubt he was correct when he said this but as it happens later the very same day Sir John Mitting, who is Chair of the Undercover Policing Inquiry, ruled that there should be a delay in reporting of 10 minutes in his inquiry. He also ruled that there should be no delay in the live stream and it was up to the press to ensure that 10 minutes had elapsed before they reported any piece of the evidence.

37. I have also been referred to time delays in other inquiries. While it is always instructive to hear what has been done in other inquiries, each one is fact specific. Different inquiries have different subject matters, sensitivities and locations, and the amount of available accommodation for holding the hearings are different. Andrew O'Connor QC on behalf of SMG pointed out that the working conditions which we are going to have to adopt because of COVID-19 will make taking instructions on whether evidence given has contravened a restriction order more difficult and require more time. In my judgment he makes a valid point.

38. CTI recognise in their submissions that the delay should be as short as reasonably possible and they accept that the need for a delay and the length of it may vary between different chapters of the Inquiry. They have therefore proposed that for some parts of the Inquiry there should be no delay, for others there should be a 3 minute delay and for the most sensitive parts a 10 minute delay. In the circumstances, this seems to me to be a sensible compromise and I adopt their proposals. That will be the position at the start of the Inquiry. If it does not work satisfactorily, or if the 10 minute delay for certain chapters proves unnecessarily long, I shall review the position.

39. While I have considered the decision of Sir John Mitting and his conclusion that a delay in the live stream is unnecessary and a delay on reporting is sufficient, I am not convinced that on the facts of this inquiry that this will be satisfactory or provide sufficient assurance that OS content is not inadvertently put into the public domain,

particularly bearing in mind the risk of the mosaic effect in the circumstances of this inquiry. It seems to me that a livestream with no delay puts journalists at great risk of inadvertently contravening restriction orders.

40. I am satisfied that a delay on the livestreaming to the remote locations identified by CTI is necessary and proportionate.

41. There will be room for only a limited number of journalists in the hearing room. At the moment this is limited to two, with a further four able to be present in the annexes to the hearing room at Manchester Magistrates' Court. They will of course be listening to the evidence in real time.

42. CTI propose that they should not be able to report any matter until there is a break in the hearing as it is unrealistic to expect them to time accurately how long has elapsed since the evidence that they wish to report was given.

43. I am concerned that leaving reporters to estimate when 10 minutes has elapsed while listening to the evidence continuing would place an impossible burden on the journalists in the hearing room and the court annexes. I am prepared to be convinced that it is practical and safe to allow them to judge when the time has elapsed but for the moment I am not so persuaded, and they will have to wait for a break in the proceedings in order to report the evidence.

44. All of these matters will be kept under review. It will be easier to judge properly what is appropriate when we are up and running.

Anonymity and special measures applications

45. I will deal with the two relatively uncontentious applications.

PC Richardson

46. PC Edward Richardson is an authorised firearms officer (AFO) and a specialist firearms officer (SFO). He seeks screening from the public and the media at the hearing, and from the livestreaming, and a direction that no picture of him is published. He has no objection to being visible to CPs and their lawyers in the hearing room. He says that his Article 8 rights are engaged as the publishing of his image or being seen by the public will affect his career. He already does work as a covert officer. He wishes to expand that role which will be difficult if his image is made known to the general public. In addition to the effect on his career, PC Richardson is concerned that he and his family may be subject to threats from the public if his occupation becomes generally known. He says that he has had threats in the past and colleagues have suffered them when an image of them has been published.

47. CTI do not accept that PC Richardson's Article 8 rights nor the common law duty of fairness require the orders to be made. CTI accept that it would be possible to make the order asked for on public interest grounds.

48. In my judgment PC Richardson's Article 8 rights are engaged. As is well known this is a qualified right and I need to balance the possible interference with his Article 8 rights with any effect on open justice. It has not been argued that there will be any significant effect on the principle of open justice if the media cannot publish a picture of him, which is PC Richardson's main concern. I have considered his evidence and, while it is relevant evidence relating to the immediate emergency response, it does not seem to me to be likely to be controversial or central. In those circumstances, the limited restriction of not publishing a photograph and screening from the general public and media does not outweigh the potential interference with his Article 8 rights. If I am wrong about that then in any event I allow the application on public interest grounds as provided in section 19(3)(b) of the Inquiries Act 2005. The precise extent of screening which will be required from people in the hearing room can be decided when the time for him to give evidence comes. I make the order as asked.

F1

49. F1 is another police officer. The application in his case is that his identity should be protected from being revealed, he should be screened from the public and the media, and from the livestreaming. I have considered both open and closed statements in his case.

50. I agree with the submissions of CTI that his Article 2 and 3 rights are not engaged but his Article 8 rights are. If he were to be identified his prospects in continuing in his present role would be reduced as he is required to act covertly. He would run the risk of threats to his personal safety as others in his position have been. As I have indicated in the previous application Article 8 rights are qualified rights and they have to be balanced against the open justice principle embodied in Article 10. I have considered the evidence that F1 can give. I agree with the submissions that have been made that it is not evidence which is central to the Inquiry and accordingly the effect on open justice does not outweigh F1's Article 8 rights and I will make the order as asked.

Witness J

51. I will not give a ruling on the application of Witness J at present. I have received further submissions from the Home Office and they have asked me to consider some matters in a closed session. I will do so but that should not be seen as any indication that I have reached any particular preliminary view on the application.

Sir John Saunders

31 July 2020