Directions on the conduct of the Tranche 1 Phase 2 (T1 P2) hearings

Directions

1. The hearings will take place from 21 April to 14 May 2021. The first three days will be devoted to opening statements. 22 April is the 28th anniversary of the murder of Stephen Lawrence. If opening statements can be accommodated within two days, as a mark of respect to him and his family, the Inquiry will not sit on 22 April. If they cannot, proceedings will be shortened on 22 April, to the same end. The next 15 working days will be devoted to the receipt of evidence.

2. Opening statements will be made virtually and be live-streamed to the public at large. The reading of written statements and summaries will also be live-streamed to the public at large.

3. The oral evidence of witnesses will be given virtually and be live-streamed to a hearing room in the Amba hotel, as in Tranche 1 Phase 1 (T1 P1). A rolling transcript with a 10-minute delay capable of being paused and rewound will be published, as in the second part of the evidential hearings in T1 P1. It is likely that this facility will only be provided for T1 P2, because of its cost. A transcript will be published at the end of each morning and afternoon session setting out the oral evidence given in that session. As in T1 P1, the written statement of the witnesses and relevant documents will be published shortly before they give evidence.

4. An encrypted audio transmission of the oral evidence will be made by a Zoom webinar, with a 10-minute delay, to those who apply for access to it, identify themselves and log in to receive it. It will not be uploaded onto the Inquiry's website. The transmission will be watermarked and geo-fenced. The link will not work if forwarded to another recipient. A restriction order will be made prohibiting recording of the evidence and displayed to the recipient during transmission. If, for any reason particular to an individual former undercover officer who is to give live evidence, an objection is raised to the transmission, by this means, of his or her evidence, it must be made within 14 days of today.

5. No audio-visual transmission of the evidence will be made outside the hearing room except in the case of any witness who requests it. That will be achieved, at the election of the witness, by live-streaming their evidence with a 10-minute delay or by making a video recording of it and posting it on the Inquiry's website.

6. Witnesses will be questioned by Counsel to the Inquiry. The Recognised Legal Representatives of any Core Participant may propose lines of questioning or topics to Counsel to the Inquiry by 16 April 2021. A meeting or meetings on 19 and/or 20 April 2021 (which may be virtual) will be arranged between Counsel to

the Inquiry and those who propose such questions or topics to ensure that they are understood.

7. Counsel instructed by the Recognised Legal Representative of the witness will be permitted to ask questions at the conclusion of his or her oral evidence about any topic covered in the oral or written evidence of the witness. If more than 10 minutes is required for this exercise, permission must be sought on the day.

8. At the conclusion of the evidence of a witness, there will be a 15-minute pause to permit counsel for a Core Participant to apply for permission to ask questions of the witness about any topic or issue which has arisen unexpectedly during the course of the evidence given by the witness. The request can be raised in the first instance with Counsel to the Inquiry who may agree without the need to refer the matter to me. If no such agreement is reached, the request must be made to me and I will determine it.

9. Any request to question a witness about a topic not covered in their oral or written evidence, whether by their own counsel or by counsel for another Core Participant, must, in the first instance in made to Counsel to the Inquiry. The evidential foundation for the request must be disclosed. If Counsel to the Inquiry does not agree, the request will be determined by me. This process should, save for good reason, be completed by 20 April 2021.

10. There will not be a period of 30 minutes at the conclusion of the oral evidence of a witness during which counsel for a Core Participant may question the witness about any topic not covered in paragraphs 8 and 9.

Reasons

11. Mr Menon QC, on behalf of Audrey Adams, Richard Adams and Ken Livingstone submitted that the provisions of the Equality Act 2010 required me, as Chairman of the Inquiry, to set up an audio-visual live stream of the oral evidence, to permit those unable or unwilling to attend the hearing rooms by reason of a protected characteristic to hear and see that evidence. This submission requires a careful examination of the nature and statutory foundation of the Inquiry and of the provisions of the 2010 Act which apply to it and to me, as its chairman.

12. The Inquiry was set up to enquire into “particular events (which) have caused, or are capable of causing public concern” under terms of reference set by the Secretary of State for Home Affairs: Inquiries Act 2005 sections 1 (1) (a) and 5 (1) (b) (1). To that end, it must determine facts and make recommendations: section 5 (6) (b) and (c).

13. Mr Menon submits that in performing those functions, I am providing a service to the public at large and so am a service provider under section 29 (1) of the 2010 Act. I disagree. The determination of facts about events which have caused public concern and the making of recommendations to the Secretary of State cannot sensibly be categorised as the provision of a service to the public or a section of the public. The functions combine those of a body such as court, determining criminal culpability or civil liability and those of a group, typically a committee, set up to make recommendations about the conduct of policy to government. My position fits squarely within section 29 (6) of the 2010 Act: "A person must not, in the exercise of a public function that is not the provision of the service to the public or a section of the public, do anything that constitutes discrimination…"

14. That duty is subject to the exception contained in paragraph 3 of schedule 3: it does not apply to "a judicial function", which includes "a judicial function conferred on a person other than a court or tribunal".

15. It is self-evident, and Mr Menon rightly concedes, that in conducting much of the work of the Inquiry I am performing a judicial function – to take the simplest example, hearing the evidence of a witness and determining whether it is truthful and reliable. The determination of other issues about witnesses also requires the performance of a judicial function: for present purposes, the most significant is whether or not a restriction order should be made under section 19 of the 2005 Act in respect of the true identity of a witness. In the case of many state and non-state witnesses (almost all of whom are Core Participants), I have determined whether or not a restriction order should be made in respect of their true identity. I do not understand Mr Menon to dispute that, in so doing, I was performing a judicial function.

16. Determining the measures necessary to uphold a restriction order in respect of the true identity of a witness is also the exercise of judicial function - for example, in a traditional hearing room, deciding whether or not the provision of a screen is required, to shield the witness from those present.

17. Nine former undercover officers are due to give live oral evidence in T1 P2. Restriction orders in respect of their true identity have been made in each case. Each order provides that "There shall be no disclosure or publication of any evidence or document given, produced or provided to the Inquiry which discloses HN XX's real identity (including any description or image capable of identifying HN XX)".

18. Mr Greenhall submits that this restriction does not prohibit the publication by the Inquiry of an image capable of identifying HN XX. He is, as a matter of language

correct: the orders made do not, in terms, bind the Inquiry team, but each states that the Inquiry team will take its own measures to ensure that information the subject of the order is not disclosed in such a way as to undermine its intended effect. That imposes a practical and, ultimately, legal obligation on the Inquiry. If the Inquiry team were not to take those measures, the Inquiry would be open to legal challenge by those in respect of whom restriction orders have been made, to which it would have no answer. The broadcasting of an image by live-streaming by the Inquiry would be something which would require it to flout its obligation. The Inquiry has, so far, been careful to ensure that disclosure of an image of a witness via live stream to a hearing room would not do so. Live-streaming to a hearing room under its control, to a limited number of people, subject to a restriction order prohibiting recording of the image, is not materially different from the giving of evidence by HN XX in person in the hearing room. Publication of the evidence of HN XX, including his image, outside a hearing room under the control of the Inquiry would breach its obligation.

19. Section 18 (1) of the 2005 Act provides a simple answer to Mr Menon's core submission: it states: "Subject to any restrictions imposed by notice or order under section 19, the chairman must 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". Live-streaming of the oral evidence of the officers to the public at large (including reporters) would contravene restriction orders. I am prohibited by section 18(1) from doing so. Even if, as Mr Menon contends, the provision of this facility to the public is the provision of a service within section 29 of the 2010 Act, it would contravene the restriction order for me to order or arrange for the live-streaming of the oral evidence of the officers to the public at large (including reporters).

20. The position in relation to Core Participants and their legal representatives is more nuanced and is governed by section 17(1) and (3) of the 2005 Act, which provide that the "procedure and conduct of an inquiry are to be such as the chairman of the inquiry may direct" and that "in making any decision as to the procedure or conduct of an inquiry, the chairman must act with fairness…". Decisions as to the manner in which the evidence of former undercover officers is to be received are made in the exercise of a judicial function: I determine which of them should give oral evidence and for those who will, what steps are necessary to permit them to do so and to uphold the restriction orders already made in relation to them. Decisions to facilitate the transmission of their evidence to Core Participants and their Recognised Legal Representatives outside the hearing room and the manner in which it is to be achieved and the restrictions, if any, to which it is to be subject

are as much decisions made in the exercise of a judicial function as a decision to screen a witness in a hearing room. The only relevant legal obligation imposed upon me, by section 17(1) and the common law is that I must act with fairness. The decisions made in paragraphs 4 and 5 are made in the exercise of a judicial function and so are exempt requirements of the 2010 Act.

21. Mr Menon and Mr Greenhall submit that, in any event, I should revisit the restriction orders and either revoke or qualify them to permit live-streaming of the evidence to those who are unable, by reason of a protected characteristic, to attend the hearing rooms. It is unclear from Menon's submission whether he accepts that in so doing and/or in taking a decision about whether or not to do so, I would be exercising a judicial function. In paragraph 24 of his written submission dated 2 February 2021, he states "The judicial function exemptions are irrelevant to a review of RO's in circumstances where the operational activity involves an administrative or policy decision as to how the evidential hearings are to be transmitted to the public." I have no doubt that I would be exercising a judicial function, in either case. In deciding whether or not to revoke or qualify a restriction order, I would have to balance the competing claims of witnesses to the right to respect for their private life under article 8 ECHR with the right of the public and of Core Participants to see and hear their evidence. I would also have to determine the impact on the quality of their evidence that such a step might produce. This is a classic judicial function. I would also be exercising a judicial function in deciding whether or not to embark on the exercise, for similar reasons.

22. Despite that, I do wish to ensure that the proceedings in T1 P2, including the evidence given by the undercover officers, are capable of being followed both by the public (including reporters) and by Core Participants who cannot be present in the hearing rooms. The steps required to achieve this are those set out in paragraphs 2 to 5 of the directions.

23. If I am wrong to conclude that those decisions are made in the exercise of a judicial function and so are exempt from the provisions of the 2010 Act, I must address the disadvantage which will undoubtedly be caused to those with protected characteristics which prevent or discourage them from attending the hearing rooms in current circumstances. Whether they are members of the public or Core Participants, they will not have the opportunity to see as well as hear the nine undercover officers as they give evidence. If they are to be treated as members of the public under section 18 (1) of the 2005 Act this is the unavoidable consequence of the requirement to uphold restriction orders already made. If, as I prefer, the issue is to be dealt with under section 17 (1), I have to consider

whether or not it is fair and a proportionate means of achieving a legitimate aim. For the reasons set out below, I am satisfied that it is.

24. Each of the nine officers has known for the last 2 to 3 years that his identity will be protected and that no image capable of identifying them will be disclosed or published by the Inquiry. They have prepared to give their evidence on that footing. Save that they are all of some age, their circumstances differ; but it would be surprising if a majority of them would not be alarmed about a last-minute change in a matter of importance to them. That and the prospect of having their evidence and face live-streamed outside the hearing room would be likely to have an adverse impact upon the evidence which they will give and diminish its quality. The experience of T1 P1 has demonstrated that elderly former officers have evidence of value to give to the Inquiry and have done their best to do so. I have every reason to expect that the same will be true in T1 P2. I am unwilling to take a step which will put that at risk and is also likely to have an adverse impact on their right to respect for private life under article 8 ECHR.

25. On the other side of the balance, the disadvantage to those who can hear, but not see, the witness is not great. A reasonable analogy is the difference between hearing a news broadcast or interview on the wireless and doing so on the television. In terms of understanding what a newsreader or interviewee is saying and forming a view about the manner in which they are saying it, there is little to choose between the two. The only material difference is the ability of a television screen to show pictures of events which have occurred or are occurring. That difference does not apply to evidence given to the Inquiry. What matters is what the witness says and how he or she says it.

26. For those reasons, I am satisfied that the difference between a Core Participant hearing the evidence on an audio link and hearing and seeing the witness by live stream is justified; or, to put it in statutory language, the provision of an audio link permitting Core Participants and members of the public who take advantage of the facility offered, is fair and is a proportionate means of achieving the legitimate aims of upholding the right to respect for the private life of witnesses under article 8 ECHR and permitting the Inquiry to obtain the best evidence which they can give from them. I am also satisfied that, in relation to those with disabilities which inhibit them from attending a hearing room, it is a reasonable adjustment to make to minimise the effect of the disabilities.

27. I do not propose to set out the practical difficulties which would be occasioned to the Inquiry and to those who represent the witnesses if the steps proposed by Mr Menon and Mr Greenhall were to be taken to revisit the restriction orders in place, save to say that I am satisfied that they have underestimated them substantially.

Doing so would distract the staff of the Inquiry and of the Recognised Legal Representatives of the witnesses from the task of preparing for evidential hearings which will begin on 26 April 2021, to an extent far greater than they have claimed. In current circumstances, it is essential that nothing occurs which would distract them from that task.

28. The questioning of witnesses in T1 P1, in particular by Mr Menon, has demonstrated the need for the direction set out in paragraph 9. He has provided a detailed explanation of what caused him to ask some of the questions which gave rise to the difficulties then encountered. The explanation has been provided in confidence and I will respect that confidence. If he had been able to provide that explanation to Counsel to the Inquiry in the first place and to me if necessary, he would not have been permitted to ask the questions that he did. The primary responsibility to respect and, where possible, uphold the rights of others lies on me. Of necessity, the Inquiry is likely to have learnt more about the circumstances of most of them than any questioner for a Core Participant could have done. The best practicable means of discharging that duty, in relation to questioning by counsel other than Counsel to the Inquiry, is the direction set out in paragraph 9.

29. Nothing set out in paragraph 28 is intended to detract from my willingness to permit questioning of witnesses by counsel on behalf of Core Participants who are willing to give evidence about matters of significance to the Inquiry which only they and the witness can know. Ms Williams QC submitted that, in the case of some Category H Core Participants, this course may be undesirable. I have always intended that it should be permissible, not mandatory. It may in fact arise in T1 P2. I will address it once I have the witness statement of the Category H Core Participant concerned. I will, of course, consider representations made on her behalf and, if necessary, on behalf of the officer concerned before deciding how to proceed.

05 February 2021

Sir John Mitting
Chairman, Undercover Policing Inquiry