

IN THE MATTER OF THE UNDERCOVER POLICING INQUIRY

BEFORE SIR JOHN MITTING

**SUBMISSIONS ON BEHALF OF
AUDREY ADAMS, RICHARD ADAMS AND KEN LIVINGSTONE
FOR THE PROCEDURAL HEARING ON 26 JANUARY 2021**

Introduction

1. These written submissions are made on behalf of Core Participants (“CPs”) Audrey and Richard Adams and Ken Livingstone for the procedural hearing on 26 January 2021. These submissions are supported by the other CPs we represent, Nathan Adams and Duwayne Brooks OBE.
2. As the submissions of the Non-Police, Non-State Core Participants (“NPSCPs”) address the arrangements for the T1P1 evidential hearings and the impact on all NPSCPs it is not necessary for these submissions to address all of those matters again.
3. In T1P1 the evidential hearings were only accessible to CPs, their lawyers, members of the public and the media either by attendance at the screening venue (which was inaccessible to many) or by way of a rolling transcript (which was inaccessible to many and ineffective for all as the only means by which to access the evidential hearings remotely). This position was contrary to the principle of openness.
4. Across various submissions on myriad issues, the NPSCPs have reiterated that this is a public inquiry, which necessarily must be held in – and accessible to – the public. Ordinarily, the public would be able to access this Inquiry through attendance in-person at any open hearing they were able to and chose to attend. Ordinarily no questions would have been asked of any person what their interest was in the inquiry or in the particular

section of evidence for which they were present, merely to see and hear the evidence. The fact that we are living through a pandemic is not a reason to deny the public proper access to the Inquiry, particularly not in a technological age where visual and audio live streaming of proceedings is not only possible but relatively easy to organise and cost effective.

5. These submissions focus on the discriminatory nature of the arrangements in T1P1 and the specific impact of those arrangements on Audrey and Richard Adams and Ken Livingstone. Audrey and Richard Adams and Ken Livingstone felt unable to attend the T1P1 evidential hearings in person because of the degree of risk to their health. All three of them are in older age groups and Audrey and Richard Adams are disabled and are Black. They are at increased risk of serious injury or death from Covid-19, when compared with others who do not have these protected characteristics. They were therefore effectively excluded from seeing and hearing the evidence and the workings of the Inquiry.

The legal position

6. Indirect discrimination is defined in section 19 of EA, which states:

“19 Indirect discrimination

(1) A person (A) discriminates against another (B) if A applies to B a provision, criterion or practice which is discriminatory in relation to a relevant protected characteristic of B's.

(2) For the purposes of subsection (1), a provision, criterion or practice is discriminatory in relation to a relevant protected characteristic of B's if—

(a) A applies, or would apply, it to persons with whom B does not share the characteristic,

(b) it puts, or would put, persons with whom B shares the characteristic at a particular disadvantage when compared with persons with whom B does not share it,

(c) it puts, or would put, B at that disadvantage, and

(d) A cannot show it to be a proportionate means of achieving a legitimate aim.”

7. Part 3 of EA deals with services and functions. Insofar as it is relevant to these submissions, section 29 of EA provides:

“29 Provision of services, etc.

(1) A person (a “service-provider”) concerned with the provision of a service to the public or a section of the public (for payment or not) must not discriminate against a person requiring the service by not providing the person with the service.

(2) A service-provider (A) must not, in providing the service, discriminate against a person (B)—

(a) as to the terms on which A provides the service to B;

(b) by terminating the provision of the service to B;

(c) by subjecting B to any other detriment.

...

(6) A person must not, in the exercise of a public function that is not the provision of a service to the public or a section of the public, do anything that constitutes discrimination, harassment or victimisation.

...”

8. The relevant parts of section 31 of EA are as follows:

“31 Interpretation and exceptions

(1) This section applies for the purposes of this Part.

(2) A reference to the provision of a service includes a reference to the provision of goods or facilities.

(3) A reference to the provision of a service includes a reference to the provision of a service in the exercise of a public function.

(4) A public function is a function that is a function of a public nature for the purposes of the Human Rights Act 1998.

...

(7) A reference to a service-provider not providing a person with a service includes a reference to—

(a) the service-provider not providing the person with a service of the quality that the service-provider usually provides to the public (or the section of it which includes the person), or

(b) the service-provider not providing the person with the service in the manner in which, or on the terms on which, the service-provider usually provides the service to the public (or the section of it which includes the person).

...”

9. The Supreme Court considered indirect discrimination in the case of *Essop and others v Home Office (UK Border Agency)* [2017] UKSC 27, [2017] 1 WLR 1343. Baroness Hale, giving the judgment of the Court, defined indirect discrimination at [1] as follows:

“Indirect discrimination...is meant to avoid rules and practices which are not directed at or against people with a particular protected characteristic but have the effect of putting them at a disadvantage. It is one form of trying to “level the playing field”.”

10. Further, in *Essop*, Baroness Hale identified a number of salient features in the various iterations of indirect discrimination at [24]-[29], specifically that:

- (1) There is no express requirement for an explanation of the reasons why a particular provision, criterion or practice (“PCP”) puts one group at a disadvantage when compared with others. [24]
- (2) Indirect discrimination does not require a causal link between the less favourable treatment and the disadvantage; instead it requires a causal link between the PCP and the particular disadvantage suffered by the group and the individual. [25]
- (3) The reasons (or “context factors”) why one group may find it harder to comply with the PCP than others are many and various. [26]
- (4) There is no requirement that the PCP in question puts every member of the group sharing the particular protected characteristic at a disadvantage. [27]
- (5) It is commonplace for the particular disadvantage to be established on the basis of statistical evidence. [28]
- (6) It is always open to the respondent to show that the PCP is justified. [29]

11. In *Lord Chancellor and Secretary of State for Justice and another v McCloud and others* [2018] EWCA Civ 2844, [2019] ICR 1489 at [85]-[87], the Court of Appeal held in relation to justification that:

- (1) The means of achieving any particular aim must be carefully scrutinised by a fact-finding tribunal and accord a margin of discretion when it comes to both aims and means. [85]
- (2) Establishing that an aim is capable of being a legitimate aim is only the beginning of the story: it is then for the fact-finding tribunal, according an appropriate margin of discretion, to decide whether it is legitimate in the circumstances of the case. An aim must be at least rational; margin of discretion cannot rescue an aim that is irrational. [86]
- (3) Where the government has a legitimate interest in any issue which arises in a discrimination claim, it is to be afforded a margin of discretion, but it is for the fact-finding tribunal to assess whether the government has a legitimate interest and the amount of discretion to be afforded and then the case should be decided in accordance with ordinary principles. [87]

12. In *R (Carson) v Secretary of State for Work and Pensions* [2005] UKHL 37, [2006] 1 AC per Lord Hoffmann at [15]-[16]:

“15 Whether cases are sufficiently different is partly a matter of values and partly a question of rationality. Article 14 expresses the Enlightenment value that every human being is entitled to equal respect and to be treated as an end and not a means. Characteristics such as race, caste, noble birth, membership of a political part and (here a change in values since the Enlightenment) gender, are seldom, if ever acceptable grounds for differences in treatment...the Strasbourg court has given it a wide interpretation...and it is therefore necessary...to distinguish between those grounds of discrimination which prima facie appear to offend our notions of the respect due to the individual and those which merely require some rational justification: Massachusetts Board of Retirement v Murgia (1976) 427 US 307.

16 There are two important consequences of making this distinction. First, discrimination in the first category cannot be justified merely on utilitarian grounds, e g that it is rational to prefer to employ men rather than women because more women than men give up employment to look after children. That offends the notion that everyone is entitled to be treated as an individual and not a statistical unit. On the other hand, differences in treatment in the second category (e g on grounds of ability, education, wealth, occupation) usually depend upon considerations of the general public interest. Secondly, while the courts, as guardians of the right of the individual to equal respect will carefully examine the reasons offered for any discrimination in the first category, decisions about the general public interest which underpin differences in treatment in the second category are very much a matter for the democratically elected branches of government.”

Submissions

The PCP

13. The PCP with which we are concerned is the provision of visual and audio live streaming of the evidential hearings to only those people who attend the screening venue.
14. The only live streaming of the evidential hearings to a location other than the screening venue of which we were aware in T1P1 was to the Chair himself and to remote locations where the transcribers and members of the Inquiry Team were based.
15. In the Inquiry’s Equality Impact Assessment (“EIA”) of November 2020, the PCP was clearly identified as having a “*potential for negative impact*” on those with the protected characteristics of age, disability, pregnancy and maternity. The negative impact or disadvantage identified for age and disability was that “*The current Covid 19 restrictions mean that [people in a vulnerable age category and people with disabilities] who may want to view the hearings may not be able to do so and therefore may not experience the full impact of the hearings.*” The action identified to address the negative impact on those groups was the provision of a live stream of the opening statements and a transcript during the evidential hearings.

16. In relation to race, the EIA of November 2020 states:

“We are not aware of any evidence which could create a negative impact with respect to race. Those from the BAME community may be more reluctant to attend the screening venue at the hotel due to factors, such as ethnicity, that can influence the impact of COVID 19 on different population groups.”

17. On the one hand, it is suggested in the EIA that there is a neutral impact on race but then a negative impact is clearly identified. If evidence is required, for example, ONS data reported on 14 December 2020 shows that the death rate for Black people is considerably higher than for white people, particularly when adjusted for age. For Black Caribbean females the death rate when adjusted for age is over two times that for white females and for Black Caribbean males the death rate when adjusted for age is almost three times that for white men.¹

18. The EIA of November 2020 then appears to address the negative impact, by proposing action, namely:

“The inquiry has taken all reasonable measures to ensure that the venue is COVID-secure and the risks of transmission of the virus are minimised. Those who choose not to come to the venue to follow the evidential part of the proceedings can follow proceedings via a live stream of the transcript.”

19. Overall, the Inquiry has, by its EIA, accepted that the PCP disadvantages people in a vulnerable age category, disabled people and people of certain ethnicities, which accords with the protected characteristics of Audrey and Richard Adams and Ken Livingstone. The PCP put persons who are in an older age group and/or disabled and/or Black at a disadvantage when compared with those who do not have those protected characteristics.

20. It is only open to the Inquiry to apply the PCP if it can justify it as a proportionate means of achieving a legitimate aim. We expand on this point further below.

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<https://www.ons.gov.uk/peoplepopulationandcommunity/healthandsocialcare/conditionsanddiseases/articles/whyhaveblackandsouthasianpeoplebeenhithardestbycovid19/2020-12-14>

21. If the PCP remains in T1P2, whole swathes of people with an interest, whether formal, informal or professional, in this Inquiry will be unable to follow the evidence by means other than a real-time or published transcript. Some of those people (we would suggest many) will be unable to attend the screening venue because of their protected characteristics. Some of those people will be unable to follow the evidence by a real-time or published transcript, also because of their protected characteristics. Furthermore, many people, even if they do not have protected characteristics, may be unwilling to take the risk of contracting Covid-19.

Provision of a service

22. This Inquiry is a public inquiry. The Inquiry provides a service to the public in general by inquiring into the subject matter in question. Undercover policing is, by its very nature, a matter of public interest and concern. The Inquiry provides a service to a section of the public, namely CPs and others with an interest in the Inquiry, through its evidential hearings, thus enabling the public to see and hear the evidence. The Inquiry is very much providing a service in the exercise of a public function. As part of its service, the Inquiry provides facilities, such as the screening venue, for the purpose of its evidential hearings. Accordingly, the definition of a service provider, pursuant to sections 29 and 31 of EA is met.

23. In accordance with section 29(1) of EA, the Inquiry must not discriminate against a person requiring the service by not providing them with the service. Pursuant to section 29(2) of EA, the Inquiry must not discriminate against a person as to the terms on which the service is provided or by subjecting them to any other detriment.

Indirect discrimination

24. As a result of their protected characteristics, Audrey and Richard Adams and Ken Livingstone:

(1) cannot attend the screening venue without putting themselves at risk of serious injury and/or death arising from Covid-19; and therefore they

(2) are unable to see and hear the evidence of witnesses and are thus effectively prevented from securing the “*justice*” for which this Inquiry was in part established and furthermore from participating effectively.

25. In our submission, this is a clear case of indirect discrimination. The PCP here indirectly discriminates against people in relation to their protected characteristics, as defined by section 19 of EA. The provision of visual and audio live streaming of the evidential hearings to only those members of the public who can attend the screening venue is discriminatory because the same venue is inaccessible to many because of their protected characteristics. The context of the current Covid-19 pandemic is highly relevant.

26. The PCP requires attendance at the screening venue in order to see and hear the evidence of witnesses. This puts the CPs to whom these submissions relate at a disadvantage because of their protected characteristics. If they were to attend the screening venue, they would be subjected to greater risk of serious injury or death from Covid-19 and/or their non-attendance deprives them from seeing and hearing the witnesses.

27. In the circumstances, people who do not share these protected characteristics (or have any other bar to attendance) would be able to see and hear the evidence at the screening venue at reduced risk to their health and at reduced risk of death. Audrey and Richard Adams and Ken Livingstone have in effect been excluded from the PCP by virtue of their protected characteristics.

28. People who are unable to attend the screening venue had make do with either a real-time transcript or a published transcript of evidence for the evidential hearings in T1P1. These provisions are not equivalent. The terms on which access to the evidential hearings is provided is not the same and people with protected characteristics suffer a detriment.

Justification

29. It is for the Inquiry to justify the PCP and to show that it is a proportionate means of meeting a legitimate aim. The PCP must be capable of being legitimate, in fact be legitimate and be rational. In the current context, it must be shown how the PCP is proportionate during a pandemic, where everyone faces risk of injury or death to a greater or lesser degree and in some cases that increased risk is due to protected characteristics.

30. The Inquiry has not yet justified the PCP that was in place during T1P1. There are no proposals for T1P2 and no EIA as matters stand. The burden is on the Inquiry but we make a number of necessarily provisional submissions below.

31. In the EIA of November 2020, the Inquiry accepted that the main way to mitigate the negative impacts for people with the protected characteristics of age, disability and pregnancy would be to live stream the evidential hearings. We agree. We also note that, since a further negative impact is accepted, race as a protected characteristic also falls to be included.

32. However, it was said that “*security*” prevented visual and audio live streaming of evidential hearings to a wider class of people than those who could attend the screening venue. This does not appoint to a tenable justification. A justification must be a proportionate means to achieve a legitimate aim. “*Security*” amounts to a generalisation. The Inquiry has not addressed how security issues justify the PCP and how the PCP is a proportionate means of meeting a legitimate aim. It is not said how this is rational.

33. If it is restriction orders that are relied upon, it is not enough to simply state that restriction orders are in existence. Regard must be had to the specific restriction orders in place, for relevant witnesses. Restriction orders that relate to matters of privacy, rather than security, cannot form the basis of the legitimate aim of security. Many of the restriction orders were made prior to the pandemic, when in-person access to the hearings was anticipated, and without reference to EA.
34. The other reason stated in the EIA of November 2020 as to why visual and audio live streaming would not be provided was “*decisions taken with regard to the conduct of the hearings*”. For “*decisions*” to be a legitimate aim, it is axiomatic that the nature of those decisions is made known. A general reference to “*decisions*” cannot found a legitimate aim. In any event such decisions are likely to have been made prior to the pandemic and without reference to EA.
35. Decisions made in entirely different circumstances and indeed prior to the PCP cannot be capable of legitimising it, after the event, during a pandemic. All of the relevant decisions fall to be reconsidered.
36. Further, it is plain that any legitimate aim would have to be consistent with the function of a public inquiry. It would fall to the Inquiry to demonstrate that this was in fact the case.
37. At this stage there are no arrangements in place for T1P2. In the event they are similar to those in place for the evidential hearings in T1P1, it falls to the Inquiry to identify the legitimate aim in having no visual and audio live streaming away from the screening venue. Whatever the aim, it is hard to envisage how excluding people, in particular core participants, from the full experience of the hearings on the basis of age, disability and race could be a proportionate means of achieving a legitimate aim.
38. If a legitimate aim can be identified, the Inquiry must show how the PCP is proportionate to the legitimate aim. This necessitates consideration of practical alternatives. If there are practical alternatives, which would avoid discrimination, but the PCP is not adapted, it is disproportionate. In the EIA of November 2020, the Inquiry has considered actions to

address the negative impact of its PCP. The only action for the evidential hearings was the provision of a live transcript during the hearings. However, by the Inquiry's own analysis, this action would not adequately address the impact, defined by the Inquiry as not being able to experience the full impact of the hearings. By the same measure, audio only live streaming does not adequately address the impact of the PCP, as it denies people the experience of the full impact of the hearings. The only PCP that is proportionate is visual and audio live streaming with a short delay.

The impact

39. Audrey Adams very much wanted to attend the evidential hearings in T1P1. She wanted to see and hear how the Inquiry was dealing with the first witnesses it was due to hear. Audrey Adams wanted to see and hear former undercover officers and NPSCPs giving evidence. She was also interested in seeing and hearing how the Chair conducted the hearings and to see how the witnesses, lawyers and other CPs reacted. Audrey Adams would have felt supported to be with other people who had experienced similar circumstances. The risk to Audrey Adams in attending was too high, specifically hospitalisation and/or death, due to her protected characteristics. The PCP prevented her from engaging with the evidential hearings in T1P1 in the way she would have wanted to.

40. Richard Adams would have gone to many of the hearings in T1P1, had it not been for Covid-19. His position is that, as victims of undercover policing, it was necessary for them to know how it could happen they could have been spied on in a democracy. He says that the family would have a better understanding of what happened to them if they could learn what happened to others before them. This would have afforded them the same wider understanding the Inquiry has of the issues. Richard Adams also says that it is important that they are involved so that they can ensure that other unsuspecting, innocent families are not subjected to the intrusion that is undercover policing. They wanted to demonstrate their solidarity with others. However, the risk of Covid-19 prevented Richard Adams from attending the hearing, due to his protected characteristics. He says that it was perverse and bizarre that they were excluded from the Inquiry that concerns them and that the decision not to provide visual and audio live streaming further victimised them.

41. Ken Livingstone did not attend the evidential hearings in T1P1 because he understands that he has a 1 in 12 chance of dying if he catches Covid-19, due to his age. Had there not been such a risk, he would have attended, to see for himself what was happening at the Inquiry. He was denied the opportunity to see what was happening at the Inquiry because of the PCP.

Reasonable adjustments and special measures

42. We raise these issues as invitations were made to CPs to make individual applications for T1P2. In our submission, it would be premature to make such applications in advance of making the arrangements for T1P2. Any applications would need to address the means of access to the hearings on an individual basis, whereas these submissions address the arrangements to provide access to the evidential hearings for all. We hope that no individual applications will be necessary.

43. Reasonable adjustments only apply to disabled people who meet the definition in EA. This means that many people are excluded from making applications for reasonable adjustments at all.

44. Special measures are not a feature of equality law in the same way that reasonable adjustments are. Special measures should only become relevant at the point at which lawful arrangements have been made.

45. In any event, the making of individual applications risks unnecessarily and inappropriately focusing on the individual and their interest in the Inquiry, rather than the key issue, which is the arrangements for the hearings.

46. Audrey Adams says:

“It was because I wanted to attend and could not attend the hearings that I asked for audiovisual live streaming of the hearing. I was turned down. Among the reasons the Chair gave was that I did not feature at all in the evidence in T1P1...That is irrelevant. It is an Undercover Policing Inquiry.

We are part of a whole range of issues that took place because of undercover policing....the officers who spied on me...are part of a whole system as is this Inquiry and I do have an interest in the system.”

47. Further, the making of individual applications also risks being cumbersome, unwieldy and not cost effective.
48. It should be also noted that any application for reasonable adjustments and/or special measures requires the person on whose behalf the application is made to reveal sensitive personal information. We take the view that this is unnecessarily intrusive, particularly in the context of what this Inquiry is about.
49. Furthermore, in T1P1, NPSCPs were asked to consent to sharing that information with police legal teams. It is obvious why the NPSCPs would be reluctant to share their sensitive personal information with the police. Richard Adams says, *“The police have already intruded into our lives enough.”*
50. Such a requirement is also unfair. The NPSCPs have not been provided with the sensitive personal information of former undercover officers when that information has been relied upon in relation to applications for restriction orders.

Conclusions

51. For all of the reasons set out above, the PCP in question is indirectly discriminatory in contravention of Part 3 of EA and thus it is unlawful. The PCP must be adapted for T1P2.
52. The position of the CPs whom we represent is that in order to avoid discrimination it will be necessary for the Inquiry to provide visual and audio live streaming – with appropriate delay – as a matter of course. We cannot see a distinction to be drawn between any CP and the public.

53. We do not consider it appropriate to seek to address wide-ranging discrimination by way of individual applications for reasonable adjustments, nor special measures.

54. It will be necessary for the Inquiry to prepare an EIA for T1P2. We ask for a timetable for the provision of the draft EIA, filing of responses to the draft and publication of the final EIA. We also ask for a timetable for any individual applications for reasonable adjustments and/or special measures and when they will be determined. It is crucial and in the interests of justice that this date allows sufficient time for any application for review.

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21st January 2021