**IN THE MATTER OF THE UNDERCOVER POLICING INQUIRY**

**BEFORE SIR JOHN MITTING**

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**FURTHER SUBMISSIONS ON BEHALF OF AUDREY ADAMS, RICHARD ADAMS AND KEN LIVINGSTONE ON THE EQUALITY ACT 2010 AND AUDIO-VISUAL STREAMING**

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## Introduction

1. These submissions on behalf of Audrey Adams, Richard Adams and Ken Livingstone are made in accordance with the Chairman's direction at the conclusion of the hearing on 26th January 2021. They should be read in conjunction with our earlier submissions dated 21st January 2021 and the submissions on behalf of the wider group of Non-State Core Participants ("NSCPs") dated 2nd February 2021. We are keen to avoid unnecessary duplication or repetition.

2. We address herein several key questions relating to the applicability of the Equality Act 2010 ("the EA") to an important operational activity of the Inquiry, namely the conduct of its evidential hearings.

3. In summary, we submit that:

    a) The Chairman's decision to limit audio-visual streaming to the hearing venue, his home and the transcribers does not constitute the exercise of a judicial function and is, therefore, not exempt from the provisions of the EA.

b) The Chairman's decision as to audio-visual streaming indirectly discriminates on the grounds of age, disability, and race.

c) Although the restriction orders ("ROs") were made by the Chairman in the exercise of a judicial function, they cannot convert a non-judicial decision made subsequently as to audio-visual streaming into a judicial decision.

d) The ROs were made in pre-pandemic times. They are outdated and cannot be relied on as the legitimate aim to justify the denial of audio-visual streaming to all those who cannot attend the hearing venue.

e) The Chairman's decision as to audio-visual streaming is not a proportionate means of achieving a legitimate aim.

f) There is sufficient time before the start of T1P2 to revisit and review the ROs in respect of the ten undercover police officers due to give oral evidence in T1P2.

g) Even if the Chairman were to conclude that his decision as to audio-visual streaming is judicially exempt from the provisions of the EA, he has an overriding duty to act fairly under s17(3) of the Inquiries Act 2005 and ordinary judicial decision-making principles and an overriding duty not to discriminate under the Human Rights Act 1988.

**Judicial function**

4. The judicial function exemption in the EA is to be found in Schedule 3 and Schedule 18.

5. Paragraph 3 of Schedule 3 pertains to service providers and persons exercising public functions. It provides that:

> "*(1) Section 29 does not apply to—*
> *(a) a judicial function;*
> *(b) anything done on behalf of, or on the instructions of, a person exercising a judicial function;*
> *...*
> *(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.*"

6. Paragraph 3 of Schedule 18 pertains to the Public Sector Equality Duty ("PSED"). It provides that:

> "*(1) Section 149 does not apply to the exercise of—*
> *(a) a judicial function;*
> *(b) a function exercised on behalf of, or on the instructions of, a person exercising a judicial function.*
> *(2) The references to a judicial function include a reference to a judicial function conferred on a person other than a court or tribunal.*"

7. Paragraph 921 of the Explanatory Notes to the EA addresses the Schedule 18 exemption. It states that:

> "*Paragraph 3 disapplies the equality duty in respect of judicial functions or functions exercised on behalf of, or on the instructions of, a person exercising judicial functions. A judicial function includes judicial functions which are carried out by persons other than a court or tribunal, for example courts martial.*"

8. In *R (Howard) v Official Receive*r [2014] QB 930 at §147-206, the High Court addressed the meaning of judicial function under Schedule 18 of the EA. Sir Nicholas Stadlen held that:

a) The Official Receiver was exercising a judicial function within the meaning of paragraph 3 of Schedule 18 when deciding whether to revoke a debt recovery order.

b) Accordingly, in making that decision, the Official Receiver was not subject to the public sector equality duty under section 149 of the EA.

9. At §162 and 163, Sir Nicholas stated that:

> "*162. Allied to this aspect of public policy which in my judgment explains the exclusion of section 149 in the case of judges exercising judicial functions, if not central to it, is the fact that part of what judges do is to determine the rights and liabilities of people. Usually they determine the rights and liabilities of people who appear in front of them whether in a civil or criminal case. However in some situations they may determine the rights and liabilities of persons who are not before the court. An obvious example*

*is an order freezing a person's assets made on an ex parte application. Even though that person has a right to apply later to set aside the freezing order, until and unless the order is set aside the order has determined his right to dispose of his assets as he wishes and indeed it may deprive him forever of disposing from in a particular way such as acquiring a unique asset which is only available in the period between the making and setting aside of the order. Although the context was different it is of interest that in Bottomley v Brougham [1908] 1 KB 584, 588 Channell J held that the fact that the official receiver made a report ex parte made no difference to the fact that in performing his statutory duty to inquire in a judicial way into certain matters under the 1890 Act he was acting in a judicial capacity:*

> *"A judge in hearing an ex parte application is still acting as a judge and the absolute privilege applies quite as much as when he is hearing a case in which both parties appear."*

*163. It is in the nature of civil litigation that is the judge's duty to determine the rights and liabilities of the parties in accordance with the relevant law and the parties are entitled to expect and the rule of law depends on the certainty that the judge will do so.* ***In that vital respect the process by which a person's rights and/or liabilities are determined with binding legal effect is in my judgment materially different from the very many situations in which the public sector public bodies take decisions which may foreseeably or even inevitably have an impact on or affect one or more individuals.*** *Often such decisions involve difficult questions of allocating scarce resources.* ***The application to such decisions of the public sector equality duty does not involve the same conflict as that to which I have referred in the context of judicial decision making***." [Our emphasis]

10. In *R (Adath Yisroel Burial Society) v Inner North London Coroner* [2019] QB 251, the Divisional Court considered the lawfulness of a Coroner's blanket policy relating to burials that did not prioritise the religious requirements of the orthodox Jewish community. At §143, Singh LJ found that the Coroner's policy was in breach of section 29 of the EA and indirectly discriminatory on the grounds of religion.

11. In *Royal Aquarium & Summer & Winter Garden Society Ltd v Parkinson* [1892] 1 QB 431 at 442-443, Lord Esher MR stated that:

> *"It was argued, in the first place, on behalf of the defendant, that he was exercising a judicial function when he spoke the words complained of, and was therefore entitled to absolute immunity in respect of anything he said. It is true that in respect of statements made in the course of proceedings*

*before a Court of justice, whether by judge, or counsel, or witnesses, there is an absolute immunity from liability to an action. The ground of that rule is public policy. It is applicable to all kinds of Courts of justice; but the doctrine has been carried further; and it seems that this immunity applies wherever there is an authorized inquiry which, though not before a Court of justice, is before a tribunal which has similar attributes. In the case of Dawkins v Lord Rokeby, the doctrine was extended to a military Court of inquiry. It was so extended on the ground that the case was one of an authorized inquiry before a tribunal acting judicially, that is to say, in a manner as nearly as possible similar to that in which a Court of justice acts in respect of an inquiry before it. This doctrine has never been extended further than to Courts of justice and tribunals acting in a manner similar to that in which such Courts act. Then can it be said that a meeting of the county council, when engaged in considering applications for licences for music and dancing, is such a tribunal? It is difficult to say who are to be considered as judges acting judicially in such a case. The manner in which the business of such a meeting is conducted does not appear to present any analogy to a judicial inquiry. Again, there is another consideration. It is argued for the plaintiffs that this function of granting licences, which has been transferred from the justices to the county council, is not judicial, but merely administrative. The justices had two distinct and separate duties. They had judicial duties. They had to try criminal cases, and in respect of that duty they would be entitled to the absolute immunity which I have mentioned. They also had administrative duties, one of which was this duty of granting licences, and for the purpose of performing these they held consultations among themselves. In the case of duties properly administrative, such as that of granting licences, their action was consultative, for the purpose of administration, and not judicial. When such duties are transferred to the county council, what they do in respect of them is likewise consultative for the purpose of performing an administrative duty; it is not judicial. That consideration also appears to me to shew clearly that the case does not come within the doctrine of absolute immunity applicable to tribunals similar to Courts of justice.*"

**Provision of services**

12. Section 29(1) of the EA provides that:

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

13. The provision of services is defined broadly in sections 31(2), (3) and (4) of the EA:

> *"(2) A reference to a provision of a service includes a reference to the provision of goods and facilities.*
> *(3) A reference to a 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 1988."*

**Submissions**

14. The Chairman's decision to limit audio-visual streaming to the hearing venue, his home and the transcribers constitutes the provision of services and facilities in the exercise of a public function pursuant to sections 29(1), 31(2) and 31(3) of the EA.

15. This is a public Inquiry about undercover policing which is, by its very nature, a matter of public interest and concern. The Inquiry provides a service to the public by carrying out its terms of reference. It provides a service to a section of the public, namely the core participants and others with an interest in the Inquiry, through its evidential hearings, thus enabling them to see and hear the evidence. As part of that service, the Inquiry provides facilities, such as a hearing venue and a daily transcript. Accordingly, the Inquiry is a service provider, pursuant to sections 29(1) of the EA.

16. The Chairman's decision as to audio-visual streaming does not constitute a decision in the exercise of a judicial function.

17. A decision about the practical arrangements by which the core participants and the wider public can access the Inquiry's evidential hearings, whether taken by the Chairman or a member of the Inquiry team, does not result in the determination of either rights or liabilities with binding legal effect, of the kind envisaged in *Howard* (ante), to which the judicial function exemptions in Schedule 3 and 18 of the EA apply. A decision about the way in which access to the evidential hearings is provided is one of those "very many situations in which the public sector public bodies take decisions which may foreseeably

or even inevitably have an impact on or affect one or more individuals", again as envisaged in *Howard* (ante). It is a policy decision, akin to the policy relating to burials in *Adath Ysiroel* (ante), and/or an administrative decision, akin to the granting of licences in *Royal Aquarium* (ante).

18. The Chairman's decision as to audio-visual streaming plainly has an impact on multiple individuals, as set out in detail in our earlier submissions and those of the wider group of NSCPs on the same issue. Applying the PSED to a decision about access to the evidential hearings does not involve the same sort of conflict that would arise, were the PSED applied to a decision made in the exercise of a judicial function.

19. We dealt with the issue of justification in some detail in our earlier submissions and do not repeat those submissions herein. For these purposes, we address the point as to whether the existence of restriction orders ("ROs") can be used as justification for the decision as to audio-visual streaming, given the former decisions were in the exercise of a judicial function and the latter was not.

20. Theoretically, there is no barrier to relying on decisions made in the exercise of a judicial function as justification for a subsequent policy or administrative decision to which section 29 or 149 of the EA applies. However, as argued in our earlier submissions, such decisions must be a legitimate aim before they can justify the policy or administrative decision. The burden is on the Inquiry.

21. The fact that a decision relied upon as a legitimate aim was made in the exercise of a judicial function does not convert a subsequent policy or administrative decision into a decision made in the exercise of a judicial function. A decision-maker can exercise dual functions, some judicial and some administrative.

22. If a decision made in the exercise of a judicial function is relied on to justify a policy, the same considerations must apply as with any other justification advanced. The judicial decision must be capable of being legitimate, must in fact be legitimate and must be

rational. The fact that a RO is a judicial decision cannot by itself amount to a legitimate aim. The RO must be relevant to be rational. In the circumstances, several points arise:

a) A RO that is out of date cannot be relevant. For example, a RO made in 2018 protecting the privacy or safety of a witness who is now deceased would not be relevant in 2021 and could not amount to a legitimate aim. Likewise, a RO made in 2018 protecting the privacy of a witness's child would not be relevant in 2021 and could not amount to a legitimate aim, if the child is now an adult.

b) The Inquiry's ROs were made in pre-pandemic times and in radically different circumstances. They were made following a balancing act between the fundamental principle of public justice and the individual rights of undercover police officers. However, the public nature of the Inquiry has fundamentally changed. The regulations in relation to court hearings and the dangers of attending a public venue in central London fall to replace the outdated, pre-pandemic circumstances in the balancing act.

23. Obviously, it is only when the legitimate aim has been established that it is possible to devise and assess a policy or arrangement and whether it amounts to a proportionate means of achieving a legitimate aim.

24. The burden is on the Inquiry to justify a discriminatory arrangement and, therefore, to demonstrate that the aim is legitimate. The Inquiry must show that the appropriate balancing act has been carried out, in light of the facts and circumstances that apply in 2021, not those that applied in pre-pandemic times. This plainly requires that the ROs on which the Inquiry seeks to rely are revisited. The judicial function exemptions are irrelevant to a review of ROs in circumstances where the operational activity involves an administrative or policy decision as to how the evidential hearings are transmitted to the public.

25. There is a viable option for resolving the issue of ROs in a timely manner and without any need to delay the T1P2 evidential hearings. A minded-to note could be prepared, stating

that the Chairman is minded to revisit the ROs. A short timescale could be provided for submissions from each relevant witness, dealing with whether the RO is still required, whether any evidence of a change in position should be provided or confirmation that the position has not changed. A further short deadline for submissions in response ought to follow.

26. Finally, during the hearing on 26th January 2021, whilst discussing with Owen Greenhall the likely process, were the ROs of the ten officers giving oral evidence in T1P2 to be revisited, the Chairman raised the issue of a possible challenge to the lawfulness of any decision he might make and the impact this would have on the timetable (see transcript of 26/1/21 hearing, p62). It would be wrong in principle for the Chairman to be influenced in any way into making an unlawful, discriminatory decision about audio-visual streaming by a police core participant threatening judicial review.

**Conclusion**

27. If the Chairman determines that the Inquiry's operational arrangements as to audio-visual streaming are not subject to the EA, this does not exempt him from his duties to equality and fairness. Principles of judicial conduct now require all justices to act without bias. Even if the Chairman's decision on access to the hearings is exempt from the EA on the basis that it was made in the exercise of a judicial function, the Chairman is still bound by the judicial values that attaches to such a function.

28. Each court or tribunal has its own guidelines (see, for example, the Supreme Court's guidelines at https://www.supremecourt.uk/docs/guide-to-judicial-conduct.pdf). The equality principle is a key value in the Supreme Court's Guide to Judicial Conduct:

> *"EQUALITY*
>
> *6.1 A Justice should be aware of, and understand, diversity in society and differences arising from matters such as gender, race, ethnicity, colour, national origin, religion, caste, disability, birth or marital status, sexual orientation, socioeconomic or educational or*

*occupational background, and the like. A Justice will not, by words or conduct, show any bias against or preference towards any person or group on any such ground.*

*6.2 In court, the Justices will strive to ensure that no one in the court is exposed to any display of bias or prejudice on any such ground and that all are treated with equal respect by the Justices, their staff and everyone appearing in or attending the court. The court will strive to make reasonable adjustments for people with disabilities and for those who wish to manifest their religion, so far as it is practicable to do so."*

29. We trust the Chairman will not want for moral reasons to discriminate against those who have protected characteristics by excluding them from seeing and hearing the evidence put before the Inquiry. The Chairman will appreciate that to do so would undermine public confidence and the confidence of the NSCPs in the Inquiry.

**RAJIV MENON QC**
**UNA MORRIS**
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**2nd February 2021**