Standard of Proof
Ruling

Introduction

1. Whenever the panel of an inquiry is required to investigate and reach conclusions of fact the issue arises as to what standard of proof should be applied. Should the panel reach a conclusion of fact only when on the evidence it is sure that the fact is established (the criminal standard) or should it reach a conclusion of fact when satisfied that the evidence establishes the fact on the balance of probability (the civil standard), or should the panel apply some other or variable measure depending upon the factual issue under consideration?

2. In my Ruling "Costs of Legal Representation Awards" published on 16 December 2015 (which is posted on the Inquiry's website) I set new timetables and gave directions towards the hearing of preliminary legal issues. The timetable and directions set for consideration of the appropriate standard of proof are to be found at paragraph 36 of the Ruling.

Inquiry counsels' note

3. In accordance with those directions, on 16 December 2015 I received from the Inquiry's counsel team their Note on the Standard of Proof which, simultaneously, was despatched to the core participants. Although that Note is already posted on the Inquiry's website I shall for convenience attach a further copy to this Ruling (as Annex 1).

'Minded to' letter

4. On the following day, 17 December, I published a "minded to" letter (attached as Annex 2) in which I announced that, subject to further argument, I was minded to "apply to issues of fact that arise in the evidence given to the Inquiry a **flexible and variable standard of proof**" by which I meant and explained that the starting point would be the civil standard; however, where the context required, and depending upon the issue under consideration, I would express my state of certainty or uncertainty with such accuracy as I could.

5. My directions (paragraph 36(3) Costs Ruling) required that responses by core participants to the "minded to" letter should be served by 4 pm on Friday, 8 January 2016.

Responses from core participants

6. I have received written responses on behalf of the following core participants:

   The represented non-state, non-police core participants (Tamsin Allen of Bindmans)

   Metropolitan Police Service (Melanie Jones, Directorate of Legal Services)

   National Crime Agency (NCA Legal Department)

   Home Office (Government Legal Department)

   'N' Police Officers (Slater and Gordon)

   Peter Francis (Leigh Day)

   Each of these core participants either expressed agreement with the approach that I had provisionally favoured or expressed no wish to make contrary submissions.

7. I have received supplementary submissions dated 7 January 2016 from Imran Khan and Partners on behalf of Baroness Doreen Lawrence, The Monitoring Group and the Blacklist Support Group. They adopt the agreement expressed by Bindmans on behalf of the non-police, non-state core participants, but make the following assertions:

   (i) The Inquiry should require disclosure and examine the evidence with the same rigour that would apply to civil proceedings;

   (ii) The Inquiry should not apply a flexible and variable standard of proof so as to avoid taking a rigorous approach to disclosure and the examination of evidence;

   (iii) The core participants require the Chairman to give a "formal assurance" that the application of a flexible and variable standard of proof "will not prevent the core participants from making...rigorous enquiries, and requesting...full disclosures, as to allow the Inquiry to discharge its obligations..."

   I shall return to these submissions later in my Ruling.

Is an oral hearing necessary?

8. The direction given at paragraph 36(4) of the Costs Ruling, required the Inquiry, by 4 pm on Wednesday, 13 January 2016, to notify core participants whether an oral hearing on the issue of standard of proof is necessary.

9. I have decided that no oral hearing is necessary or appropriate. I am satisfied upon the written material provided to me by the Inquiry counsel team and the core

participants identified that the application of a flexible and variable standard is the correct approach to issues of fact that arise in the evidence.

Reasons

10. None of the core participants takes issue with counsels' note to the Inquiry; nor do they take issue with the reasoning of my 'minded to' letter. Counsel's note is, manifestly, a fair and accurate summary of the developing reasoning and practice of modern public inquiries whether instituted under the Inquiries Act 2005 or not. I accept it.

11. It is appropriate that in a public inquiry the starting point should be the civil standard of proof. However, depending upon the inquiry's terms of reference, the issue of fact under consideration and the context in which the issue arises, an inflexible application of any particular standard may have the effect of stifling the ultimate purpose of the inquiry which is, usually, to make recommendations in the public interest. In my view, this is just such an inquiry. I am required to investigate what has happened during 47 years of undercover policing. I will need to consider whether there has been misconduct or other failure of duty and, if so, in what areas and to what extent. Public acknowledgement of some misconduct and failure of management has already been made on behalf of the Metropolitan Police Service. In establishing the factual background against which the Inquiry will offer recommendations as to future conduct and management it seems to me likely to be more conducive to the public good if I am free to express my state of mind as to the existence (or non-existence) of a fact without being bound to any particular standard of proof. As the counsel team put it at paragraph 38 of their note, recent public inquiries have adopted "a flexible and variable approach to the standard of proof so as to enable a full and nuanced approach to the determination of facts".

12. I shall adopt the flexible and variable standard as the circumstances require but my starting point will always be the civil standard. I do not consider it necessary further to expand on the reasons given above and in my 'minded to' letter.

The nature of the Inquiry

13. I turn to the supplementary submissions made by Imran Khan and Partners. This is not litigation; it is an Inquiry whose purpose is to investigate and report in accordance with its terms of reference. The distinction was referred to in closing sentences of paragraph 24 of the Costs Ruling. Paragraph 8 of the terms of reference provides that the Inquiry will examine and review all documents as the Chairman shall judge appropriate; paragraph 9 provides that the Inquiry will receive such oral and written evidence as the Chairman shall judge appropriate. Section 17(3) of the Inquiries Act 2005 requires me to act with fairness and with regard to the need to avoid unnecessary cost. The approximate duration of the

Inquiry has been estimated at three years. The essential difference between litigation and a public inquiry is that in a public inquiry there are no parties who would in their pleadings define the issues to be resolved. The probable issues in this Inquiry are foreshadowed by its terms of reference. From time to time I shall have to make a judgement whether and to what extent a particular issue of fact will be explored by the inquiry. When doing so I shall have in mind both the importance of the issue in itself and its importance in the context of the Inquiry as a whole. The Inquiry will be manageable only if an appropriate sense of proportion is applied.

14. It seems to me that the "rigour" with which the Inquiry pursues its terms of reference is entirely unrelated to the issue as to what standard of proof should be adopted by the Inquiry. I am surprised that Messrs Imran Khan and Partners should have thought it appropriate to seek from the Chairman a formal assurance that he will not use the flexible and variable standard of proof to pursue an oblique motive of shutting down legitimate lines of enquiry. Such an assurance will not be given because it is unnecessary.

15. As to the scope of evidence-gathering by the Inquiry team and the core participants and of disclosure by the police, I do not intend at this stage to fetter my discretion under paragraphs 8 and 9 of the terms of reference. I shall make such decisions as and when required and will strive to act fairly and transparently in the process.

13 January 2016

Sir Christopher Pitchford
Chairman, Undercover Policing Inquiry

Annex 1

COUNSEL TO THE INQUIRY'S NOTE ON THE STANDARD OF PROOF

Introduction

1. This note examines and seeks to explain the legal context in which a decision falls to made by the Chairman of the Inquiry as to the approach which he should take to standard of proof when determining questions of fact during the course of the Undercover Policing Inquiry. In doing so it explores recent practice in other public inquiries, the majority of which have adopted a flexible approach to the standard of proof.

The Statutory Context

2. Neither The Inquiries Act 2005 ("the 2005 Act") nor the Inquiry Rules 2006 ("the Rules") specifies, or expressly refers to, the standard of proof which a public inquiry must apply when determining facts. Various provisions within the legislation do, however, inform the legal position in relation to the standard of proof to which facts may be determined.

Section 2 of the 2005 Act

3. The function of a statutory public inquiry is wholly different to that of either a civil or criminal court. Not only is the procedure of a public inquiry inquisitorial, unlike that of civil or criminal litigation which is adversarial, the panel of a public inquiry is specifically prohibited by s.2 of the 2005 Act from determining any person's civil or criminal liability. The statutory prohibition is stated in the following terms:

> *"2(1) An inquiry panel is not to rule on, and has no power to determine, any person's civil or criminal liability.*
>
> *"2(2) But an inquiry panel is not to be inhibited in the discharge of its functions by any likelihood of liability being inferred from facts that it determines or recommendations that it makes."*

4. The difference in function between a civil or criminal court on the one hand and a statutory public inquiry on the other means that the Inquiry is not required to adopt the standard of proof applicable in the civil courts or that which is applied in the criminal courts.

5. It is also clear from s.2(2) of the 2005 Act that a statutory public inquiry is not to be inhibited from making findings of fact to either the criminal or civil standards of proof merely because to do so might give rise to a likelihood of liability being inferred from facts so determined.

Section 17 of the 2005 Act

6. So long as he acts fairly, the Chairman is free to decide upon an approach to findings of fact which best suits discharging the Inquiry's terms of reference. The breadth of his discretion is conferred by s.17 of the 2005 Act which provides that:

> *"17(1) Subject to any provision of this Act or of rules under section 41, the procedure and conduct of an inquiry are to be such as the chairman of the inquiry may direct.*
>
> *"(2) In particular, the chairman may take evidence on oath, and for that purpose may administer oaths.*
>
> *"(3) In making any decision as to the procedure or conduct of an inquiry, the chairman must act with fairness and with regard also to the need to avoid any unnecessary cost (whether to public funds or to witnesses or others)." (emphasis added).*

Section 24 of the 2005 Act

7. The Chairman is under an obligation, imposed by s.24(1)(a) of the 2005 Act, to set out in his report the facts which he (as the inquiry panel in this Inquiry) determines.

8. S.24(1) contains a rider that the report may also contain anything else that the panel considers to be relevant to the terms of reference. As will be explained later in this note, this rider has been used in some statutory public inquiries to justify expressions of suspicion, falling short of findings of fact, where an inquiry panel has concluded that it suspects that something might have occurred.

9. S.24(1) of the 2005 Act provides that:

> *"The chairman of an inquiry must deliver a report to the Minister setting out–*
>
> *(a) the facts determined by the inquiry panel;*
>
> *(b)the recommendations of the panel (where the terms of reference required it to make recommendations).*
>
> *The report may also contain anything else that the panel considers to be relevant to the terms of reference (including any recommendations the panel sees fit to make despite not being required to do so by the terms of reference)."*
>
> *(emphasis added)*

The Approach Adopted in Recent Public Inquiries

10. There is now a line of decisions made by the chairs of previous public inquiries which have generally favoured what is sometimes referred to as the "flexible and variable" standard of proof. We explore them and the thinking which has underpinned them below before turning to examples of inquiries in which the flexible approach has not been adopted. A table summarising the approaches of recent public inquiries to the standard of proof is appended to this note.

The Shipman Inquiry: no single standard of proof

11. Dame Janet Smith inquired into the conduct of Dr Harold Shipman. She looked at almost 500 cases with a view to establishing whether Shipman might have killed the patient concerned. In some cases Dame Janet Smith was unable to reach a decision on the evidence. In other cases she concluded that Shipman probably was implicated and in certain cases she was sure that he had killed the patient. When considering standard of proof, Dame Janet Smith concluded that she was not constrained by any single standard of proof and was free to give nuanced conclusions which expressed the degree to which she was satisfied of particular conclusions. She summarised her approach to the standard of proof at paragraph 9.43 of her first report, making clear that her decisions would determine neither

criminal nor civil liability and emphasising the purpose of her fact finding inquiry, in these terms:

> *"In an inquiry such as this, there is no required standard of proof and no onus of proof. My objective in reaching decisions in the individual cases has been to provide an answer for the people who fear or suspect that Shipman might have killed their friend or relative. I have also sought to lay the foundation for Phase Two of the Inquiry. My decisions do not carry any sanctions. Shipman has been convicted of 15 cases of murder and sentenced appropriately. He will not be tried or punished in respect of any other deaths. Nor will my decisions result in the payment of compensation by Shipman. It is possible that relatives might recover damages from Shipman if they can show that Shipman has killed their loved one, but my decision that he has done so will not automatically result in an award of compensation against him. Accordingly, I have not felt constrained to reach my decisions in the individual cases by reference to any one standard of proof* (emphasis added)".

12. Dame Janet Smith was careful to explain in her report how the approach described in general terms in the quotation above had been applied in practice in the different scenarios which she had been required to consider. In relation to findings of unlawful killing she wrote, at paragraph 9.44:

> "*...In some cases, I have felt sure that Shipman has killed the patient. Where I have felt sure, I have said so. In some cases, I have concluded that Shipman has killed the patient but I have not been able to say that I am sure of it. In those cases, I have said that Shipman probably killed the patient. The evidence in those cases is not finely balanced; it is clearly weighted on the side of guilt and I have reached a positive conclusion. If it seemed to me that the evidence was too finely balanced, I have not reached a positive conclusion."*

13. In relation to the reverse of this position, namely that a death was natural, Dame Janet Smith decided that it was appropriate to express the mere possibility that Shipman was involved even where she thought it very likely that a death was natural. Thus, paragraph 9.46 states, insofar as is material:

> *"There are many cases in which I have been able to say that I am sure the death was natural and that Shipman was not in any way involved. There are also some in which I think it likely, or even very likely, that the death was natural and that Shipman was not involved. I have drawn the distinction between being sure and being not quite sure usually where there is some uncertainty in the evidence, which leaves open the possibility that Shipman was involved, even though my conclusion is that he was probably or almost certainly not ..."*
> (emphasis in original)

14. Where no decision was possible, Dame Janet Smith nevertheless considered that it was appropriate to distinguish those cases which she considered suspicious from those in which she was unable to form any view at all on the available evidence. At paragraphs 9.47 and 9.48 of her report, she stated:

> *"It was inevitable that there would be some cases in which I would not be able to reach a positive conclusion one way or the other. There are a number of cases where real suspicion arises that Shipman might have killed the patient and yet the evidence is not sufficiently clear for me to say that he probably did. In those cases, which I call 'suspicious cases', I have explained why my suspicions are aroused but I cannot give a positive decision either way. I regret that the families of such patients are left in a state of uncertainty.*
>
> *"There are also a number of cases in which there was insufficient evidence or evidence of such poor quality that I have been unable to form any view at all. I have not said that the death was natural or probably natural unless there was a proper evidential basis for that conclusion. In general, if there were no reason to think that a death is unnatural, one would assume it was natural. Unfortunately, where Shipman was involved, there is always a possibility that death might have been unnatural. Where, for example, all that is known is that Shipman certified the cause of death and indicated that he had seen the patient shortly before the death, I do not feel able to say that the death was probably natural. It might or might not have been".*

15. The approach taken in the Shipman Inquiry was particularly apposite to the specific task of that inquiry. However, it has been cited with approval and

followed by a number of subsequent inquiries: e.g. see paragraphs 9 & 10 of the Standard of Proof Ruling made by The Bloody Sunday Inquiry; paragraphs 1 & 28 of the Ruling on Standard of Proof made by the Baha Mousa Inquiry (which followed the approach in slightly modified form); and paragraphs 85 & 100 of the Report of the Mid Staffordshire NHS Foundation Trust Public Inquiry, Volume 1.

The Bloody Sunday Inquiry: endorsement of the flexible approach and rejection of a uniform standard of certainty

16. The Bloody Sunday Inquiry inquired into the shooting by British soldiers of civilians in Northern Ireland. A central focus of that Inquiry was whether or not the shootings were justified. The inquiry heard competing submissions on the standard of proof which it summarised in the following terms at paragraph 1 of its ruling:

> *"...On the one hand it was argued that the Tribunal should apply the criminal standard of proof before making any findings implying criminal conduct on the part of an individual (said to mean the balance of probabilities modified to take account of inherent improbability and likely consequences) before making any finding of serious misconduct falling short of criminality on the part of an individual. On the other hand it was argued that the Tribunal should not be obliged to apply these standards, provided it made clear in its Report the degree of confidence or certainty with which it reached its conclusions and gave its reasons for coming to those conclusions..."*

17. The Bloody Sunday Inquiry considered a number of authorities on the standard of proof to be applied by courts in adversarial litigation. It found them to be of little assistance in the context of a public inquiry because of the very different function of a public inquiry in comparison to adversarial litigation. At paragraph 8 of their ruling, the panel stated:

> *"In the context of the present Inquiry, there is no question of the Tribunal having any power to remove or diminish the rights, liberties or freedoms of anyone. It is not the function of an Inquiry of the present kind to determine rights and obligations of any nature. Its task, set by Parliament, is to inquire into and report upon the events on Sunday 30th January 1972 which led to loss of life in connection with the procession*

in Londonderry on that day, taking account of any new information relevant to events on that day. The Inquiry cannot be categorized as a trial of any description. Unlike the courts it cannot decide the guilt (or innocence) of any individual or make any order in its report. Our task is to investigate the events of Bloody Sunday, to do our best to discover what happened on that day and to report the results of our investigations. It accordingly follows that the considerations that led the courts in the cases cited to require proof to a very high standard before making orders that affected the rights, liberties and freedoms of individuals are no guide to the task entrusted to the Tribunal."

18. The Bloody Sunday Inquiry also considered case law relating to the standard of proof to be applied in coroners' inquests at paragraphs 11 to 17 of its Standard of Proof Ruling. It found these cases to be of little assistance, again because of the significant differences between a public inquiry and an inquest. It summarised its reasons for so finding at paragraphs 14-17 of its ruling, which stated:

> *"14. It is clear from the remarks of Lord Lane CJ cited by Watkins LJ in* ***R v West London Coroner, ex parte Gray (supra)*** *that a coroner's inquest is inquisitorial in nature and thus has this in common with the present Inquiry. However, there are other features that are quite different.*
>
> *"15. A coroner's inquest is limited in the verdicts that it can return, and where there is a jury it is obviously necessary for the jurors to be given clear and simple directions as to the degree of certainty with which they can reach particular verdicts. Unless there were different and specified degrees of certainty, it would be difficult if not impossible to reach a particular verdict, for example between unlawful killing and death by misadventure. Furthermore, as Woolf LJ pointed out in* ***R v Wolverhampton Coroner, ex parte McCurbin (supra*** *at page 724), before a change in the law in 1977 a jury could under Section 4(3) of the Coroner's Act 1887 return a verdict that named a person or persons as guilty of murder or manslaughter, which in his view still provided considerable assistance in considering the question of the standard of proof which was applicable, "since that section made clear the importance of the decision of the coroner's jury and the gravity of the issues which they had to determine which could result in a person*

being at that time arrested and in due course tried for murder or manslaughter". There are accordingly both practical and historical reasons for requiring a high standard of proof before making a finding of unlawful killing, reasons that do not apply to an Inquiry of the present kind, which does not have to select and give a particular verdict, but instead has to provide a report on the matters referred to it.

"16. It is also important to note that in the same case (at page 727) Woolf LJ made clear that in different proceedings there are different considerations which lead to what is the appropriate test which it is useful to apply, having regard to the role of the decision making body that has the task of coming to a conclusion on the facts. To our minds this is a clear indication that the Court in that case was not seeking to lay down any rule or principle applicable to all kinds of inquisitorial inquiry or which are apt in our consideration of the events of Bloody Sunday.

"In our view therefore the cases cited do not provide any support for the proposition that as a matter of principle we cannot make findings implying criminality unless we are satisfied to the criminal standard of proof or of serious misconduct unless we are satisfied to the enhanced civil standard" (emphasis added; citation of *ex parte* McCurbin corrected from ruling).

19. The Bloody Sunday Inquiry panel endorsed the analysis of the Supreme Court of Canada in *Canada (Attorney-General) v Canada (Commission of Inquiry on the Blood System) 1997 3 SCR 440* as to the status of the findings of a commission of inquiry. The decision, as summarised at paragraph 19 of the panel's ruling, again emphasised the difference between an inquiry and civil or criminal litigation:

"..the findings of a commission of inquiry relating to an investigation are simply findings of fact and statements of opinion reached by the commission at the end of the day; and though they may affect public opinion, they are not and cannot be findings of criminal or civil responsibility".

20. The Bloody Sunday Inquiry panel rejected a submission that fairness required findings which implied criminal wrongdoing to be determined to the

criminal standard of proof. At paragraph 23 of its ruling the panel set out what it considered fairness required:

> *"In our view, provided the Tribunal makes clear the degree of confidence or certainty with which it reaches any conclusion as to facts and matters that may imply or suggest criminality or serious misconduct of any individual, provided that there is evidence and reasoning that logically supports the conclusion to the degree of confidence or certainty expressed, and provided of course that those concerned have been given a proper opportunity to deal with allegations made against them, we see in the context of this Inquiry no unfairness to anyone nor any good reason to limit our findings in the manner suggested..."*

21. The inquiry panel firmly rejected the submission that it ought not to reach conclusions on matters implying criminality or serious misconduct, unless it was sure beyond reasonable doubt. It went so far as to conclude that it was duty bound to take a different approach which required it to set out its reasoned conclusions and make clear the degree of confidence or certainty with which it had arrived at those conclusions. It expressed itself in the following way at paragraph 24 of its ruling:

> *"It was also submitted that there would be no point in reaching conclusions on matters implying criminality or serious misconduct, unless we were sure beyond a reasonable doubt. We do not understand this submission. We are asked to investigate and report on an event that took place some three decades ago, where on any view soldiers of the British Army shot and killed (and wounded) a number of civilians on the streets of a city in the United Kingdom and where the question whether or not they were justified in doing so has been the subject of such debate ever since that it led to the institution of this (the second) Inquiry some thirty years later. It seems to us that it would be quite wrong to confine ourselves in relation to this central part of the Inquiry to making findings where we were certain what happened. On the contrary, it is in our view our duty to set out fully in our Report our reasoned conclusions on the evidence we have obtained and the degree of confidence or certainty with which we have reached those conclusions. We are not asked to report only on these central matters on which the evidence makes us certain."* (emphasis added)

The Baha Mousa Inquiry: further application of the flexible approach and examination of the status of expressions of suspicion

22. The Baha Mousa Inquiry examined an instance of the very serious mistreatment of civilian detainees by British soldiers in Basra, Iraq in September 2003 which had led to the death of Baha Mousa and serious injury to other detainees. The inquiry panel in that inquiry comprised solely of the chairman, Sir William Gage. He expressed the provisional view that he should adopt a flexible approach indicating the level of satisfaction which he found established in relation to any significant finding of fact which warranted such an indication (i.e. the approach adopted both by the Shipman and Bloody Sunday inquiries). He heard submissions advocating a wide range of different approaches ranging from the application of the balance of probabilities across the board to complex systems applying different standards of proof to different categories of alleged conduct.

23. As was the case in the Bloody Sunday Inquiry, the Baha Mousa Inquiry's attention was drawn to a range of case law from both the coronial jurisdiction and civil courts. Sir William Gage explained at paragraph 17 of his ruling that these authorities did not help on the issue of whether he should adopt a uniform standard of proof across-the-board. That was because they were decisions in proceedings which did not equate to public inquiry proceedings.

24. Sir William Gage followed the Bloody Sunday Inquiry in endorsing Dame Janet Smith's flexible approach to the standard of proof, concluding that it was in the public interest to do so. He put it this way at paragraph 19 of his ruling:

> *"I must also be fair to the detainees who, on any view of the evidence I have so far heard, suffered serious and traumatic injuries following their arrest and detention in the TDF at Battlegroup Main between 14 and 16 September 2003. In addition, this is a Public Inquiry and it is in the public interest that my findings in the Report are expressed in such a way as can be readily understood as my judgment on what occurred, who was responsible and why I have made recommendations. In my opinion, this can best be achieved by adopting the flexible and variable standard of proof as applied in the Shipman Inquiry."* (emphasis added).

25. At the end of his ruling, in paragraph 28, Sir William Gage explained how he would apply the flexible approach in the relation to his task. He opted to adopt the civil standard of proof as a starting point but indicating where he was sure of a finding:

> *"For the reasons which I have endeavoured to explain I have concluded that it is right for me to approach my task by initially adopting the civil standard of proof in relation to findings of facts, but indicating where appropriate where I am sure of a finding. As I have said, I shall record the level of satisfaction which I find established in relation to any finding of fact. Thus, I shall state where necessary that I find a fact proved on the balance of probabilities or to a higher standard where appropriate. I do not think it will be necessary expressly to refer to expressions such as 'inherent improbabilities' or the 'bare' balance of probabilities".*

26. A specific issue arose during the course of argument as to whether in an inquiry under the 2005 Act the inquiry panel is permitted to express suspicion. Sir William Gage concluded that he was permitted to express a suspicion that an allegation was true but that to do so would not be a finding of fact but a permissible comment. The arguments and his conclusions are set out at paragraphs 24 – 26 of his Ruling on the Standard of Proof:

> *"24. During the course of oral argument I canvassed with all counsel whether or not I am entitled to make comments expressing suspicion or, some other such phrase, that an allegation is true. Mr Singh submitted that I am entitled to do so; others disagreed. Mr Beer submitted that I have no power to do so because my power is only to determine the facts (s.24(1)(a) of the 2005 Act).*
>
> *"25. I do not accept that I may not make such comments. In my opinion the terms of s.24(1)(a) do not restrict me from doing so. In any event, as Mr Singh pointed out, s.24(1) of the 2005 Act provides that "The report may also contain anything else that the panel considers relevant to the terms of reference". I do, however, accept and stress that by making a comment of that nature I would not be making a finding of fact. I further accept that the power to make such a comment should be exercised sparingly. Circumstances in which I will feel constrained to do so will, I believe, be comparatively rare.*

> *"26. In adopting this procedure for finding facts I do not see any unfairness arising to Core Participants from not knowing to what standard of proof allegations against them may be found proved. In preparing submissions on their behalf counsel representing them will no doubt properly seek to place their version of events in the best possible light, regardless of the variations in the standard of proof. As I have indicated, my starting point will be the civil standard. I shall not make findings of fact to a lower standard than on the balance of probabilities and I will make clear where appropriate that I am sure of a finding. This I conceive to be my duty and cannot lead to any unfairness. Equally, albeit sparingly and with fairness at the forefront of my mind, I may indicate, where appropriate, that reasonable suspicion remains in relation to an issue, but this would be a comment and not a finding of fact".*

The Al-Sweady Inquiry: further endorsement of the flexible and variable approach

27. Like the Baha Mousa Inquiry, the Al-Sweady Inquiry was concerned with investigating the alleged misconduct of British soldiers in Iraq. The chairman of the Al-Sweady Inquiry, Sir Thayne Forbes, set out his approach to fact finding in Chapter 5 of Volume 1 of the Al-Sweady Inquiry Report. He expressly adopted the same "flexible and variable" approach as that decided upon by Sir William Gage in the Baha Mousa Inquiry.

The Mid Staffordshire NHS Foundation Trust Public Inquiry: distillation of principles

28. Robert Francis QC, chairman of the Mid Staffordshire NHS Foundation Trust Public Inquiry, reviewed the rulings on standard of proof made in the Shipman Inquiry, the Bloody Sunday Inquiry and the Baha Mousa Inquiry before identifying the following five principles at paragraph 95 of Volume 1, Part 1 of his report. He expressed these principles in the following terms:

> *"Looking at the overall effect of how previous inquiries have approached the matter, together with the current Inquiries Act and Inquiry Rules, the following principles may be gleaned:*
>
> - *It is for the chairman of the inquiry to decide on the approach to be taken to findings of fact, criticism and recommendations as part of his role in determining the procedure of the inquiry.*

- *Even in inquiries which have to address allegations of extremely serious crimes, there is no place for the application of the criminal standard of proof.*

- *The context of the task set for the inquiry is important in deciding what the proper approach to making findings may be.*

- *An inquiry should not be inhibited from setting out its findings and opinions based on those findings by adherence to particular standards of proof.*

- *An inquiry is free to express its findings as it sees fit, provided that they are logically founded on the evidence, the basis of the finding is made clear, and a person adversely affected by a finding has had a fair opportunity to deal with it.*

29. Applying those principles to his terms of reference, Mr Francis determined to proceed as set out at paragraph 100 of the Introduction to Part 1 of his report which is a further example of an inquiry adopting a flexible approach to the standard of proof:

"Taking all these considerations into account, I have concluded that:

- *The Inquiry should make findings based on the evidence before it, taking into account the findings of the first inquiry. In all instances, the Inquiry's findings must be guided by what is fair.*

- *Much evidence of what happened has not been contradicted. Where such evidence is not contradicted the Inquiry is likely to accept it unless it is inherently improbable, in which case this will be made clear.*

- *Where there are issues in relation to what happened, all the evidence relevant to that issue will be considered and taken into account. No particular standard of proof will be applied, but the Inquiry will find the facts on the basis of the evidence that it has preferred. A common sense approach will be adopted whereby inherently improbable assertions will be regarded with more caution then inherently likely ones.*

- *Where it is decided in relation to an important event that it is only possible to say it may have occurred, this will be made clear. The narrative of the report will make clear what the inquiry has concluded occurred and will refer to evidence supporting that conclusion. As this is a report not a court judgment, a full account of the reasons for preferring the evidence cited will not always be given.*

- *Although there are no strict rules of evidence other than the overriding requirement of fairness, I will bear in mind that different weight may have to be afforded to different types of evidence.*

- *Criticisms of organisations and individuals may appear either in the course of a narrative account of what happened or separately. They may either be made explicitly or be implied. Where a criticism is made or implied, this will be the result of the Inquiry forming an adverse opinion arising out of the finding of fact. That opinion and the resulting criticism are a matter of judgment and not a matter for which proof is required. An explanation of the significance of criticisms in this report appears below"* (emphasis added).

The Robert Hamill Inquiry: choosing to adopt the balance of probabilities

30. The Robert Hamill Inquiry was tasked to inquire into the murder of an Irish catholic by a loyalist group. Following an oral hearing on 17 November 2009 the panel directed that the inquiry would apply the civil standard of proof. There is no ruling to explain why the panel decided to adopt that approach. It is evident from the transcript of the hearing that none of the interested parties sought to make submissions in support of any other approach.

The Leveson Inquiry, Part 1: choosing to adopt the balance of probabilities

31. The terms of reference for the Leveson Inquiry into press standards are divided into two distinct parts. Part 1 of that inquiry has taken place. Part 2 has not. The inquiry panel, Lord Justice Leveson (as he then was), set out his approach to the nature and standard of proof in Volume 1, Part A, Chapter 3, Section 3 of his Part 1 report. He decided to determine facts on

the balance of probabilities. The decision was specifically influenced by the general and forward looking nature of the task set by his Part 1 terms of reference and especially the ambit of the recommendations which he was required to make. Unlike the inquiries referred to above, these terms of reference did not require detailed factual investigation. Lord Justice Leveson summarised the nature of his task and the distinction between Parts 1 & 2 of his inquiry in these terms at paragraphs 3.2 and 3.3 of Part A, Volume 1 of his report:

> *"3.2. More important than the topics about which I am required to inquire are the subjects about which I am required to make recommendations. It is sufficient to repeat the Terms of Reference which are expressed in this way:*
>
> *'To make recommendations:*
>
> *(a) for a new more effective policy and regulatory regime which supports the integrity and freedom of the press, the plurality of the media, and its independence, including from Government, while encouraging the highest ethical and professional standards;*
>
> *(b) for how future concerns about press behaviour, media policy, regulation and cross-media ownership should be dealt with by all the relevant authorities, including Parliament, Government, the prosecuting authorities and the police;*
>
> *(c) the future conduct of relations between politicians and the press; and*
>
> *(d) the future conduct of relations between the police and the press.'*
>
> *"3.3 These issues are to be contrasted with those set out in Part 2 of the Terms of Reference, which are specifically directed to a far more fact focussed investigation of the conduct of News International and other newspaper organisations ('the extent of unlawful or improper conduct', 'the extent of corporate governance and management failures'), along with the police ('the extent to which the police received corrupt payments or other inducements, or were otherwise complicit in such misconduct or in suppressing its proper investigation') and politicians ('the role, if any, of politicians, public servants and others in*

relation to any failure to investigate wrongdoing at News International'). In Part 2, there is a requirement 'to consider the implications' of what is then found to have happened. In other words, Part 1 of this Inquiry is a qualitative exercise of sufficient breadth to determine the appropriate recommendations to make for the future. Part 2 is a quantitative exercise: how extensive have been the identified failures in News International, other press organisations, the police, the political class, public servants or others? On that basis, the implications (and any additional recommendations fall to be addressed. Part 2 requires a far greater and more detailed factual investigation than has Part 1: this is not surprising given that the Terms of Reference were split into two because of the ongoing police investigation and the lack of clarity as to where it might lead)." (emphasis added).

The correct approach to determining facts on the balance of probabilities

32. Although there are limits to the assistance which can be derived from case law relating to adversarial or coronial proceedings, because of the unique nature of a public inquiry, there is one area in which case law from adversarial proceedings deserves mention. That is in relation to the correct approach to determining facts on the balance of probabilities. The leading case is now *In re S-B (Children) (Care Proceedings: Standard of Proof)* [2010] 1 AC 678, SC in which a panel of seven supreme court justices, in the context of care orders under s.31(2) of the Children Act 1989, confirmed and explained the case of *In Re B* in which Lord Hoffmann had held that the balance of probabilities did not involve a heightened standard of proof in cases where the allegations were serious. The core reasoning of the court is set out at paragraphs 10-14 of the judgement which are set out below:

> *"10. The House of Lords was invited to revisit the standard of proof of past facts in In re B (Children) (Care Proceedings: Standard of Proof) (CAFCASS intervening) [2009] AC 11, where the judge had been unable to decide whether the alleged abuse had taken place. The suggestion that it would be sufficient if there were a 'real possibility' that the child had been abused was unanimously rejected. The House also reaffirmed that the standard of proof of past facts was the simple balance of probabilities, no more and no less.*

"11. The problem had arisen, as Lord Hoffmann explained, because of dicta which suggested that the standard of proof might vary with the gravity of the misconduct alleged or even the seriousness of the consequences for the person concerned: para.5. He pointed out that the cases in which such statements were made fell into three categories. In the first were cases which the law classed as civil but in which the criminal standard was appropriate. Into this category came sex offender orders and anti-social behaviour orders: see B v Chief Constable of Avon and Somerset Constabulary [2001] 1 WLR 340 and R(McCann) v Crown Court at Manchester [2003] 1 AC 787. In the second were cases which were not about the standard of proof at all, but about the quality of evidence. If an event is inherently improbable, it may take better evidence to persuade the judge that it has happened than would be required if the event were a commonplace. This was what Lord Nicholls was discussing in In re H(Minors) [1996] AC 563, 586. Yet, despite the care that Lord Nicholls had taken to explain that having regard to the inherent probabilities did not mean that the standard of proof was higher, others had referred to a "heightened standard of proof" where the allegations were serious. In the third category, therefore, were cases in which the judges were simply confused about whether they were talking about the standard of proof or the role of inherent probabilities in deciding whether it had been discharged. Apart from cases in the first category, therefore, "the time has come to say, once and for all, that there is only one civil standard of proof and that is proof that the fact in issue more probably occurred than not": In re B [2009] AC 11, para 13.

"12. This did, of course, leave a role for inherent probabilities in considering whether it was more likely than not that an event had taken place. But, as Lord Hoffmann went on to point out, at para 15, there was no necessary connection between seriousness and inherent probability:

> *'It would be absurd to suggest that the tribunal must in all cases assume that serious conduct is unlikely to have occurred. In many cases, the other evidence will show that it was all too likely. If, for example, it is clear that a child was assaulted by one or other of two people, it would make no sense to start*

> *one's reasoning by saying that assaulting children is a serious matter and therefore neither of them is likely to have done so. The fact is that one of them did and the question for the tribunal is simply whether it is more probable that one rather than the other was the perpetrator.'*

"Baroness Hale of Richmond made the same point, at para 73:

> *'It may be unlikely that any person looking after a baby would take him by the wrist and swing him against the wall, causing multiple fractures and other injuries. But once the evidence is clear that that is indeed what has happened to the child, it ceases to be improbable. Someone looking after the child at the relevant time must have done it. The inherent improbability of the event has no relevance to deciding who that was. The simple balance of probabilities test should be applied.'*

"13. None of the parties in this case has invited the Supreme Court to depart from those observations nor have they supported the comment made in the Court of Appeal [2009] 3 FCR 663, para 14, that In re B 'was a sweeping departure from the earlier authorities in the House of Lords in relation to child abuse, most obviously the case of In re H'. All are agreed that In re B [2009] AC 11 reaffirmed the principles adopted in In re H [1996] AC 563 while rejecting the nostrum, "the more serious the allegation, the more cogent the evidence needed to prove it", which had become a commonplace but was a misinterpretation of what Lord Nicholls had in fact said.

"14. In re B [2009] AC 11 was not a new departure in any context. Lord Hoffmann was merely repeating with emphasis what he had said in Secretary of State for the Home Department v Rehman [2003] 1 AC 153, para 55. A differently constituted House of Lords applied the same approach in In re D (Secretary of State for Northern Ireland intervening) [2008] 1 WLR 1499."

33. In *in re D (Secretary of State for Northern Ireland intervening) [2008] 1 WLR 1499*, cited with approval in *In Re S-B*, Lord Carswell analysed, at paragraph 28, the way in which the seriousness of an allegation or the consequences

which might flow from it could be relevant to the civil standard of proof, notwithstanding that it was a finite and unvarying standard:

> *"…a possible source of confusion is the failure to bear in mind with sufficient clarity the fact that in some contexts a court or tribunal has to look at the facts more critically or more anxiously than in others before it can be satisfied to the requisite standard. The standard itself is, however, finite and unvarying. Situations which make such heightened examination necessary may be the inherent unlikelihood of the occurrence taking place (Lord Hoffmann's example of the animal seen in Regent's Park), the seriousness of the allegation to be proved or, in some cases, the consequences which could follow from acceptance of proof of the relevant fact. The seriousness of the allegation requires no elaboration: a tribunal of fact will look closely into the facts grounding an allegation of fraud before accepting that it has been established. The seriousness of consequences is another facet of the same proposition: if it is alleged that a bank manager has committed a minor peculation, that could entail very serious consequences for his career, so making it the less likely that he would risk doing such a thing. These are all matters of ordinary experience, requiring the application of good sense on the part of those who have to decide such issues. They do not require a different standard of proof or a specially cogent standard of evidence, merely appropriately careful consideration by the tribunal before it is satisfied of the matter which has to be established."*

34. Thus it is submitted that when determining whether an allegation is more likely than not to be true regard can properly be had to whether or not the disputed fact is inherently probable. However, it is to be remembered that the gravity of the allegation is not necessarily connected to its inherent probability.

Conclusions

35. The panel of a statutory public inquiry is not required to adopt any specific standard of proof so long as it acts fairly. The function of a statutory public inquiry is very different from that of a criminal court, a civil court or a coroner's court. Indeed, a statutory public inquiry is specifically prohibited from determining any person's civil or criminal liability. Consequently, the

case law relating to the standard of proof in those courts is of little assistance.

36. Uniform application of the criminal standard of proof is most unlikely to be appropriate even in inquiries which have to determine allegations of very grave conduct. However, this does not mean that the panel of an inquiry cannot express itself as being sure that something occurred if it chooses to adopt a flexible and variable approach to the standard of proof.

37. When deciding upon its approach to standard of proof an inquiry panel should have regard to the task which has been set through its terms of reference which should inform the decision. So long as he acts fairly, the Chairman is free to decide upon an approach to findings of fact which best suits discharging the Inquiry's terms of reference.

38. The majority of recent public inquiries have found it appropriate to adopt a flexible and variable approach to the standard of proof so as to enable a full and nuanced approach to the determination of facts. Of the two recent examples in which this approach was not followed and the civil standard was adopted, the Leveson Inquiry decision was made in the context of very different terms of reference for Part 1 of that inquiry. No fully reasoned decision was sought or given in the Robert Hamill Inquiry.

39. Expressions of suspicion are permissible. They are properly analysed not as findings of fact but as comment permitted under s.24(1) of the 2005 Act.

DAVID BARR QC

KATE WILKINSON

VICTORIA AILES

16 December 2015

Recent Public Inquiries' consideration of standard of proof

Inquiry and date of decision on standard of proof	Links to relevant documents	Summary
Shipman First report published 19 July 2002	Report: http://webarchive.nationalarchives.gov.uk/20090808154959/http://www.the-shipman-inquiry.org.uk/images/firstreport/narrative/pdf/vol1.pdf (Chapter 9, especially 9.40 – 9.48)	Set up under Tribunals of Inquiry (Evidence) Act 1921 Flexible and variable standard: cases in which the conclusion was that the Chairman was sure that something had happened; that it had probably happened; that it had probably not happened; that she was sure that it had not happened; also cases where it was not possible to reach a conclusion on the evidence.
Bloody Sunday Ruling dated 11 October 2004	Ruling: http://webarchive.nationalarchives.gov.uk/20101103103930/http://www.bloody-sunday-inquiry.org/rulings/tribunal/Archive/proof.pdf	Set up under Tribunals of Inquiry (Evidence) Act 1921 Flexible and variable standard following approach in Shipman. In particular, there is no support for the proposition that findings cannot be made implying criminality unless the Inquiry is satisfied to the criminal or "enhanced civil" standard.

Robert Hamill Directions dated 17 November 2009	Inquiry Chairman's directions, 17 November 2009: http://webarchive.nationalarchives.gov.uk/20140108104637/http://www.roberthamillinquiry.org/the-public-hearings/directions/ Transcript of directions hearing: http://webarchive.nationalarchives.gov.uk/20140108104637/http://www.roberthamillinquiry.org/the-public-hearings/transcripts/159/ (from page 28)	Set up under Police (Northern Ireland) Act 1998; converted to a 2005 Act inquiry on 29 March 2006 *"The Inquiry will apply the civil standard of proof to findings of fact as explained by the House of Lords in Doherty. This entails the general standard of proof being the balance of probabilities. The more serious the accusation, the more cogent the evidence must be before the panel will make the relevant finding of fact. There is no burden of proof."*
Baha Mousa Ruling dated 7 May 2010	Ruling: http://webarchive.nationalarchives.gov.uk/20120809191124/http://www.bahamousainquiry.org/linkedfiles/baha_mousa/key_documents/rulings/standardofproofruling7may2010.pdf	Set up under Inquiries Act 2005 Flexible and variable standard: Chairman decided to apply the civil standard of proof initially, but indicate where appropriate that he was sure of a finding. Considered that he could indicate suspicion (but that it would not be a finding of fact).
Azelle Rodney Protocol dated June 2011	Closing submissions: http://webarchive.nationalarchives.gov.uk/20150406091509/http://azellerodneyinquiry.independent.gov.uk/docs/ARI_Written_Closings_with_Submissions(6).pdf (pages 1 - 17) Burden and standard of proof protocol: http://webarchive.nationalarchives.gov.uk/20150406091509/http://azellerodneyinquiry.independent.gov.uk/docs/Burden_and_standard_of_proof__June_2011.pdf	Set up under Inquiries Act 2005 Flexible and variable standard – *"The Inquiry Chairman may express himself in terms of the degree of likelihood of something having happened."*

Leveson Inquiry report dated 29 November 2012	Report: http://webarchive.nationalarchives.gov.uk/20140212151345/http://www.official-documents.gov.uk/document/hc1213/hc07/0780/0780_i.pdf (Part A, chapter 3, section 3)	Set up under Inquiries Act 2005 It is the overall picture that is critical – the facts determined are those necessary to provide context for the recommendations. Worked examples may exemplify the problems, but it is not an inevitable inference that the culture, practices and ethics of the title affected is driven by the problem exemplified. In these circumstances the balance of probabilities is the appropriate standard.
Mid-Staffordshire NHS Foundation Trust Report dated 6 February 2013	http://webarchive.nationalarchives.gov.uk/20150423111725/http://www.midstaffspublicinquiry.com/sites/default/files/report/Volume%201.pdf (p 32 & seq.)	Set up under Inquiries Act 2005 Flexible and variable standard, following approach taken in Shipman, Bloody Sunday and Baha Mousa. No particular standard of proof will apply, but where it is only possible to say that an event may have occurred, this will be made clear.
Al-Sweady Inquiry report dated 17 December 2014	Inquiry Report: http://webarchive.nationalarchives.gov.uk/20150115114702/http://www.alsweadyinquiry.org/linkedfiles/alsweadyinquiry/theal-sweadyinquiryreport-volume1part1.pdf (para 1.29; Chapter 5) (Chapter 5 as separate pdf: https://www.gov.uk/government/uploads/system/uploads/attachment_data/file/388255/43358_02e_Part_1_Chapter_05.pdf)	Set up under Inquiries Act 2005 *"Where I have been able to reach an appropriate conclusion on the evidence, I have stated clearly what it is and have also indicated the degree of confidence or certainty with which I have reached the conclusion in question."* -Report, Volume 1 Part 1, para 1.29 Analysis of the law and adoption of *"flexible and variable"* standard following approach taken in Baha Mousa and Shipman Inquiries – but taking the civil standard of proof as the basic starting point – Report, Volume 1 Part 1, Chapter 5

Annex 2
Chairman's 'minded to' letter

1. Subject to further argument, if any, I am minded to apply to issues of fact that arise in the evidence given to the Inquiry a **flexible and variable standard of proof**. By that I mean:

   (i) My starting point for most decisions of fact should be the civil standard, the balance of probabilities, but I should not be bound by it because:

   (ii) Depending upon what the issue is, it will be more useful if, having examined the evidence, I express my state of certainty or uncertainty upon it with such accuracy as I can.

2. It is not possible, in advance of the hearing of the evidence, to forecast the circumstances in which I will find it appropriate to depart from or enlarge upon the civil standard when expressing a "a determination of fact" (as to which see e.g. section 2 (2) and section 24(1)(a) of the Inquiries Act 2005) or to express in my report a comment upon an issue by a measure unrelated to standard of proof (as to which see section 24(1)(b) of the Inquiries Act 2005). I will need to make a judgement how best to express myself when I can see the issue of fact in its full Inquiry context. What matters is that the approach I adopt is transparent and properly explained.

3. The words used in the terms of reference demonstrate the investigatory nature of the Inquiry's task to ascertain or identify what happened during the 47 year period under review. Recollections are likely to be imperfect and contemporaneous documents may no longer be available. A fuller understanding of the essential history of undercover policing is likely to become available by the application of a flexible rather than an inflexible approach to the standard of proof.

4. I am also required to "assess the adequacy" of justification for undercover policing and of the statutory, policy and judicial regulation of undercover policing. Ultimately, I will "make recommendations" as to the future deployment of undercover officers. The essential quality of any assessment or recommendation is that it is explained by the range of findings I make. Provided that I express accurately the route that I have taken to my assessment and recommendations, the reader will be able to judge whether they are justified.

5. I agree with the opinion of the distinguished panel of the Bloody Sunday Inquiry at paragraph 23 of its ruling upon the issue of proof and the achievement of fairness in the resolution of allegations of misconduct (see paragraph 20 of the Inquiry counsel team's note).

6. In my opinion, the conclusions expressed by the Inquiry's counsel team at paragraphs 35 – 39 of their note are accurate.

17 December 2015

Sir Christopher Pitchford
Chairman, Undercover Policing Inquiry