

Relevant background

The Inquiry's Terms of Reference

5. The Inquiry's Terms of Reference² (ToR) include investigation of Salman Abedi's background and radicalisation, his relationship with relevant associates (including family members), and the build up to the attack (including bomb preparation, assembly and storage, and the movements of relevant associates in the lead up to the attack). The ToR state that to fulfil the Inquiry's ToR, "*The inquiry will receive such oral and written evidence as the inquiry chairman shall judge appropriate.*"³

The relevance of IA's evidence to the Inquiry's Terms of Reference

6. IA's evidence is highly relevant to the Inquiry's ToR. That is apparent from the detailed list of questions provided to IA in the Chairman's Rule 9 request⁴, the opening statements from CTI⁵ and the families⁶ (which drew attention to the fact that IA can be seen in numerous images with his brothers in possession of firearms in Libya in 2015, and possessed 'mindset' material on his devices in 2015), the evidence heard so far during the Inquiry's oral evidence hearings, the expert report of Dr Wilkinson, and the Inquiry's efforts to secure evidence from IA (see below).

The Inquiry's efforts to secure evidence from IA

7. The Inquiry has made significant efforts to obtain a statement from IA prior to him being required to give evidence at the Inquiry. Those efforts were set out in detail in an update given to the Inquiry by CTI on 14th April 2021.⁷ In summary:

² <https://files.manchesterarenainquiry.org.uk/live/uploads/2019/11/18090347/MAI-Terms-of-Reference-17-Sept-2020.pdf>

³ See under sub-heading "Method" in the Inquiry's ToR.

⁴ The questions provided to IA have been provided to CPs: INQ100066.

⁵ <https://files.manchesterarenainquiry.org.uk/live/uploads/2020/09/09184255/Transcript-9-September.pdf>, 95/16-96/18, 103/4-104/11, 109/25-110/6, 113/6-16.

⁶ <https://files.manchesterarenainquiry.org.uk/live/uploads/2020/09/28185422/MAI-Day-11-1.pdf>, 60/16-61/4, 86/1-7, 110/8-12.

⁷ https://files.manchesterarenainquiry.org.uk/live/uploads/2021/04/14155037/MAI-Day-87-002_Redacted.pdf, 49/16-57/7.

8. On 28th May 2020, the Inquiry sent a Rule 9 request to IA requesting a witness statement. The Rule 9 request set out 40 questions that IA was asked to answer.
9. On 20th July 2020, IA replied and refused to provide a statement to the Inquiry. He sought to rely on the privilege against self-incrimination.
10. On 23rd July 2020, the Chairman served a s.21(2)(a) notice on IA, requiring him to attend a designated location for interview in order to provide evidence for a witness statement to the Inquiry.
11. On 12th August 2020, IA provided a one page, seven paragraph, unsigned statement indicating that he did not wish to answer the questions that had been posed on the grounds of privilege against self-incrimination. The Inquiry subsequently disclosed this statement to all CPs.⁸
12. On 21st August 2020, the Inquiry wrote again to IA, indicating that his assertion of privilege was not accepted and repeating that a statement was required.
13. On 4th September 2020, IA's solicitor invited the Chairman to reconsider the position on IA's claim to privilege and withdraw the s.21 notice that had been issued.
14. On 9th September 2020, the Inquiry replied, refusing to withdraw the s.21 notice. The Inquiry's response observed that there were important questions for IA to answer, IA had been willing to be interviewed by Sky News after his brother's sentencing hearing (which thus undermined his general assertion of privilege), and IA had not asserted the privilege against self-incrimination against each question on which a statement had been requested. The request for a statement answering the Inquiry's questions was repeated and IA was informed that a failure to provide a statement was likely to result in the Chairman issuing a further s.21 notice requiring IA to give evidence in person.

⁸ INQ036599.

15. On 13th September 2020, IA's solicitor replied, stating that no further statement would be provided by IA.
16. On 16th September 2020, the Inquiry responded, noting that IA had neither provided detailed reasons for the assertion of privilege nor how that privilege was said to be maintained against each question he had been asked. The Inquiry repeated that as a result IA would now be required to attend the Inquiry to give evidence in person.
17. On 9th October 2020, the Inquiry again wrote to IA's solicitor, this time following an approach made of IA by a BBC journalist.
18. IA and his solicitor provided no response to the Inquiry's emails of 16th September and 9th October 2020.
19. On 9th April 2021, the Inquiry wrote again to IA's solicitor requesting a statement and reiterating that IA would be required to attend the Inquiry to give evidence, pursuant to s.21 of the 2005 Act.
20. On 14th April 2021, CTI provided an oral update on the Inquiry's efforts to obtain evidence from IA. That update included the steps summarised above. In conclusion, CTI observed as follows⁹:

Sir, having heard that chronology of events in relation to Ismail Abedi, many will feel that he has been given every chance to provide his written statement and the inquiry will, we expect, now be fixing a date for Ismail Abedi's attendance at the inquiry and serving a notice under section 21(1)(a) and accordingly, sir, what we anticipate is that you will be using your powers to require the attendance here of Ismail Abedi to give evidence.

21. On 14th April 2021, following the update from CTI, the Chairman observed that he¹⁰:

...would be grateful for a response from the solicitor giving some degree of update as to what the present position is and what Mr Abedi's present attitude is.

⁹ https://files.manchesterarenainquiry.org.uk/live/uploads/2021/04/14155037/MAI-Day-87-002_Redacted.pdf, 56/10-18.

¹⁰ https://files.manchesterarenainquiry.org.uk/live/uploads/2021/04/14155037/MAI-Day-87-002_Redacted.pdf, 57/3-6.

22. On 14th April 2021, and in light of the Chairman's comments at the hearing that day, STI wrote to IA's solicitor in the following terms:

I write further to our previous correspondence. A general update was provided in court today about various matters, including the requests made to your client Ishmale Abedi for him to provide evidence to the Inquiry. I have attached an extract of the relevant part of the transcript. You will note that at the conclusion of the update the Chairman directed that, "I would be grateful for a response from the solicitor giving some degree of update as to what the present position is and what Mr Abedi's present attitude is." Please provide a written update on the position with your client and the requests for him to give evidence to the Inquiry by no later than 4pm on Wednesday 21 April.

23. On 20th April 2021, IA's solicitor replied in the following terms:

There is no material change in Mr Ben Romdhan's position. He continues to invoke the privilege against self-incrimination.

If I may add a little more informally:

1. His invocation of the privilege is not unexplained, as the inquiry seems to think. On 4 September 2020 I sent you a number of factual propositions which taken together explained his reason for believing he would be at risk. For ease of reference I repeat them here:
 - Mr Ben Romdhan was arrested in the course of the police investigation of this matter
 - He was detained at a police station for upwards of a week
 - He was interviewed at length under caution (we do not have a record of those interviews but the inquiry no doubt has access to the contents)
 - At the conclusion of his detention he was 'released under investigation'
 - He has never been told that that investigation is at an end and that no further police action will be taken against him
 - It is an offence under the Terrorism Act to withhold information in some circumstances
 - The questions now asked by the inquiry are the same as he was asked by the police
 - Any evidence he gives to the inquiry will be in public and open to cross-examination by other parties
 - The Attorney-General has not given any undertaking that evidence given to the inquiry will not be used in furtherance of any prosecution (as has happened in the Grenfell inquiry)

I invited you to indicate which of those propositions you did not accept. You never replied.

2. You tried in earlier correspondence to qualify the privilege. You referred to the *Akcin* case as saying that the privilege "*has to be exercised with great care and only*

where there is a real risk of serious prejudice which may lead to injustice". You were kind enough to provide the case reference and I found the quote word for word in paragraph 18. The quote does not relate to self-incrimination at all. I took the liberty of pointing this out. You have never acknowledged the mistake.

3. My instructions on 'interviews with Sky' are that the alleged comments are made up by a pushy journalist who has pestered Mr Ben Romdhan on a number of occasions. If there is anything actually filmed maybe you have a clip. Contrast Mr Ben Romdhan's response when doorstepped by the BBC in a car park, which was on camera: he declined to make any comment. ...
4. The earlier set of propositions included reference to the Attorney General. In the Grenfell inquiry the building firm executives declined to give evidence saying that what they said might incriminate them. I do not know whether they were threatened with formal notices and prosecutions, but one way or another the Attorney General issued an undertaking that evidence given to that inquiry could not be used in prosecutions. The executives are now giving evidence. I am aware a similar undertaking was given in the undercover policing inquiry. Has your chairman made a similar request to the Attorney General for an undertaking that would cover this inquiry? I cannot promise that such an undertaking would address all Mr Ben Romdhan's concerns but it would radically alter the picture.

24. On 22nd April 2021, STI replied, again indicating that IA's claim to privilege was not accepted and setting out the reasons for that in considerable detail. Having set out the relevant background correspondence, STI stated as follows:

1. You have suggested that you, as your client's representative, have explained your client's reason for believing he would be at risk in answering the Inquiry's questions. You also appear to suggest that it is for the Inquiry to indicate which of the "propositions" you listed are not accepted. Those comments misunderstand the correct position.

First, where an assertion of privilege is made against multiple questions, the assertion must be specific and must explain why it would be potentially incriminating to answer each question asked (*Hajiyeva v National Crime Agency* [2020] 1 WLR 3209, §50). The Inquiry has asked your client a number of questions. He has indicated that he wishes to assert privilege against all of them. But your client has not explained why it would be potentially incriminating to answer each question asked.

Second, while a witness's legal representative may take exception to a particular question, it is the witness himself who must state under oath that he believes the answer will tend to incriminate him (*Downie v Coe* (CA, 5 November 1997), *The Times*, 28th November 1997; *Webb v East* (1880) 5 Ex D 108; *Lamb v Muster* (1883) 10 QBD 110). In making such a statement, the witness can be required to provide "a full account of the circumstances and the nature of his claim in respect of [the] risk" (*McKay v All England Lawn Tennis Club*

(Championships) Ltd [2020] EWCA Civ 695, §92). That is what the Chairman has required of your client. He has not complied with that requirement.

Third, the evidential burden of establishing a claim to the privilege lies with the party asserting it (*McKay*, §92; *Hajiyeva*, §50). It is not for the Chairman to indicate which of your short “propositions” he accepts. As he has made clear, the Chairman does not consider that your client has discharged the evidential burden of establishing a claim to the privilege.

Fourth, a tribunal – here, the Chairman – may require an individual to provide a witness statement setting out, in sufficient detail, the basis for the claim to privilege (*McKay*, §§90, 92; *Gray v News Group Newspapers* [2013] 1 AC 1, §80). The Chairman has requested such a statement from your client. Your client has provided statement containing 7 short paragraphs running to less than one page. The Chairman does not consider that your client has set out, in sufficient detail, the basis for his claim to privilege.

Fifth, the privilege does not entitle your client to refuse to engage with the machinery by which the claim to privilege will be assessed (*McKay*, §§90, 92). The Chairman considers that such engagement requires meaningful engagement. It is for that reason that the Chairman has sought a statement from your client answering the Inquiry’s questions or setting out in detail the basis for any claim to privilege. Your client has not done that.

2. You suggest that the Inquiry has “tried in earlier correspondence to qualify the privilege”. That is not the case. The authorities make clear that the privilege is not an absolute right (e.g. see *Brown v Stott* [2003] 1 AC 681, 704; *R v Mushtaq* [2005] 1 WLR 1513, §49).

You go onto refer to *Akcine Bendrove Bankas Snoras v Antonov and another* [2013] EWHC 131 (Comm). In *Akcine* Gloster J set out the relevant principles in granting a stay where there are related proceedings where in which the privilege against self-incrimination is relied on. The quote from paragraph 18(i) of the judgment should be read in this context. The assertion that the privilege applies where there is a real risk of serious prejudice is in substance correct. The privilege applies where the risk in question is “a real and appreciable risk as distinct from a remote or insubstantial risk” (*Rio Tinto Zinc Corp v Westinghouse Electric Corp* [1978] AC 547, 574). Further, as Gloster J indicates in *Akcine*, a positive account is likely to exculpate, rather than incriminate. It is a well-established principle that the privilege against self-incrimination cannot be invoked where an answer does not materially increase an existing risk of prosecution or strengthen a case against a such a person (see *Khan v Regina* [2007] EWCA Crim 2331 at §30). It is not clear why your client maintains that answering any of the questions the Inquiry detailed for him last May will place him at risk of prosecution. The reason that is not clear is set out above; essentially, it is because your client has not set out the basis for his claim to privilege in the manner and detail that is required.

In the circumstances, the Chairman does not accept your client’s blanket assertion of privilege is a reasonable excuse. A claim must be specific,

identifying the class of fact and to explain why it is potentially incriminating (see *JSC BTA Bank v Abyzov* [2009] EWCA Civ 1125 at §39 as approved by the Lord Chief Justice in *Zamira Hajiyeva v NCA* [2020] EWCA Civ 108 at §50). In this regard, notwithstanding your assertion of privilege on behalf of your client, it is for the Chairman to satisfy himself that there is a reasonable ground to apprehend real and appreciable danger of your client incriminating himself (see *R (on the application of the CPS) v Bolton Magistrates' Court* [2003] EWHC 2697 at §25 which was also expressly approved in *Zamira Hajiyeva* at §50).

3. A link to the Sky News article is available here. As your client will be well aware, we are told that the Sky News interview with your client was conducted by phone. The fact that your client has been prepared to give comments to the media is relevant to any claim for privilege against self-incrimination that he wishes to rely on now. The position remains that your client will be required to attend the Inquiry to give evidence. Your client is in a unique position to assist the Chairman in his search for the truth. In light of his previous comments to the press we anticipate your client will wish to have an opportunity to give an account and address criticism that may be made against him. Any claim to rely on the privilege against self-incrimination will need to be made by him in response to each question he is asked. Your client's blanket assertion of privilege is not accepted.
4. You have asked for the first time whether the Chairman has requested that the Attorney General issue an undertaking similar to those issued in relation to the Grenfell Tower Inquiry and the Undercover Policing Inquiry. He has not. That is a matter of public record as any such undertaking would be made available on the Inquiry's website, as you will be aware from the other inquiries you have referred to. Similarly, for the first time you have stated that while you "cannot promise that such an undertaking would address all [your client's] concerns ... it would radically alter the picture" were such an undertaking in place. If your client's position is that he will answer the Inquiry's questions if an undertaking is in place, he should formally indicate that that is the case in writing and the Chairman will consider the issue and any next steps that are appropriate. Such a formal written indication should be provided by 4pm on 29th April.

25. On 29th April 2021, IA's solicitor responded. He did not respond to the Inquiry's request for IA formally to confirm whether "*he will answer the Inquiry's questions if an undertaking is in place*". IA's solicitor stated as follows:

Thanks for your latest. Since then Mr Ben Romdhan has been the subject of another press offensive, this time in the Sunday Times.

I have been discussing with him the possibility of asking that the Attorney General issue an undertaking as to non-prosecution. I would not want us to be at cross-purposes, so it would help to check the proposed wording with you at this stage.

This is the form of words we have in mind, it is the same as has been given in the Undercover Policing Inquiry:

“It is undertaken that, in respect of any person who provides evidence or produces a document, information or thing to the Inquiry, no evidence he or she may give to the Inquiry, whether orally or by written statement, nor any written statement made preparatory to giving evidence, nor any document, thing or information produced by that person to the inquiry: (i) will be used against him or her (or their spouse or civil partner) in any criminal proceedings (whether present or future or on appeal from a conviction); or (ii) will be used when deciding whether to bring such proceedings, except proceedings where he or she is charged with having given false evidence in the course of this Inquiry or with having conspired with or procured any other person to do so or 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 not to use in criminal proceedings (whether present or future or on appeal against conviction) against that person (or their spouse or civil partner) any evidence which is itself the product of an investigation commenced as a result of the provision by that person of any evidence, document, thing or information to the Inquiry. For the avoidance of doubt, this undertaking does not preclude the use of a document and/or information and/or evidence identified independently of the evidence provided by that person to the Inquiry.”

Without prejudice to the chairman’s willingness to make the request, is this wording in order?

26. On 30th April 2021, STI replied as follows:

Although I understand the reason for asking, I am not able to give a provisional indication on the wording of a proposed undertaking to seek from the Attorney General. If you wish to make an application for the Chairman to consider such a request, the next step would be to lodge a written application setting out the reason that you consider the Chairman should seek an undertaking from the Attorney General and the proposed wording of the undertaking that you consider should be sought. A copy of the application would be circulated to Core Participants so they have an opportunity to share their views. If you wish to make an application it should be submitted by 4pm on 7 May 2021.

27. On 10th May 2021, IA’s solicitor lodged the application currently being considered.

CTI’s position

28. CTI recognise that for the bereaved family CPs this application has proved complex and has given rise to considerable difficulties; legal, emotional, practical and otherwise. The Inquiry Legal Team is acutely conscious of those difficulties.