manchester
arena
inquiry

Ruling on Restriction Order applications made by

the Security Service, GMP, NCTPHQ and Counsel to the Inquiry

Background

1. At the time that I was conducting inquests into the deaths of the 22 people who died at the hands of Salman Abedi (SA) I made PII rulings excluding relevant evidence from the inquests on the grounds that to include it would have a detrimental effect on national security. The consequence of that has been that the Home Secretary agreed to establish a statutory Public Inquiry which enables me to consider that relevant evidence in a CLOSED hearing.

2. The evidence could only be heard in a CLOSED session pursuant to a Restriction Order (RO) under s.19 of the Inquiries Act 2005. Applications have been made to make restriction orders to cover the material covered by the PII ruling.

Legal Framework

3. I set out in my ruling of 31st July 2020 the legal principles that I should apply to applications for ROs and I repeat it here:

> *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.*
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> *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'.*
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> *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…

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.

My approach to these applications following the OPEN hearing on 20th September 2021

4. At the OPEN hearing on 20th September 2021, Pete Weatherby QC took the lead on behalf of the bereaved families in making submissions as to how I should approach the applications for ROs.

5. He urged me to take a careful and analytical approach to the application for restriction orders. It does not follow as a matter of course, he argued, that all those parts of the evidence covered by my PII ruling should be made the subject of restriction orders. He warned against a broad-brush approach being taken and argued that the decision is not necessarily a binary one, meaning that while part of a witness's evidence may be properly subject to a restriction order, other parts may not be. While he accepted that consideration of a mosaic effect (that is that putting several apparently innocuous facts together may result in a breach of national security) is justifiable, he warned me against simply accepting such a suggestion without proper examination of the basis for it. He also submitted that there are different categories of restriction orders that I can impose short of no disclosure to CPs and the public at all. He reminded me that there should be the least possible derogation from the principle of openness and transparency in these hearings.

6. In general terms I accept Mr. Weatherby's submissions and I have had all those matters in mind when making my decision on restriction orders. In addition, it must also be borne in mind that the application for PII was based on the damage to national security

that would be caused by disclosure of that material. In general terms the basis for that is the assistance that terrorists would have in making successful attacks if that information was made public. That is something that I had to consider with great care when considering my PII ruling.

7. The basis for the application for restriction orders is the same and also needs to be considered with great care. The applications are made under s. 19 of the Inquiries Act 2005.

8. In practice the test for PII is very similar to the test for making a restriction order based on national security. In both cases, I have to decide whether considerations of national security outweigh the requirement for openness in the inquiry's proceedings. The need for openness and transparency arises from the principle of open justice and as part of the right of the bereaved families to participate effectively in the Inquiry as provided by Article 2 of the ECHR.

9. National security is a very important consideration, particularly when the concern is to prevent attacks by terrorists on the rest of the population. If I am satisfied that that evidence must be given in a CLOSED hearing for that reason, then I cannot believe that anyone in this process would disagree, particularly the bereaved families who have suffered so much.

10. When dealing with an application for PII, rather than restriction orders, the courts have made it clear that once a PII ruling is made a procedure should not be followed to allow for partial disclosure nor use of confidentiality rings because of the difficulties that that inevitably causes. See *Somerville v. Scottish Ministers* [2007] 1 WLR 2734 and *AHK v. Secretary of State for the Home Department* [2013] EWHC 1426 (Admin). So, for example, the courts have made it clear that any arrangement that allows for lawyers but not their clients to see confidential material should not be introduced. The risks of inadvertent disclosure have to be avoided. While lawyers often submit that there is no risk of inadvertent disclosure in providing them with secret information, experience has proved otherwise. Most judges have experienced inadvertent or mistaken disclosure of material subject to an order for non-disclosure, sometimes by experienced lawyers. While partial disclosure may be permitted under a RO, it is necessary to be careful to avoid the real risk that this would lead to inadvertent disclosure particularly where national security is concerned.

11. Mr. Weatherby submitted that there is a concern that MI5 are carefully stage managing the PII/RO process to limit public scrutiny or criticism. That concern was echoed by John Cooper QC, who was concerned that the Inquiry Legal Team would rubber stamp the applications for ROs made by the Security Service.

12. Everyone understands that there may be a good reason for excluding some of the evidence coming from the Security Service from a public hearing and that is accepted. However when evidence is heard in a CLOSED session, the suspicion can always arise that national security is not the real reason for the exclusion and that the real motivation is to cover up wrong doing or inadequacies in the work of the Security Service. As I have said that is something that I have had and will continue to have at the forefront of my mind.

13. Some of those concerns may arise from what have been said by the higher courts in cases such as *R(Begum) v. SIAC* [2021] UKSC 7 where it was emphasised that the court should pay due regard to the assessment of national security of the Secretary of State because she is charged by Parliament with making these assessments and is accountable to Parliament for her exercise of that responsibility. It was, however, significant in that case that no evidence was heard as to the effect on national security.

14. Equally, in a number of cases the Courts have re-iterated that it is not for them to defer unthinkingly to the view of the Secretary of State on national security.

15. In my judgment the approach of a court may differ depending on the issue being litigated and the relevance of national security. I shall therefore set out, for the avoidance of any doubt, my approach in this Inquiry. It is for me to make the decision how the balance between national security and open justice is to be struck in any particular case. The Security Service knows a great deal better than I, and most people, how the disclosure of information could affect national security. That does not mean that I will not make my own judgment on this. What it means is that I shall look to the Security Service to explain how national security is affected. This may involve effects of which I would not be aware and will need an explanation for. But I should be able to understand the reasoning and explanation and will not accept it if I consider it is not made out persuasively. In particular, I shall give the weight which I consider appropriate to any such explanation in carrying out a balancing act. I will not allow the proceedings to be 'stage managed' by the Security Service, GMP or others nor will I act as a rubber stamp. That would be a negation of my function as Chairman of this Inquiry. In so far as my legal team are concerned, I am confident that none of them would allow themselves to be stage managed or turned into a rubber stamp.

16. I have followed and applied these legal principles in making my decision. In determining what evidence should be subject to ROs I have followed the principle of making the minimum interference necessary. I have balanced what I am satisfied is capable of affecting national security against the open justice principle and the requirements of Article 2 in making my decision whether to make ROs. I have kept in mind that there may be lower levels of restriction other than a CLOSED hearing which could meet the public interest. I have had in mind that ROs may not need to be all or nothing i.e. part of a witness's evidence could be heard in open while other parts have to be in closed. I shall keep under review any restrictions when listening to the evidence with a view to moving any part of the evidence into OPEN if the balance seems to me to be in favour of disclosure. At the end of the evidence I shall consider what evidence can be gisted while preserving the public interest in protecting national security.

Rulings on the applications following the CLOSED hearing on 18th October 2021

17. I heard submissions by counsel on behalf of GMP and the Security Service, as well as CTI. There are two principal bases for the applications for the ROs which cover most of the evidence which are sought to be heard in the CLOSED hearings. They cover the same material on which PII was claimed when I was conducting the inquests. They are both bases and categories of evidence which have been accepted by the courts as attracting PII in other cases because of the risk that disclosure would pose to national security. I have kept carefully in mind that each case is fact sensitive and simply because applications for PII for similar reasons have been accepted by the courts in the past, that does not mean that PII will automatically be granted in these proceedings. I have also

considered whether PII still applies or whether subsequent developments since the PII ruling (in particular the conclusion of the criminal trial of Hashem Abedi), the passage of time, or what has already emerged in evidence to the Inquiry has changed this. I am satisfied on the information that I have been given that the same considerations apply as did when I made my PII ruling and the evidence that I have heard has not changed this, save in three respects. Following the CLOSED hearing and my request that the Security Service carefully review its national security assessment in respect of several specific pieces of information, the Security Service varied its application and no longer seeks a RO over the following three issues:

a. Intelligence available to the Security Service that Salman Abedi associated with a serious crime gang called the Rusholme Crips;

b. The Security Service's knowledge of the use of stash cars for criminal purposes; and

c. The Security Service's general assessment, based on the intelligence picture as it stands and without prejudice to the ongoing police investigation and any further evidence that the police may obtain, that no one other than Salman Abedi and Hashem Abedi was knowingly involved in the attack plot.

18. CPs will therefore be able to ask questions about these matters of Witness J in the course of his OPEN evidence on 25th and 26th October 2021.

19. Apart from these three matters, I have decided to grant the applications made by the Security Service, GMP/ CTPNW and NCTPHQ and make ROs which cover the relevant evidence in the manner sought. I am satisfied that it would be damaging to national security to reveal these matters publicly and that risk outweighs the interests of open justice on the facts of this case.

20. I have considered whether any other parts of the material which the ROs seek to cover could nevertheless be moved in to OPEN or a lesser restriction attached to it. In particular, I have considered the submission of the families that they are not concerned with how the information covered by PII was obtained; what interests them is what the information was and what steps were taken as a result of that information. They have asked me to consider whether therefore the information could be revealed while not disclosing how it was obtained. Whereas there will be occasions when that would be possible, I am satisfied that, as it stands, it is not possible in this case to do that without causing substantial damage to the interests of national security. I will however continue to keep this under review as the Chapter 14 evidence is heard.

21. I have accordingly made ROs to cover the material included in the PII ruling, as well as the witness evidence from those witnesses from the Security Service and GMP which relate to that material.

Preventability Expert & other witnesses giving CLOSED evidence

22. CTI seek a RO covering the identity of the expert that I have instructed to assist with this area of the case. He was a former officer of the Security Service and the application is made on the basis of there being risk to him if his previous employment becomes public. Mr. Weatherby argues that this seems to be a class application i.e. that all

officers or former officers of the Security Service should automatically be covered by an order for anonymity. The fact is that those who have been active as officers or agents for the Security Service invariably are granted anonymity in legal proceedings when they ask for it. That does not mean that judges do so in individual cases automatically. It just means that in individual cases judges have accepted on a specific risk assessment that because of the witness's current or previous employment he or she would be at risk if their identities were made public and have reached similar decisions. The consequences of identification are likely to be less for former officers who are no longer employed than for current officers, who in addition to any risks to them would not be able to carry on their employment once their identity was revealed.

23. I have considered a risk assessment which is specific to my expert and while many of the factors which apply to him may apply to other retired officers it does not mean that I have treated this as a class application. I have made a RO covering the identity of my expert having considered all relevant matters. As a separate issue, I will continue to keep under review whether any part of his report can be disclosed to Core Participants.

24. Other applications for ROs have been made to cover the identification of other Security Service and GMP officers who would not be able to carry out their jobs if their identification had been made public. On the individual facts of their cases I am satisfied that they are made out and I therefore grant those applications and make the appropriate ROs.

25. As I have repeatedly confirmed, I will keep under review whether any further matters can be moved into OPEN during the CLOSED hearings. The RO's which are the subject of this judgment each carry a recital which permits me to vary them at any stage. At the conclusion of the CLOSED hearings a detailed analysis of what matters can be gisted or summarised, and how, will be undertaken and any further information which can be disclosed to CPs and/or the public will be.

Chairman

Sir John Saunders

25 October 2021