IN THE MATTER OF THE UNDERCOVER POLICING INQUIRY

WRITTEN SUBMISSIONS ON BEHALF OF
THE DESIGNATED LAWYER OFFICER CORE PARTICIPANT GROUP
FOLLOWING T1P2 PROCEDURAL HEARING 26 JANUARY 2021

Introduction

1. These written submissions[1], on behalf of the Designated Lawyer Officer Core Participant Group ("DL" and "DLO") are filed following the livestreamed T1P2 Procedural hearing held 26 January 2021 and pursuant to the Chairman's invitation for written submissions on issues originally raised by Mr Menon QC on the potential impact of the Equality Act 2010 on T1P2 evidential hearings.

2. The narrow version of the question raised is:

> "whether and if so to what extent the decision about audio-visual transmission involves the exercise of a judicial function or is purely administrative." (Transcript, p. 158, line 13-15).

3. The wider potential implication was summarised by the Chairman:

> "You heard the submission that the restriction orders made in the case of the undercover officers who were going to give evidence in P2 should be reopened." (Transcript, p. 157, lines 14-17).

4. At the heart of the issue is the question of how sections 17-19 of the Inquiries Act 2005 ("IA") interrelate and whether the Equality Act 2010 ("EA") affects or modifies the obligations therein.

[1] See further part 6 of DL submissions dated 27 September 2018 and part 3 of DL submissions dated 28 November 19 already referred to at paragraph 10 of DL submissions dated 6 January 2021 drafted for the 26 January 2021 hearing. Those submissions concern hearings and, in particular, the issues/risks arising from transmission of images, voice samples and the potential adverse impact on the quality of witness evidence.

Inquiries Act 2005

5. Counsel to the Inquiry's Note of 25 January 2021 covered the issues principally at paragraphs 4-10, in particular:

   5.1. Noting that the duty imposed on the chairman of an inquiry by section 18(1) IA is "subject to any restrictions imposed under section 19" (CTI Note para 5.1).

   5.2. Recognised that the duty imposed by section 18(1) IA to "take such steps as he considers reasonable… to secure that members of the public (including reporters) are able… to attend the inquiry or to see and hear a simultaneous transmission of proceedings at the inquiry" is *not* absolute. (CTI Note para 5.2)

   5.3. That section 17(1) IA may be the governing provision for Core Participants and their lawyers rather than section 18(1) (CTI Note para 5.3).

   5.4. That section 18(2) is concerned with broadcasting by others (so irrelevant to the question of live streaming by the inquiry itself)[2].

6. On the above analysis, CTI recognises that section 18(1) is *doubly* qualified, in that it is subject to both Restriction Orders (which as a matter of fact pre-exist the arrangements being made for T1P2) *and* that it is not an absolute duty but requires only what a chair considers "reasonable". Section 17 IA also provides a wide discretion on the procedure and conduct of an inquiry, expressly subject to fairness and cost.

7. CTI has already noted that the pre-existing ROs for officers includes a prohibition on disclosure/publication of any "description or image" and that this, therefore, precludes audio-visual streaming.

8. As a matter of construction of section 18 IA, and as a matter of principle and practice, ROs rank above the general obligation to enable attendance etc within section 18(1):

   8.1. Firstly, that is the natural reading of section 18(1) and the words "subject to" in particular.

[2] A point made by the DL at paragraph 6.7 of 27 September 2018 submissions in response to the Public Consultation on the Approach to the Administration of Evidence Hearings.

8.2. Secondly, an "RO heavy" inquiry such as the present, where very substantial time and effort went into establishing and then following an RO process (and which was amenable to challenge) should not lightly (and was not expected to) be subject to revision based around more general decisions about hearings.

8.3. Thirdly, decisions about hearings which respond to the difficulties presented by the Covid-19 pandemic (however difficult) should not result in any increase in risk to those officers who have the benefit of ROs, even where they are based on privacy grounds. The proposed transmission of unique identifiers (even audio only) likely increases the risk of infringement of those privacy rights.

8.4. Fourthly, ROs apart, section 18(1) permits a wide latitude for an inquiry chairman.

9. The above analysis, accords with both the approach taken by the inquiry to T1P1 (including there being no transmission of audio of Tariq Ali or Joan Hillier) and the fact that the inquiry planned for or held a wide spectrum of hearing types to date, including:

9.1. Open physical hearings on procedure (e.g. those held at the RCJ about various issues over the last few years).

9.2. Closed hearings about whether to grant ROs (both relating to individual officers and in respect of redaction of documents) at various times.

9.3. Livestreamed openings for T1P1.

9.4. Internet-based procedural hearings on 17 November 2020 and 26 January 2021.

9.5. Witness evidence as planned for T1 originally: public access to both the physical hearing room with a live transmission to a physical overflow room for members of the public at Pocock Street.

9.6. Witness evidence as planned for T1P1 as at July 2020: live transmission to physical hearing room for members of the public but, ultimately, available only to CPs, RLRs and the media due to Covid-19 regulations in force at the time.

9.7. Planned closed hearings for T1 evidence with strictly limited access and no transmission even by way of transcript.

10. It is worth noting that sections 18-19 IA clearly contemplate that the public may well not see/hear proceedings or obtain/view a record of evidence to the same extent as an inquiry chairman. On a similar point, whilst it is noted that the Chairman is inclined to the traditional model, where seeing a witness is understood to assist with assessing credibility[3], it is important to note that there is no question of *the Chairman* being prevented from seeing the witnesses whilst they give evidence nor, in respect of the open T1P2 hearings, the relevant RLRs.

11. Overall, it is clear that sections 17-19 IA read alone permit T1P2 hearings to follow a similar set up to T1P1 hearings without *either* an audio stream or audio-visual stream to CPs generally or the public[4]. It is submitted that the Equality Act arguments ultimately fail to make a difference.

Equality Act 2010

12. Similar obligations arise under section 29 EA whether a service is being provided or a public function is being exercised and by section 31(3) EA "A reference to the provision of a service includes a reference to the provision of a service in the exercise of a public function". Section 6(3)(b) of the Human Rights Act 1998 ("HRA"), provides that "any person certain of whose functions are functions of a public nature" amounts to a Public Authority within that section, it being (by section 6(1)) "unlawful for a public authority to act in a way which is incompatible with a Convention right".

13. In any event, paragraph 3 of Schedule 3 to the EA provides an exception to section 29 in the case of a judicial function:

Judicial functions

3(1)Section 29 does not apply to—

[3] Transcript p. 116, lines 8-14, the Chairman also noting that there are alternative views.
[4] Note that the MPS "concession" on an audio feed (with conditions) was predicated on the assumption that "the public are not permitted to attend, or advised not to attend/travel". See MPS submissions dated 8 January 2021 for the 26 January 2021 hearing, paragraph 21.

(a)a judicial function;

(b)anything done on behalf of, or on the instructions of, a person exercising a judicial function;

(c)a decision not to commence or continue criminal proceedings;

(d)anything done for the purpose of reaching, or in pursuance of, a decision not to commence or continue criminal proceedings.

(2)A reference in sub-paragraph (1) to a judicial function includes a reference to a judicial function conferred on a person other than a court or tribunal.

14. Paragraph 3(2) is drafted widely enough to encompass an inquiry chairman as someone upon whom a judicial function has been conferred[5] and paragraph 3(1)(b) allows not just delegation ("anything done… on the instructions of") but also wider activities ("anything done on behalf of") which must extend to certain ancillary functions.

15. At the 26 January 2021 procedural hearing there were some relatively brief exchanges on the issue, suggesting that there might be a spectrum of activities carried out by an inquiry chairman and others on his behalf, e.g. the provision of a lift at a physical hearing venue (transcript, p. 99, from line 24) which was then followed by the Chairman posing the question of "whether or not *the decision to* provide audio transmission or audio-visual transmission of the evidence being given to the hearing is the provision of a service or not." (Emphasis added).

16. It is submitted that *the decision* whether or not to transmit/broadcast must be (the exercise of) a judicial function. The very fact that written submissions are being invited upon the construction of section 18 IA, or ROs (already adjudicated upon) potentially being called into question involves the construction of statutes, the exercise of judgment (what is reasonable?) and, potentially, the determination of rights and obligations. That is at the core of a judicial function and part 4 of the DL's supplementary submissions on privacy and the GDPR dated 8 March 2019 is repeated.

17. Even if a possible potential *outcome* of the decision under section 18(1) is the provision of e.g. an audio feed to the public or the provision of a public venue to attend, the *decision* is

[5] And various non-court and non-tribunal office holders must have been in contemplation.

still a judicial function whether or not the result might be akin to listening to attending a lecture, watching "YouTube" or listening to the radio at home.

18. Furthermore, the actual inquiry proceedings (even when taking place on an internet based platform) are no better described as a provision of a service (whether or not it is the exercise of a public function) than any other court or tribunal proceedings so as to divorce the outcome from the decision itself.

19. Finally, there would be a real tension in construing judicial function in schedule 3 to EA too narrowly without recognising the obligations on an inquiry chairman under section 17(3) IA (fairness) and section 6 HRA/ECHR article 8 rights *already* reflected in the ROs granted.

Restriction Order process

20. To revisit the RO process at this stage, even for 10 DL clients, presents significant practical challenges on the DL/DLO side. Without prejudice to the argument that the existing ROs should not be reviewed, revisiting the same with even a curtailed version of the established RO process would require: taking instructions from clients who are also due to age (at least) in a vulnerable group from Covid-19; potentially filing further evidence by way of impact statements; potential further medical evidence supported by written applications/submissions; allowing for "minded to" decisions; allowing hearings or other fair method of challenge; allowing time for challenge by way of judicial review.

21. The DL have a limited number of lawyers able to carry out RO work, have limited access to their offices and are operating under Covid-19 restrictions generally. Where third parties may need to be relied upon (e.g. for medical records or reports) then it is anticipated that there may be practical difficulties. This is against the background of planned preparation for the T1P2 hearings as well as continued evidence-gathering and redaction work for future phases and tranches of the inquiry.

22. It is presumed that other parties involved (in particular the MPS and ILT) will have similar challenges in respect of workload pressures, made more difficult by Covid-19 restrictions.

23. There is a real danger that adopting the course suggested by Mr Menon QC would lead to a rushed process of rebalancing interests already weighed and settled pre-pandemic and is tantamount to shifting the goal posts and is likely to have a significant impact on DL clients who have been given a clear and public indication that there are ROs in place. Any change in process is inherently unfair and may lead to less engagement in the Inquiry.

24. Furthermore, the *outcome* of any rebalancing would necessarily be at large and DL officers may wish to argue that audio (and, in particular video if in serious contemplation despite arguments to date) changes the position so much that the ROs should be more restrictively drawn or, alternatively, that special measures (including voice modulation/screens) are required in individual cases.

Discrimination/mitigation

25. If, contrary to the submissions above, the Chairman considers that the judicial function exception to the EA does not apply then it is submitted that any difference in treatment is justified. Whilst it is certainly right that the Chairman should seek to ensure that there is no discrimination, justified difference in treatment is permissible. In considering the overall position, the Chairman should expressly consider, in the alternative, whether or not an audio feed, as proposed by the MPS (but not conceded by the DL) with conditions would suffice.

26. *If*, contrary to the submissions above, the Chairman considers that he is subject to and potentially in breach of the EA then he should also consider whether waiting for those in vulnerable groups to be offered vaccines and allowed sufficient time to likely develop immunity to Covid-19 is the fairer course than revisiting ROs.

27. Alternatively, if contrary to the submissions above, the Chairman considers the ROs should be reconsidered, then there should be further consultation on the appropriate approach to take to that exercise with a real risk that the scheduled hearing dates for T1P2 are put in jeopardy by the revisiting exercise.

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