manchester
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inquiry

Ruling on applications relating to Witness J:

anonymity, screening and variation to the Inquiry's Rule 10 procedure

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1. Applications have been made by the Secretary of State for the Home Department (SSHD) for anonymity for Witness J who is the corporate witness giving evidence to the Inquiry in open on behalf of MI5; screening while Witness J gives evidence from everyone except Counsel to the Inquiry and me; and for a variation to the Inquiry's Rule 10 procedure concerning the advance notification of questions to Witness J.

2. Applications have also been made by the SSHD concerning the practicalities of Witness J's evidence, including limiting the live feed of Witness J's evidence to certain specified locations, non-public entry and exit for Witness J, clearing the hearing room and switching off the secure live feed when Witness J enters and exits, requiring all electronic devices to be turned off while Witness J gives evidence (save for limited exceptions), a prohibition on recording Witness J's evidence (and thus no publicly available livestream of his evidence), and a prohibition on public disclosure (including media reporting) of Witness J's evidence until CTI has confirmed that the evidence can be disclosed.

3. In this open ruling I consider the applications for anonymity, screening and a variation to the Rule 10 procedure. I have also issued a short closed ruling. The other applications made by the SSHD concern matters of practicality that are better considered when the position is clearer regarding the current state of the public health crisis when Witness J gives his open evidence, the ability of the Inquiry to hold in person hearings, the practical arrangements for and capacity of such hearings, whether the Spinningfields Conference Centre is available to the families at the time of Witness J's open evidence, and the evidence before me as to the risk posed by the electronic devices that the SSHD seeks to have turned off. I consider that the other applications that have been made should therefore be determined closer to the date for Witness J's open evidence. At that stage, reference can be made to this ruling and what practical measures are said to be necessary to give effect to it. Following that I intend to circulate a draft order to reflect the rulings that I have made.

4. In determining the applications for anonymity, screening and a variation to the Rule 10 procedure, I have received and considered detailed written and oral submissions, including the following:

   a. Written submissions from CTI on the legal principles applicable to the making of restriction orders (ROs), dated 22nd January 2020.

   b. Written submissions from CTI on the legal principles applicable to anonymity and special measures applications, dated 3rd March 2020.

   c. Open written submissions from the SSHD, dated 1st May 2020, 11th June 2020, 16th June 2020 and 27th July 2020, closed written submissions dated 27th July 2020, open and closed threat assessments provided in support of the applications, a closed statement by Witness J, an open draft RO provided by the SSHD, and a response (dated 15th October 2020) to a direction made by me following the 1st October hearing requiring MI5 to *"indicate, to the fullest extent possible in open and in closed if necessary, whether there is anyone with Witness J's seniority and expertise who could give open evidence to the Inquiry about the matters which must be investigated and who could be publicly avowed, other than the Director General of MI5."*

   d. Written submissions from the families, dated:
      i. 3rd June 2020 (from Broudie Jackson Canter on behalf of all the family Core Participants (CPs));
      ii. 7th July 2020 (from Addleshaw Goddard on behalf of the families they represent);
      iii. 7th July 2020 (from Slater Gordon on behalf of the families they represent);
      iv. 8th July 2020 (from Broudie Jackson Canter, Hogan Lovells and Hudgell Solicitors on behalf of the families they represent);
      v. 16th July 2020 (from all the family CPs);
      vi. 3rd August 2020 (from Addleshaw Goddard, Broudie Jackson Canter, Hudgell Solicitors and Slater Gordon on behalf of the families they represent);
      vii. 3rd August 2020 (from Hogan Lovells on behalf of the families they represent); and
      viii. 15th October 2020 (from the families represented by Broudie Jackson Canter, Hogan Lovells, Hudgell Solicitors and Slater Gordon).

   e. Written submissions from a number of media organisations, dated 10th July 2020.

   f. Open written submissions from CTI on the Witness J applications, dated 10th July 2020, 20th July 2020 and 29th September 2020, and closed written submissions from CTI for the hearing on 9th October 2020.

g. Open oral submissions from CTI, relevant CPs (including the families and the SSHD) and the media on 23rd July 2020 and 1st October 2020.

h. Closed oral submissions from CTI and on behalf of the SSHD on 9th October 2020.

5. The legal principles involved in these applications are not in dispute and have been set out in detail in the submissions provided by CTI. The principles concerning ROs are also summarised in my earlier ruling on restriction orders following the hearing on 23rd July 2020 (ruling dated 31st July 2020), and in my subsequent ruling on Greater Manchester Police's application for a RO (ruling dated 22nd October 2020). Those rulings have not been challenged. In those circumstances I shall deal with the legal principles briefly and only in so far as they apply to these applications.

Anonymity

6. Section 18(1) of the Inquiries Act 2005 imposes a duty on me to take reasonable steps to secure public access to the Inquiry's proceedings and information. That is subject to any restrictions imposed by an order made under s.19. The effect of s.18/19 is that there is a presumption that the Inquiry's proceedings will be public which can be overridden in certain circumstances. The presumption includes making public the identities of witnesses.

7. Under s. 19(1) and (2)(b) I can make a restriction order (RO) preventing the making public of any evidence given to the Inquiry.

8. The power to make a RO is limited by s.19(3) to (5). For the purposes of this application s.19(3)(a) is of particular relevance. Section 19(3)(a) provides that a RO must specify only such restrictions as are required by any statutory provision, enforceable EU obligation or rule of law.

9. The application for anonymity is made on the basis that Witness J's rights under Articles 2, 3 and 8 of the ECHR are engaged. Under s.6(1) of the Human Rights Act 1998 it would be unlawful for 'a public authority', which includes an Inquiry Chairman, to 'act in a way which is incompatible with a Convention right'.

10. I am satisfied on the evidence that I have heard both in closed and open that Witness J's rights under Articles 2, 3 and 8 are engaged. Article 2 is the right to life. On the facts of this case, as I find that Article 2 is engaged, I do not consider that Article 3 adds to my obligation not to act in a way which is incompatible with that right. Article 8 is the right to a private life which covers both family life and private life, including a person's employment and career development.

11. I will briefly summarise the evidence on which I find that Witness J's Article 2 and 8 rights are engaged. Some of it was included in closed submissions so I do not deal with

the detail of it but the effect only. Witness J has worked for MI5 for 28 years and at the time of this application was the Acting Director General of Strategy. There are three Director Generals who support the overall Director General. Witness J has had considerable operational as well as managerial experience within MI5.

12. The identities of people who work for MI5 are not made public. Considerable care is taken to ensure that those who work operationally with MI5 cannot be identified. The reason for that is that it is assessed that their lives and those who are close to them may be at risk if it became known that they worked for MI5. Identifying by name people who work for MI5 may also jeopardise the lives of people who have been involved in operations with them or were recruited by them.

13. The job of MI5 includes protecting UK citizens against terrorist attacks and protecting the country against the actions of hostile state actors whose aim is to detrimentally affect the security of the UK and/or its economic interests.

14. I am satisfied that in carrying out that job, the lives of employees of MI5 can be at risk. Revealing the identity of an MI5 officer and disclosing what they look like may increase the risk to their or other people's lives. They may be identified on a future operation where they are acting uncover; they may be identified as having been involved in a previous operation when they were acting undercover. The people who MI5 act against are dangerous and are prepared to take the lives of people who they regard as working for their enemies. They include terrorists and hostile state actors. The degree of risk may vary depending on the role of the MI5 member and the type of operation that they have been involved in, but I am satisfied that that risk may exist.

15. I am satisfied on the evidence that I have seen in closed that, as a result of his previous operational activities, there would be a real and immediate risk to Witness J's life if his identity were to be made public. Article 2 is absolute; if refusing to grant anonymity to Witness J would give rise to a risk to his life within the meaning of Article 2, anonymity must be granted. That is the case here.

16. In relation to his Article 8 rights, I am also satisfied on the evidence that I have seen, both in closed and open, that if Witness J was identified as working for MI5 this would significantly affect his family life and would reduce his prospects of continuing to work for MI5.

17. In making the decision whether to grant anonymity because of the risk to Witness J's Article 8 rights, I have to weigh a number of other factors, including:

    a. The presumption in favour of disclosure. I bear in mind when considering this the fact that part of the hearings conducted by the Inquiry will be in closed session which highlights the need to give as much disclosure as possible in open sessions.

b. The importance of open justice in any judicial proceedings.

c. The effect that an anonymity order would have on the ability of the Inquiry to carry out its terms of reference.

d. Article 2 is engaged by the circumstances of the deaths being investigated in this Inquiry and accordingly I have to consider the ability of the family CPs to effectively participate in the Inquiry if they are unaware of the identity of the witness.

18. It is important to remember that the decision I have to make is fact sensitive. While I have considered the decisions of Judges in similar cases I do not consider myself bound by them in so far as they are decided on their own facts. While judicial consistency is desirable, no two cases are identical.

19. Witness J is giving evidence of those matters that can be heard in public relating to what MI5 knew of Salman Abedi's activities before 22nd May 2017 and whether they should have taken steps to prevent the attack. Witness J is giving evidence as a corporate witness. He played no part in the investigations of Salman Abedi before the attack and he has no personal knowledge of the matters of which he will give evidence. He has made himself familiar with the details of the case and what members of MI5 did and what they knew before 22nd May. Certain of those matters can be disclosed to the public consistent with my PII rulings.

20. While it is important to an understanding of Witness J's evidence to know the position he holds, his experience and the access he has had to the information held by MI5, it is not relevant to an understanding of his evidence to know his identity. I have concluded that not knowing the identity of Witness J will not affect the ability of the Inquiry to carry out its terms of reference nor will it affect the ability of the family CPs to effectively participate.

21. Having weighed the factors set out above, I am satisfied that disclosure of Witness J's identity would constitute a disproportionate and unjustified interference with Witness J's Article 8 rights. Anonymity should therefore be granted. The same outcome would be reached under the balancing exercise required by the common law and statutory duty of fairness (a statutory provision – s.17(3) of the 2005 Act – for the purposes of s.19(3)(a), as well as a rule of law under s.19(3)(a)).

22. In the event no CP has argued that the name of Witness J should be disclosed publicly if I find that the Article 2 and/or 3 risk thresholds are met. What has been suggested by the families is that MI5 should not put forward as a witness an employee whose identity they wish to protect. Instead, they should put forward an employee who can be identified. Of current employees of MI5 who are in a suitably senior position to give this evidence only the Director General's identity is publicly known. The family CPs

argue that MI5 should have put him forward as the witness instead of Witness J or should have put forward another senior officer who could give their evidence openly. I have explored this question thoroughly, I have sought a response to these suggestions from MI5, and I have had to balance the factors in favour and against the submission that has been made.

23. The identity of the Director General has been publicly avowed for some time. While he could face similar threats to Witness J, presumably MI5 are satisfied that they can counter any threat that the Director General might face. It would also, say the families, give a public indication of the importance that MI5 attach to this Inquiry if he were to be the person who gave the corporate evidence on its behalf.

24. Equally there are powerful reasons why he should not be the person who gives the evidence. The Government argue that it is not practical and that the failure to put the Director General forward does not reflect any lack of importance being attached to this Inquiry. The Director General has to be available at all times to advise the Government and the Prime Minister about any crisis that may occur in relation to terrorist threats and attacks from hostile foreign actors. He is someone on whom the Government relies to be available to give advice as soon as it is required. If he was the witness who gave evidence to the Inquiry he would not only be involved and unavailable for the time that he was giving evidence but he would also be required to spend a considerable amount of time preparing for giving evidence by carrying out the necessary research. There would clearly be considerable difficulties in the Director General giving the evidence.

25. The families submit that their request that a person who can be publicly identified gives evidence of the actions of MI5 is based on the requirement for public justice.

26. Public justice is an important principle that applies to the proceedings of Inquiries as well as to courts. It is important that justice is done so far as is possible in public so that the public can see how it is administered and, if necessary, can hold to account those concerned in its administration.

27. It is not an absolute rule but there must be a good reason why the general rule of public justice is not followed. For example, there are occasions when witnesses in criminal trials give evidence anonymously. There the considerations of public justice are in conflict with the public interest in bringing to trial those accused of criminal offences and that trial being brought to a just conclusion. There are special procedures that need to be followed before a witness can give evidence anonymously and the Judge must be satisfied that the Defendant can still have a fair trial before that can happen but in appropriate cases it does happen. The balance is struck between the interests of public justice and bringing those accused of criminal offences to trial.

28. In this case I have to balance the risk to national security of having the Director General of MI5 committed over a period of time to preparing for and giving evidence to the

Inquiry against the cost to public justice in having the corporate witness not identified by name.

29. In my judgment the balance comes down against requiring the Director General to give the corporate evidence of MI5. Witness J is a senior member of MI5 and is well qualified by his experience to give the corporate evidence. The fact that MI5 have not put forward the Director General as the corporate witness does not mean on the evidence that I have seen that MI5 do not regard this Inquiry as important, it simply reflects the necessity to continue business as usual while this Inquiry continues. Terrorists and hostile actors will not cease their activities until the Inquiry is over.

30. The families have also submitted that MI5 should have put forward a different senior officer who could give evidence openly. I have explored this issue. MI5 have confirmed that, *"there is not anyone of witness J's seniority and experience that could give open evidence to the Inquiry about the matters that must be investigated, and who could be publicly avowed, other than the Director General."* It follows that this submission does not alter the position set out above.

31. For the reasons set out above, I am satisfied that it is appropriate in this case that Witness J should give evidence on behalf of MI5 and that he should give his evidence anonymously. This accords with the decisions made by Hallett LJ in the 7/7 inquest and the decisions of the Chief Coroner in the Westminster and London Bridge Inquests. I am reassured that this is the case but, as I have already emphasised, each case has to be decided on its own facts.

Screening

32. Some of the same considerations apply to the request that Witness J be screened from everyone except me and CTI as apply to the application for anonymity. The application is made on essentially the same grounds, namely that screening is necessary to give effect to anonymity because if Witness J is identified by sight there is a real risk that his appearance and his employment by MI5 would become public and he would then face similar risks as he would if he was identified by name.

33. No-one suggests that Witness J should not be screened from the public at large if I grant anonymity. To do otherwise would nullify my ruling on anonymity.

34. The issue that arises is whether family CPs should be able to see Witness J and/or whether advocates asking questions on behalf of the families should be able to see the witness when doing so.

35. There are rulings which go both ways. In the Westminster and London Bridge inquests, an anonymous corporate witness gave evidence on behalf of MI5 screened from everyone, including the Coroner. The Coroner was satisfied that this enabled a proper

investigation of the evidence to take place and for there to be a proper participation by the families.

36. In the 7/7 bombing inquests, where a corporate witness also gave evidence as to the knowledge of MI5 and its actions, Lady Justice Hallett (sitting as an Assistant Coroner) upheld the application for anonymity but allowed those who held interested person status to see the witness give evidence. Lady Justice Hallett is a very distinguished Judge and I have given her reasoning the closest attention. Her decision was fact sensitive. The risk to that particular witness was assessed by MI5 as being 'low' so that no Article 2 consideration was relied on. Hallett LJ said in the course of her judgment that "*if I were persuaded that there was … an increased risk to Witness G or national security or operations by refusing to allow him or her to give evidence from behind a screen, I would not hesitate to grant the application".*

37. Counsel to the Inquests argued in that case that the risk of an accidental encounter between Witness G and someone who might see him or her give evidence at the inquests was remote. MI5 have disclosed in their open submissions for this application that such a chance encounter did in fact take place following Hallett LJ's ruling.

38. I have to assess the risk in this case on the evidence and submissions that I have heard both in open and closed. While the risk to life if Witness J is identified remains the same, the risk of him being identified is reduced the smaller the number of people who see him. The families argue, as was argued in front of Hallett LJ, that the risk becomes so small that it can be disregarded if family CPs only are allowed to see the witness. So how great is the risk of identification if family CPs are able to see the witness?

39. Firstly, I am satisfied that hostile actors would be interested in finding out the identity of Witness J both because of his previous involvement in operations and his future work for MI5. I am also satisfied that some hostile actors have both the means and the desire to use covert means which are not known to members of the public to achieve their aims. Some of those covert means are known to MI5 but that would not necessarily avert the risk. The consequence of that is that a person who saw Witness J could entirely inadvertently reveal something which would assist a hostile actor in identifying Witness J's appearance and his status as an employee of MI5. There is no suggestion that any family CP would knowingly reveal anything about Witness J which might assist anyone else to identify him.

40. Secondly, the risk of an accidental meeting which might lead to a wider recognition, while small, is not non-existent as was demonstrated in the 7/7 inquests. It is not suggested that any of the family CPs would do that deliberately but that does not mean that there is no risk that it might happen inadvertently. That risk is increased because of the number of family CPs.

41. MI5 assess the risk as not being minimal and they are the people that have the greatest expertise at assessing risk within the intelligence community. While I would not simply accept their submissions because of their expertise, I am not, in the words of some authorities, waving a white flag, it does need to be recognised in assessing the weight to be attached to their submissions. MI5 are sometimes accused of using claims of secrecy to cover up their failings. It is difficult to see how this application for screening could logically fall into that category.

42. On the other side of the balance, I have to consider the impact of screening from the families on the principle of public justice and the effective participation of the families in the Inquiry process.

43. How important is it to see a witness in order to participate effectively in the process? The answer is that it depends on the individual circumstances of the case.

44. Family CPs regard it as important to be able to see witnesses particularly when they are contentious. I must take account of the risk that the effect of screening the evidence of an important witness will reduce the ability of the Inquiry to allay public concern about the conduct of MI5.

45. It is also suggested that it may be important to see a witness in order to assess their credibility. The family CPs relied on the decision of Jefford J in the case of *Dyer v Assistant Coroner for West Yorkshire* [2019] EWHC 2897 (Admin) in which she quashed a decision made by a Coroner that police officers could be screened from bereaved family members when giving evidence. One of the matters relied on by the Judge was that it was necessary to see the reaction of the witness to questions in order to assess their credibility. That decision has since been appealed and the Court of Appeal in their judgment (reported at [2020] EWCA Civ 1375) overturned the decision of Jefford J and restored the ruling of the Coroner. One of the matters on which the Court of Appeal disagreed with the Judge was that it was a factor against screening that it prevented the families from assessing the demeanour and credibility of the witness. The Court of Appeal found that it has increasingly been recognised that a witness' demeanour is an unreliable basis on which to decide credibility (see, for example, *R (SS) (Sri Lanka) v SSHD* [2018] EWCA Civ 1391 and *R v PMH* [2019] 1 WLR 3243).

46. These decisions run contrary to other, earlier decisions and represent a change in judicial attitudes. Being able to assess a witness' credibility was one of the factors relied on by Hallett LJ in rejecting the application for screens in the 7/7 inquests. It may be that the final position that the Courts will adopt will lie somewhere in between. My experience is that there are cases where being able to see a witness is a help in assessing credibility. There are also cases where seeing a witness may not assist in assessing credibility. In others seeing a witness might be misleading because a witness' reactions may well be misunderstood.

47. This is not a case where the credibility of Witness J will be significantly in issue. It is also of importance that I, as the decision maker, will be able to see the witness and make my own assessment. In doing that, I am able to rely on some experience of trying to assess a witness' credibility and the pitfalls that there are in relying too heavily on any physical reaction of the witness. My experience tells me that it is normally better to place greater emphasis in making any assessment of credibility on the facts which I find to be proved.

48. I do not consider that screening Witness J from the family CPs as well as the public will in any way inhibit the ability of the Inquiry to carry out its terms of reference.

49. I accept that no family CP would deliberately reveal any information that they might have gained from seeing the witness. I also accept that no family CP, if there was any accidental meeting with the witness, would do anything to deliberately reveal the witness' identity. In my view, nevertheless, it is impossible to exclude the risk of identification happening, particularly when there may be a number of resourceful people who are trying to find out who the witness is.

50. Article 2 is engaged in Witness J's case; I am satisfied on the evidence that there would be a real and immediate risk to Witness J's life if his identity were to be made public or if his appearance and the fact of his employment by MI5 were made public. There is therefore an obligation on me to ensure that I do not act in a way that creates or materially increases these risks and thus put his life in peril. In those circumstances, as I am satisfied that allowing the witness to be seen by family CPs will create or materially increase a risk that Witness J's appearance and the fact of his employment by MI5 will be made public, I shall direct that Witness J should be screened from family CPs as well as the public. Weighing the factors set out in the preceding paragraphs of this ruling, I am also satisfied that screening Witness J from family CPs is necessary to comply with Article 8 and the requirements of fairness in this particular case.

51. I have considered separately the issue of whether Witness J should be screened from Counsel for the family CPs who are asking him questions. This is an inquisitorial process and it is important for any advocate questioning any witness to develop some sort of relationship with the witness. It may be important for an advocate to assess an answer and consider follow up questions by taking into account the visual reaction to the questions by the witness as well as what was said. That does not relate simply to credibility but whether a question appears to come as a surprise, which may indicate that it is something that the witness had never thought of.

52. I think that preventing advocates from seeing Witness J when asking questions is potentially capable of limiting the effectiveness of the questioning which in itself is capable of affecting the ability of the Inquiry to get to the truth.

53. Against that, I assess that the risk of any of the four lead advocates for the families inadvertently disclosing information about the witness which might assist his identification is very small, as is the possibility of any chance encounter, particularly one which might lead to someone else being able to identify the witness. Those risks are, in my judgement, almost non-existent, particularly given that the advocates are very experienced and will take great care to ensure that they do nothing which might give assistance to anyone else to identify the witness.

54. In those circumstances I propose to allow the four lead advocates asking questions on behalf of the families to see Witness J when questioning him. I also hope that this will provide some reassurance to the family CPs themselves.

55. In order to give effect to my ruling in a way that will address the risk I have identified and allow for necessary practicalities during his evidence, I conclude that the following will be permitted to see Witness J when he is giving evidence:

    a. Myself.

    b. Two members of the Counsel to the Inquiry team. They will be identified by name in the draft order that is circulated.

    c. Lead Solicitor to the Inquiry, Mr Suter.

    d. The four lead advocates asking questions on behalf of the families will be permitted to see Witness J when questioning him. These four lead advocates will be identified by name in the draft order that is circulated. Other members of the family legal teams, including junior counsel and solicitors, will not be permitted to see Witness J.

56. In her application and subsequent submissions, the SSHD has not requested that I permit her lead counsel to see Witness J should they wish to ask questions of him. In light of this ruling, should the SSHD indicate that she wishes her lead counsel to be able to see Witness J when asking any questions of him, I will agree to that request. As with the four lead family advocates, the lead counsel for the SSHD will be identified by name in the draft order that is circulated. I do not consider that other members of the SSHD's legal team, including junior counsel and solicitors, should be permitted to see Witness J.

Variation of the Inquiry's Rule 10 procedure

57. I am asked by the SSHD to extend the time of the advance notice given of areas of questioning to be pursued with Witness J and to require CTI and CPs to specify in detail what the questions will be.

58. The reason for the application is the amount of material which Witness J will be required to cover and because a careful check will need to be made of what can be disclosed in open so as not to damage national security. That is not necessarily an easy exercise. The SSHD also submits that granting the variation will allow Witness J to address questions as fully as possible in open. The families have objected on the basis that MI5 are asking for special treatment which they are not entitled to. I agree that they are not entitled to special treatment and I shall not give it. I would consider in the same way any application for a longer period of notice from any witness who had a great deal of ground to cover.

59. From the point of view of good case management, I do not wish, if it can be avoided, to have a large number of issues carried over so that additional preparation can take place. I will therefore allow the extra time for the general area of questions to be notified to Witness J. I shall not require that greater detail is provided as to the actual questions to be asked as that would in my view be special treatment to which Witness J is not entitled. I will direct that any document which it is intended to refer to, which will include open source reporting, must be notified in advance in accordance with the Inquiry's Rule 10 procedure (modified to allow the extra time that has been sought). There is a great deal of it and I would not expect Witness J to deal with that without notice. Again, I would do exactly the same with any other witness. I do not consider that a proper inquiry is going to be assisted by trying to catch witnesses by surprise. I would expect any witness to have a proper opportunity to consider any document rather than being shown it in the witness box.

Sir John Saunders

11th February 2021