Counsel to the Inquiry's Submissions on Section 2 Inquiries Act 2005 and the Relevant Legal Framework applicable to Undercover Policing in the Tranche 1 Era

Introduction

1. These written submissions address two linked legal issues which are important to the work of the Inquiry. First, the proper interpretation of s.2 Inquiries Act 2005, which prohibits the determination of liability by this Inquiry and, second, the relevant legal framework applicable to undercover policing in England and Wales during the Tranche 1 era. We deal with the 2005 Act in Part 1 below, the relevant legal framework on Part 2 and discuss the effect of s.2 on the Inquiry's work in Part 3.

Part 1 – Section 2 Inquiries Act 2005

The Statutory Provision

2. Section 2 Inquiries Act 2005 provides that:

> *"(1) An inquiry panel is not to rule on, and has no power to determine, any person's civil or criminal liability.*
>
> *"(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."*
>
> (Emphasis added)

3. The central element of this provision is a clear prohibition against *ruling* on *any person's* civil or criminal liability. But, as subsection 2 makes clear, the prohibition does not prevent an inquiry panel from making any *factual* findings it needs to make even if there is a likelihood of liability being *inferred* from such findings.

4. The Explanatory Note which accompanied the 2005 Act emphasises the need for an inquiry fearlessly to investigate the facts. Paragraphs 8 & 9 thereof state, in relation to s.2, that:

> *"The purpose of this section is to make clear that inquiries under this Act have no power to determine civil or criminal liability and must not purport to do so. There is often a strong feeling, particularly following high profile, controversial events, that an inquiry should determine who is to blame for what has occurred. However, inquiries are not courts and their findings cannot and do not have legal effect. The aim of inquiries is to help to restore public confidence in systems or services by investigating the facts and making recommendations to prevent recurrence, not to establish liability or to punish anyone.*

However, as subsection (2) is designed to make clear, it is not intended that the inquiry should be hampered in its investigations by a fear that responsibility may be inferred from a determination of a fact."

Pre-2005 Act Inquiries

The Bloody Sunday Inquiry

5. Section 2 addressed an issue which predated the 2005 Act. For example, The Bloody Sunday Inquiry, which was conducted under the Tribunals of Inquiry (Evidence) Act 1921, addressed the limits of its decision-making powers. It did so in a ruling dated 11 October 2004 on the requisite standard of proof (see Vol.10, section A2.41 of that inquiry's final report, especially paragraphs 8,18 & 23 Report of the Bloody Sunday Inquiry - GOV.UK (www.gov.uk)). The panel acknowledged that it was not its function to determine rights and obligations of any nature and that its proceedings were not a trial of any nature: *"…since we are an Inquiry and not a Court (criminal or civil) we cannot give a verdict or pass a judgment on the question whether an individual was guilty of a specific crime or legally recognised serious wrongdoing. For the same reason the terminology and requirements of the criminal or civil law are largely inapplicable…"* (para.18). However, foreshadowing s.2 of the 2005 Act, it concluded that it was not to be inhibited from making factual findings which implied or suggested criminality or serious misconduct:

"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. Thus, to take an example, we cannot accept that we are precluded in our report from analysing and weighing the evidence and giving our reasons for concluding that in the case of a particular shooting, we are confident that it was deliberate, that there was no objective justification for it, and though we are not certain, that it seems to us more likely than not that there was no subjective justification either. Of course we would have in mind the seriousness of the matter on which we were expressing a view, but that is not because of some rule that we should apply, but rather as a matter of common sense and justice". (Para.23)

6. The Bloody Sunday Inquiry went on to make specific findings about the shootings examples of which we are appending to these submissions (see Appendix A). Of particular note, it dealt with the lawfulness of arrests on Bloody Sunday at Vol.9, Chapter 196 of its final report, finding, amongst other things, at paragraph196.21, that:

> *"In the light of this evidence it appears doubtful, either as a matter of common law or on the basis of the retrospective validation of the regulations relating to soldiers under the Special Powers Act, that the arrests made on Bloody Sunday were lawfully made. We consider elsewhere in this report the question whether arrests were made in good faith".* (Emphasis added).

Other Common Law Jurisdictions

7. The need to avoid determinations of criminal or civil liability, without prejudicing an inquiry's work, has also arisen in other common law jurisdictions. The Supreme Court of Canada has ruled that a public inquiry should not duplicate the wording of the Canadian Criminal Code; should endeavour to avoid making evaluations of its findings of fact in terms that are the same as those used by courts to express findings of civil liability; and should try to avoid language that is so equivocal that it appears to be a finding of civil or criminal liability[1].

2005 Act Inquiries

The Billy Wright Inquiry

8. The High Court of Northern Ireland refused leave for an application for judicial review of the Secretary of State's decision to refuse to amend the terms of reference of the Billy Wright Inquiry which were: "*To inquire into the death of Billy Wright with a view to determining whether any wrongful act or omission by or within the prison authorities or other state agencies facilitated his death, or whether attempts were made to do so; whether any such act or omission was intentional or negligent; and to make recommendations"*. Mr Justice Weatherup (as he then was) held that although the terms of reference could be interpreted in a way which offended s.2(1) Inquiries Act 2005, they did not have to be: *Re an application by Steven Davis for leave to apply for judicial review*[2].

[1] See the helpful review of common law cases in *Public Inquiries, Oxford University Press, 2011,* by Jason Beer QC et al. at 2.129-2.142, esp. 2.138, and *Canada (Attorney-General) v Canada (Commission of Inquiry on the Blood System*) [1997] 3 SCR 440 at pp.469-470, para. [52] - internal pages 30-31/44.

[2] [2007] NIQB 126 at p.4, from para. [14]. See also Beer, op. cit., at 2.114 – 2.116 for further commentary on this challenge.

The Azelle Rodney Inquiry

9. The Azelle Rodney Inquiry investigated the death of Azelle Rodney who was shot by a police officer. The Chairman, Sir Christopher Holland, considered s.2 of the 2005 Act and analysed it in the following terms (at paragraph 1.6.2 of his report).

> *"Section 2 of the 2005 Act reads as follows: "(1) An inquiry panel is not to rule on, and has no power to determine, any person's civil or criminal liability. (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." That is at once a restrictive and a permissive provision. I am not given the task of determining civil or criminal liability, but neither am I inhibited from making findings which amount to the constituents of civil wrongs or criminal acts."* (Emphasis added).

10. Sir Christopher went on expressly to find that the fatal shooting of Azelle Rodney, by police, was unlawful: see paragraph 21.13 of his report, set out below[3].

> *"I summarise the resultant overall position as follows. First, on the basis of my findings as to fact and my analysis of the issues for address by this Inquiry, I have to find that there was no lawful justification for shooting Azelle Rodney so as to kill him. Thus, granted that E7 had an honest belief that Azelle Rodney posed a threat to himself or to other officers, this threat was then not such as to make it reasonably necessary to shoot at him. Second, on the alternative factual basis of E7's description of the movements and posture of Azelle Rodney as seen through the Golf's rear offside window and on the alternative legal basis provided by the criminal law, I similarly have to find that there was no lawful justification for shooting so as to kill. As to opening fire on Azelle Rodney on this alternative premise, although I have some difficulty in accepting that this was reasonable for the prevention of crime in the perceived circumstances, I have to recognise and give weight to the subjective considerations embodied in Section 76(3) and (7). That said, I am wholly satisfied that firing so as to kill him (shots 5, 6, 7 and 8) was disproportionate and therefore unreasonable (Section 76(6)) and unlawful. There was little justification for shots 2, 3 and 4 and no justification for the ensuing shots."*

11. Sir Christopher's findings expressly took into account both the civil and criminal law tests for the use of lethal force, as is clearly recorded in paragraphs 31 & 32 of the Executive Summary[4]:

[3] The Azelle Rodney Inquiry Report HC 552 Session 2013-2014 (publishing.service.gov.uk) The references to various subsections of s.76 are to s.76 Criminal Justice and Immigration Act 2008.
[4] The executive summary of the Azelle Rodney Inquiry report HC 551 Session 2013-2014 (publishing.service.gov.uk)

"31. On the basis of UK civil law, and of the law applied by the European Court of Human Rights, the report asks whether E7 believed, for good reason, that Azelle Rodney presented a threat to his life or that of his colleagues such that it was proportionate to open fire on him with a lethal weapon. The answer is that he did not.

"32. The report then poses an alternative question. That is framed on the basis of UK criminal law, and assumes that, contrary to the Chairman's actual findings, E7 believed that Azelle Rodney had picked up an automatic weapon. Would it have been proportionate to fire the shots that killed Azelle Rodney? The answer would be no. That is because, even if it was proportionate to open fire at all, there would have been no basis for firing the fatal fifth to eighth shots"

The Baha Mousa Inquiry

12. The Baha Mousa Inquiry investigated and reported on the abuse of detainees by British soldiers in Iraq. Its Chairman, Sir William Gage, declined to rule on whether torture was committed, after considering the terms of s.2 of the 2005 Act. See paragraph 2.1329 of his report The Baha Mouse Public Inquiry Report HC 1452-I (publishing.service.gov.uk):

"Firstly, by section 2 of the Inquiries Act I have no power to rule on or determine any person's civil or criminal liability, although I am not to be inhibited in the discharge of my functions by any likelihood of liability being inferred from the facts that I determine. Secondly, torture is a specific crime both in domestic and international law. It is not appropriate that I should rule on whether torture was committed during the events of 14 to 16 September 2003. Thirdly, my task is to determine the facts. It is for others to decide what, if any, category of criminal or civil liability they give rise to."

The Al-Sweady Inquiry

13. The Al-Sweady Inquiry also investigated and reported on allegations of abuse by British soldiers in Iraq. Its Chairman, Sir Thayne Forbes, by reason of s.2 of the 2005 Act, declined to determine whether Article 3 of the European Convention on Human Rights was either engaged or breached. See The Report of the Al Sweady Inquiry (publishing.service.gov.uk) at paragraphs 1.28-1.29 set out below:

"I am satisfied that the terms of reference do not require me to make a finding as to whether Article 3 is engaged by reference to any of the many allegations of ill-treatment with which this Inquiry is concerned. Indeed, as I have already indicated, section 2(1) of the Inquiries Act 2005 prohibits me from making any findings of criminal or civil liability. I am therefore of the view that I am not required to nor do I

have the power to determine whether any of the many and various allegations of "ill-treatment" actually amounts to a breach of Article 3. 7 [2009] EWHC 2387 8 Ireland v United Kingdom 5310/71 [1978] ECHR 1; at [162] 9 See, for example, Ireland v UK Judgment 18 January 1978, Application no. 5310/71 43358_03_Part 1 Chapters 1-6.indd 8 05/12/2014 15:26 9 Part 1 | Chapter 1 | Inquiry Set Up 1.29 However, this does not mean that I have been inhibited from making appropriately expressed findings of fact in relation to those various allegations. On the contrary, I have endeavoured to make appropriate findings of fact in relation to all matters where ill-treatment or misconduct have been raised as an issue. This includes matters of a relatively minor nature. 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."

The Litvinenko Inquiry

14. The Litvinenko Inquiry reported, in 2016, upon the death of Alexander Litvinenko who died as a result of being poisoned with polonium-210. Chairman Sir Robert Owen declined to make a preliminary ruling on the interplay between s.2(1) and s.2(2) of the 2005 Act, stating that: "*I considered that it was difficult to deal in the abstract with the interplay between those two sections and made no formal ruling on the issue*" (see p.263, para.125 of the final report: The Litvinenko Inquiry (publishing.service.gov.uk).

15. Sir Robert went on to find that he was sure that named individuals deliberately poisoned Mr Litvinenko, intending to kill him and that they were probably directed to do so by Russia's Federal Security Service, probably with President Putin's approval. The summary of Sir Robert's findings, from Part 10 of the report (pp.246-7), is reproduced at Appendix B below.

The Brook House Inquiry

16. The terms of reference for the Brook House Inquiry specifically refer to Article 3 ECHR although not in terms which require that inquiry to determine whether or not there has been a breach of the Convention. The material parts of the terms of reference state, under the heading "Purpose":

"To reach conclusions with regard to the treatment of detainees where there is credible evidence of mistreatment contrary to Article 3 ECHR, namely torture, inhuman or degrading treatment, or punishment; and then make any such recommendations as may seem appropriate. In particular the inquiry will investigate:

1. *The treatment of complainants, including identifying whether there has been mistreatment and identifying responsibility for any mistreatment.*
2. *Whether methods, policies, practices and management arrangements (both of the Home Office and its contractors) caused or contributed to any identified mistreatment.*
3. *Whether any changes to these methods, policies, practices and management arrangements would help to prevent a recurrence of any identified mistreatment.*
4. *Whether any clinical care issues caused or contributed to any identified mistreatment.*
5. *Whether any changes to clinical care would help to prevent a recurrence of any identified mistreatment.*
6. *The adequacy of the complaints and monitoring mechanisms provided by Home Office Immigration Enforcement and external bodies (including, but not limited to, the centre's independent monitoring board and statutory role of Her Majesty's Inspectorate of Prisons) in respect of any identified mistreatment.*

(Emphasis added)

And, under the heading "Scope":

""Mistreatment" is used to refer to treatment that is contrary to Article 3 ECHR, namely to torture or to inhuman or degrading treatment or punishment."
(Emphasis added)

Inquests

17. Rule 42 Coroners Rules 1984 provided that "*No verdict shall be framed in such a way as to appear to determine any question of (a) criminal liability on the part of any person, or (b) civil liability*". It was replaced by s.10 Coroners and Justice Act 2009 ("the 2009 Act") which provides:

"*A determination under subsection (1)(a) may not be framed in such a way as to appear to determine any question of—*
(a) criminal liability on the part of a named person, or
(b) civil liability."

18. The above provisions differ in some respects to s.2 of the 2005 Act. They preclude even the *appearance* of a determination and, in relation to civil liability, the limitation to a named person is omitted. Nevertheless, it remains the case that a permitted conclusion, in an appropriate case, is that the deceased was unlawfully killed. Provided that one remains mindful of the differences in statutory language between the 2009 Act and the 2015 Act, case law from the coronial jurisdiction may still be of some assistance in understanding s.2 of the 2015 Act. Ms Kilroy KC cited *R(Carol Pounder) v HM Coroner for the North and South Districts of Durham and Darlington* [2009] EWHC 76 (Admin) in her oral opening statement for the Tranche 1 Phase 3 hearings. In that case the Coroner had been investigating the death of a child in custody in circumstances where his restraint formed a part of the material facts. The Court quashed the inquest verdict because the legality of restraint used on the deceased had not been properly investigated and was necessary because a verdict of unlawful killing was possible. At paragraph 63 of his ruling Mr Justice Blake stated:

> *"In my judgment, if the inquest was going to explore a matter that may have contributed to Adam's death, it needed to do so properly. The fact that examination of the legality of the restraint used may have led to witnesses being warned of their right not to answer questions that may incriminate them, and thus potentially deprive the inquest jury of the benefit of the answer, could and should not drive the proper scope of the ambit of the investigation that needs to be made. There are many cases where juries may be considering possible verdicts of unlawful killing in one form or another, where warnings may have to be given to individuals but that does not prevent or deter inquiry into the legality of the force used in all the circumstances of the case. It is to be noted that such a verdict is not a breach of Rule 42 of the Coroners Rules because no criminal liability of an individual is attributed and such a verdict does not determine or purport to state any question of civil liability."* (emphasis added).

19. Sir John Goldring sitting as an assistant coroner in the inquests into the deaths at the Hillsborough Stadium disaster left the question of unlawful killing to the jury with directions which read, in material part, as follows[5].

> *"(f) You should not say anything to the effect that a crime or a breach of civil law duty of any kind has been committed. Note that this rule does not affect your answer to question 6 [whether those who died in the disaster were unlawfully killed]. Because of this rule, when writing any explanations, you should avoid using words*

[5] These directions were cited with approval by the Court in *Sturgess* at para.81.

and phrases such as "crime / criminal", "illegal / unlawful", "negligence / negligent", "breach of duty","duty of care", "careless", "reckless", "liability", "guilt / guilty".

(g) However, you may use ordinary and non-technical words which express factual judgments. So, you may say that errors or mistakes were made and you may use words such as "failure", "inappropriate","inadequate", "unsuitable", "unsatisfactory", "insufficient", "omit / omission", "unacceptable" or "lacking". Equally, you may indicate in your answer if you consider that particular errors or mistakes were not made. You may add adjectives, such as "serious" or "important", to indicate the strength of your findings."

20. More recently, the Divisional Court upheld a challenge to the decision of a coroner concerning the scope of the inquest into the death of Dawn Sturgess. In particular, the Court held that the Coroner was wrong to rely upon s.10 of the 2009 Act as an obstacle to investigating more widely than proposed suspected Russian involvement in the death: *R(GS, a child by her grandfather and litigation friend Stephen Stanley Sturgess) v HM Senior Coroner for Wiltshire and Swindon* [2020] EWHC 2007 Admin. The Court's reasoning is set out at paragraphs 82-83 of the judgment:

"82. On the "determination of civil liability" issue in the present case, again there is the curious contrast between the position of Mr Petrov and Mr Boshirov and that of those who may have directed them or conspired with them. It is not suggested that the Senior Coroner is prohibited by s 10(2)(b) from investigating whether Mr Petrov and Mr Boshirov used Novichok in an attack on the Skripals in Salisbury, or that they discarded the perfume bottle containing more Novichok which, it seems, was picked up unwittingly by Mr Rowley and led to the death of Ms Sturgess. Yet those facts, if proved, would be more than sufficient to establish civil liability in a Fatal Accidents Act claim which could, at least in theory, be brought against Mr Petrov and Mr Boshirov. Similarly, if the evidence showed that Mr Petrov and Mr Boshirov were acting as agents of the Russian intelligence services, or of the Russian Federation itself, then this might support a civil claim based on vicarious liability in the English courts, and possibly also a claim in the European Court of Human Rights against the Russian Federation. (No party to this case asked us to rule on whether State liability at Strasbourg is included in the reference to civil liability under s 10(2)(b): we will assume, without deciding, that it does, or at least may do so).

83. But none of these possibilities means that if the inquest were to investigate who was responsible for the death of Ms Sturgess - whether Mr Petrov and Mr Boshirov, their alleged co-conspirators, directors or employers, or officials so senior that they could be said to embody the Russian Federation itself - the Senior Coroner would

be infringing the prohibition in s10(2)(b). No doubt in his determination he would be careful, as Sir John Goldring advised the Hillsborough jury to be, to avoid using inappropriate legal terminology. But s 10(2)(b) is not a valid reason for limiting the scope of the investigation in the manner suggested."

The Undercover Policing Inquiry's Terms of Reference

21. Our terms of reference, amongst other things, require the Chairman: "*to identify and assess the adequacy of the: justification, authorisation, operational governance and oversight of undercover policing; selection, training, management and care of undercover police officers; [and] identify and assess the adequacy of the statutory, policy and judicial regulation of undercover policing*". There are a number of ways in which legal issues are relevant to these aspects of the terms of reference. For example, whether the methods used by undercover police officers were lawful is relevant to whether or not their work was justified and to whether authorisation, operational governance, training, management and oversight were adequate. Similarly, if undercover policing was being conducted in an unlawful manner, it will call into question the adequacy of statutory and policy guidance in particular. We will return to these issues further below in Part 3 of these submissions.

Part 2 - The Relevant Legal Framework applicable to Undercover Policing in England and Wales during the Tranche 1 era

22. Throughout the Tranche 1 era, members of the Special Demonstration Squad regularly gained entry to private premises in their undercover identities and also gained access to confidential information about private individuals which was shared within the Metropolitan Police Service and with, at least, the Security Service. What follows below is the exploration of the legal framework relevant to this conduct.

The office of constable and police powers

23. A police officer derives his status from the common law office of constable and is granted the powers and privileges of the office of constable when he is attested as constable by making a declaration. In the Tranche 1 period a police officer was attested as a constable under section 18 of the Police Act 1964 by making the declaration set out in schedule 2 to the 1964 Act which reads as follows:

'I ------ of ------- do solemnly and sincerely declare and affirm that I will well and truly serve Our Sovereign Lady the Queen in the office of constable, without favour or affection, malice or ill will; that I will to the best of my power cause the peace to be kept and preserved, and prevent all offences against the persons and properties of Her majesty's subjects; and that while I continue to hold the said office I will to the

best of my skill and knowledge discharge all the duties thereof faithfully according to law'.

24. This declaration summarises the core duties of a constable; the preservation of the Queen's peace and the prevention of crime [see for example *Glasbrook Bros Ltd. Glamorgan County Council* [1925] AC 270 at 277: "*No doubt there is an absolute and unconditional obligation binding the police authorities to take all steps which appear to them to be necessary for keeping the peace, for preventing crime, or for protecting property from criminal injury*" reiterated in *Rice v Connolly* [1966] 2 Q.B. 414].

25. A constable is himself subject to the law, however, and cannot claim immunity from it by virtue of his office. An officer who flouts the law, whether criminal or civil, will not be acting in execution of his duty. [see *Morris v Beardmore* [1981] A.C. 446 at 458

"..*although policemen have been vested by statute with powers beyond those of other people, they are exercisable only by virtue of the authority thereby conferred upon them and in the execution of their duty. A policeman as such – in or out of uniform – has no powers or authority beyond those of the ordinary citizen on occasions or in matter which are unconnected with his duties*…[it is] *unthinkable that a policeman may properly be regarded as acting in the execution of his duty when his acting unlawfully*"].

26. Police powers in relation to arrest, entry, search and seizure in the Tranche 1 era were derived from both the common law and statute. These were examined in by the Royal Commission on Criminal Procedure under Sir Cyril Phillips which was set up in 1978 and reported in 1981. The recommendations set out in the report ultimately formed the basis of the Police and Criminal Evidence Act 1984 ('PACE'), an Act which governs the operation of police powers and codifies procedural safeguards for those suspected of crime. Police powers in relation to entry, search and seizure in the pre-PACE period in which Tranche 1 falls are set out comprehensively at paragraphs 28 to 41 in the volume of the Phillips report entitled 'The Investigation and Prosecution of Criminal Offences in England and Wales: The Law and Procedure'. These powers are summarized in the main report as follows:

"*The purpose for which entry* [into private property could] *be effected include the arrest of offenders, search for and seizure of illegally possessed property, discovery of evidence, and the prevention of a breach of the peace*" [Report of the Royal Commission on Criminal Procedure, Cmnd 8092 para 3.34]

27. The specific common law powers to enter without a warrant were "*to deal with or prevent a breach of the peace, to save life or limb or prevent serious damage to property and in fresh pursuit of a person who has escaped after a lawful arrest*" [Report of the Royal Commission on Criminal Procedure, Cmnd 8092 para 3.38].

28. In *Ghani v Jones* [1970] 1 Q.B. 693 the Court of Appeal articulated a common law extension of powers of seizure to allow a police officer, who had reasonable grounds for believing that a serious crime (defined by the Court as "*so serious an offence …that it is of the first importance that the offenders should be caught and brought to justice*") had been committed to seize any other article they came upon (but did not search for) which they had reasonable grounds for believing was either the fruit of crime, the instrument by which the crime was committed, or material evidence to prove the commission of the crime which was in the possession of an individual who is either implicated in the crime or who unreasonably withholds access to the article in question [see pages 708-709].

Trespass

29. Any unjustifiable incursion, whether intentional, reckless or negligent, by one person upon land in possession of another will constitute a trespass. An entry is not a trespass where it is justifiable, however. Entry may be justified, for example, by operation of law or under a license.

30. The law relating to trespass applies as much to a police officer as to a private individual; a police officer entering private premises in purported execution of his duty without the permission of the occupier or an express power or right of entry will be acting unlawfully [*Morris v Beardmore*].

Breach of the Peace

31. The common law confers on all citizens the power to act to suppress breaches of the peace; both a police officer or private citizen, reasonably believing that a breach of the peace is about to take place is entitled to take such steps as are necessary to prevent it, including the reasonable use of force [*Albert v Lavin* [1982] AC 546].

32. In *R v Howell* [1982] Q.B 416 at 427 a breach of the peace was defined as follows:

> "*there is a breach of the peace whenever harm is actually done or is likely to be done to a person or in his presence to his property or a person is in fear of being so harmed through an assault, an affray, a riot, unlawful assembly or other disturbance. It is for this breach of the peace when done in his presence or the*

reasonable apprehension of it taking place that a constable, or anyone else, may arrest an offender without warrant".

33. This was restated in *R (on the application of Laporte) v Chief Constable of Gloucestershire* [2006] UKHL 55 at 124 and 150 as follows:

"[a] *breach of the peace is not, as such, a criminal offence but founds an application to bind over*…[it] *involves actual harm done either to a person or to a person's property in his presence or some other form of violent disorder or disturbance and itself necessarily involves a criminal offence*".

34. Agitated behaviour which does not involve any injury or threat of injury is not sufficient to amount to a breach of the peace [*Jarrett v Chief Constable of the West Midlands* [2003] EWCA 397], although abusive language and an aggressive manner may justify an arrest on the grounds of an apprehended breach of the peace [*Hawkes v DPP* [2005] EWNC 3046].

35. The power to intervene exists where a breach of the peace is being committed, where it is reasonably believed "*that such a breach will be committed in the immediate future…although he has not yet committed any breach*" or where it is reasonably believed that a renewal is threatened [*R v Howell].*

36. The imminence of the anticipated breach of the peace was minutely considered by the House of Lords in *R (Laporte) v Chief Constable of Gloucestershire* at 151-152 which summarised the authorities on the point as follows:

"*The cases speak variously of a breach of the peace being "about to" occur (the language used by Lord Diplock in Albert v Lavin [1982] AC 546, 565), of it being "imminent" (the expression earlier used in in Humphries v Connor (1864) 17 ICLR and in Howell) "in the immediate future" (another expression used in Howell and earlier used by Professor Glanville Williams in his 1954 article "Arrest for Breach of the Peace" [1954] Crim LR 578) and "a sufficiently real and present threat": Beldam LJ in Foulkes v Chief Constable of the Merseyside Police [1998] 3 All ER 705, 711*"

37. A breach of the peace can take place on private premises [*McConnell v Chief Constable of Greater Manchester Police* [1990] 1 WLR 364]. The involvement of members of the public may be relevant to any factual decision as to whether a breach of the peace has occurred but it is not determinative of the issue.

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38. The common law also gives the police the power of entry to prevent a reasonably anticipated breach of the peace. In *Thomas v Sawkins* [1935] 2KB 249 the police were refused entry to a public meeting organised by the Communist Party of Caerau held to protest the Incitement to Disaffection Bill then before Parliament and to demand the dismissal of the Chief Constable of Glamorgan. They insisted on entering and remaining throughout the meeting. The Court found that the police had "*reasonable grounds for believing that, if they were not present, seditious speeches would be made and/or that a breach of the peace would take place. To prevent any such offence or a breach of the peace the police were entitled to enter and to remain on the premises*".

39. This power of entry is not limited to where public meetings are taking place but police must have a genuine apprehension of a breach of the peace in the near future and any power to enter private premises against the will of the occupier must be exercised with "*great care and discretion*… [in circumstances where] *there is a real and imminent risk of a breach of the peace*" [*McLeod v Commissioner of Police of the Metropolis* [1994] 4 All ER 553]. *McLeod v UK* (1999) 27 EHRR 493 ECHR held that common law concepts of breaches of the peace and the powers granted to constable to prevent breaches of the peace and to enter property to do so did not in principle violate Art 8 but when so acting a constable's action must be proportionate to the threat posed to public order.

Sedition

40. In *Thomas v Sawkins* the Court found that the police entry to a public meeting to which they had been forbidden entry did not constitute trespass because they had reasonable grounds for believing that, if they were not present "*seditious speeches would be made and/or a breach of the peace would take place*".

41. In 1977 the Law Commission published a working paper No. 72 which examined the common law offences relating to sedition [at Part III, para 68-78]. The Law Commission's provisional view was that any codification of common law seditious offences was otiose because there were statutory or common law offences which covered the same conduct without the political overtones of the common law offences (incitement of, or conspiracy to commit, offences against the person, offences against property, riot or unlawful assembly) [see paras 76 – 78]. It was not until 2009 under s.73 of the Coroners and Justice Act 2009, however, that Parliament abolished offences of sedition and seditious libel.

42. It was an offence contrary to common law to publish words, whether oral or written, with a seditious intention. It was also an offence to agree to further a seditious intention by doing any act.

43. The approved definition of seditious intention was that set out at Article 14 of Sir James Stephen's Digest of the Criminal Law (as cited in the Law Commission's paper):

> "*A seditious intention is an intention to bring into hatred or contempt, or to excite disaffection against the person of, His Majesty, his heirs or successors, or the government and constitution of the United Kingdom, as by law established, or either House of Parliament, or the administration of justice, or to excite His Majesty's subjects to attempt otherwise than by lawful means, the alteration of any matter in Church or State by law established, [or to incite any person to commit any crime in disturbance of the peace] or to raise discontent or disaffection amongst His Majesty's subjects, or to promote feelings of ill-will and hostility between different classes of such subjects.*
>
> *An intention to show that His Majesty has been misled or mistaken in his measures, or to point out errors or defects in the government or constitution as by law established, with a view to their reformation, or to excite His Majesty's subjects to attempt by lawful means the alteration of any matter in Church or State by law established, or to point out, in order to secure their removal, matters which are producing, or have a tendency to produce, feelings of hatred and ill-will between classes of His Majesty's subjects, is not a seditious intention.*"

44. The one element missing from this formulation, as identified in the Law Commission's working paper, is that for an offence of sedition or seditious libel to be made out, it must also be proved that there was an intention to cause violence. In *R v Collins* (1839) 9 C&P 456 the jury were directed that they could convict of seditious libel only if they were sure that the defendant intended that "*the people should make use of physical force as their own resource to obtain justice, and meant to excite the people to take the power into their own hands, and meant to excite them to tumult and disorder"* [see also *R v Burns* (1886) 16 Cox C.C. 353; *R v Aldred* (1909) 22 Cox C.C. 1].

45. The Canadian Supreme Court in case of *Boucher v R* [1951 2 D.L.R. 369] (as cited in the Law Commission's report at para 71) reviewed the law in relation to sedition and held as follows:

"*the seditious intention upon which a prosecution for the seditious libel must be founded is an intention to incite violence or to create public disturbance or disorder against His Majesty or the institutions of Government. Proof of an intention to promote feelings of ill-will and hostility between different classes of subjects does not alone establish a seditious intention. Not only must there be proof of incitement to violence in this connection, but it must be violence or defiance for the purpose of disturbing constituted authority*".

46. Under section 1 of the Criminal Libel Act 1919 where a person was convicted of composing, printing or publishing seditious libel, by order of a judge, police could enter and search any premises belonging to the convicted person or any person who kept copies of the seditious libel and seize any copies found. There does not appear to be any generalised power of entry in relation to sedition however a seditious speech is one that incites others to violence or public disturbance against the Crown or the institutions of Government and may therefore constitute a breach of the peace giving police common law powers to intervene.

Justification of trespass

47. An entry onto land is not trespass if it is justifiable. As outlined above, police entry onto land can be justified by statute or by common law. It may also be justified by licence or necessity.

48. It is a defence to trespass to show that the defendant is on the land pursuant to the express or implied license (permission) given by the owner. However the licensee must not exceed the permission given by the licensor or his acts in excess of the license will constitute a trespass:

"*My Lords, in my opinion this duty to an invitee only extends so long as and so far as the invitee is making what can reasonably be contemplated as an ordinary and reasonable use of the premises by the invitee for the purposes for which he has been invited. He is not invited to use any part of the premises for purposes which he knows are wrongfully dangerous and constitute an improper use. As Scrutton L.J. has pointedly said: 'When you invite a person into your house to use the staircase you do not invite him to slide down the banisters*.'" *Hillen and Pettigrew* v ICI (Alkalili) Ltd [1936] AC 65 at page 69].

49. *Hillen and Pettigrew v ICI (Alkalili) Ltd* was cited with approval by the Court in a criminal context in *R v Smith and Jones* [1976] 1 WLR 672 in which convictions for burglary were upheld in circumstances where the son of the householder, given general permission to enter the house, entered the house with another with the

express purpose of stealing a television. The appellants were trespassers for the purpose of s.9(1)(b) of the Theft Act 1968 because they entered the property in excess of the permission given to them and, with the requisite criminal *mens rea* (as per *R v Collins* [1973] 1 Q.B. 100): knowing that they were entering in excess of the permission given to them (or being reckless as to whether they were entering in excess of the permission given).

50. In *R v Boyle* [1954] 2 QB 292, a case prior to the incorporation of trespass into the criminal law governing burglary, a conviction for housebreaking was upheld in circumstances where the appellant had gained consensual entry to a dwelling house by purporting to be an employee of the BBC and once inside stole a handbag and its contents. The Court held that because he had obtained admission by a trick there had been a constructive breaking for the purpose of the Larceny Act 1916.

> "*If, in other words, the householder would not have admitted the man had he known the true facts, and admission has been obtained by means of a trick or threat, that is in law a constructive breaking. Take the very common case where a man represents himself as having called on behalf of a gas or electric light company; if he comes from the company and enters for a proper purpose and steals when in the house, it is not breaking and entering. That is larceny in a dwelling-house because the man has not used a trick to get into the house; he has come in the ordinary course of his duty representing himself (as he is in fact) as an employee of the company whose duty it is to read the meter. In the present case the court has no doubt that the appellant did obtain entry by means of a trick, and, therefore, there was a constructive breaking, as it must be taken that he went there with a felonious intent and got in for the purpose of committing a theft.*" [at page 295].

51. Paragraph 21-117 of Archbold Criminal Pleading Evidence and Practice on this topic reads as follows:

> "*A fortiori, it would seem that where a consent to entry is obtained by fraud, the entry will be trespassory; whether or not the consent can be said to have been vitiated by fraud, situations such as that where a person gains entry by falsely pretending he has come to read the gas meter can clearly be brought within the principle for which [Hillen and Pettigrew v ICI (Alkalili) Ltd, and other cases in which this principle is outlined] are authority.*"

52. The editors of Smith, Hogan & Ormrod's Criminal Law (sixteenth edition) go further. at chapter 25 (burglary and related offences,) page 1050 there is the following passage:

"Mistake as to identity, where identity is material, generally vitiates consent. So where V's invitation to enter is based on a mistake as to the identity of D who is being invited in, there will be a trespass if D knew the mistake was being made …

Where D gains entry by deception he enters as a trespasser. For example, D is a trespasser if he gains admission to V's house by falsely pretending that he has been sent by the utility company to check the meter."

53. However, in *Byrne v Kinematograph Renters Society* [1958] 1 WLR 762 covert entry was found not to amount to trespass since it did not exceed the permission granted. Representatives from the defendant's investigation department (an organisation who looked after the interests of film distributors) entered the plaintiff's cinema for the purpose of carrying out inspections on ticket sales on 23 separate occasions, there being a suspicion of irregularities in sales, but without disclosing either their presence or the reason for the visits. Having found irregularities the defendant recommended that business with the appellant ceased. In the subsequent claim the plaintiff sought to argue, inter alia, that the 23 visits by the defendant were trespassory because they entered the cinema not for the purpose for which the public was invited to enter but for a different purpose, namely, to obtain evidence against the plaintiff. It was held that since the cinema was open to the public who were invited to go and buy tickets, the defendants did nothing that they were not invited to do and that their motive was immaterial. However in Smith, Hogan & Ormerod's Criminal Law, sixteenth edition at chapter 25 (burglary and related offences) page 1051, it is submitted that the decision in *Byrne v Kinematograph Renters Society* should not be followed because it is against the weight of authority. In support of this contention the editors cite two Australian cases: *Farrington v Thomson and Bridgland* [1959] VR 286 (a police officer found to be a trespasser where he had entered a hotel for the purpose of committing a tort); and *Barker and v R Barker and v R* (1983) 7 ALJR 426 (D asked by his neighbour to keep an eye on his house and given access to a key, held to be guilty of burglary when he entered the house in order to steal).

54. Trespass can also be justified if it can be shown that the entry to land was necessary to preserve life or property but there must be "*real and imminent danger against which it was necessary to provide, and by the word 'reasonably' they affirmed that*" the acts undertaken must be "*reasonably done to meet that real and imminent danger*" *Cope v Sharpe (No 2)* [1912] 1K.B. 496.

Burglary

55. The offence of burglary (so far as may be relevant here) is governed by section 9 of the Theft Act 1968:

> *"9(1) A person is guilty of burglary if –*
> *(a) He enters any building or part of a building as a trespasser and with intent to commit any such offence as is mentioned in subsection (2) below, or*
> *(b) having entered any building or part of a building as a trespasser he steals or attempts to steal anything in the building or that part of it ….*
> *(2) The offences referred to in subsection 1(a) above are offences of stealing anything in the building or part of the building in question…."*

56. "Trespass" is here defined as it is under civil law (as explored above) however trespass in a criminal context must be accompanied by the *mens rea*, the individual must know, or be reckless as to the facts that make his entry a trespass [see *R v Collins* [1973] 1 Q.B. 100 above].

57. There are four elements to the offence of theft: (i) dishonest (ii) appropriation (iii) of property belonging to another (iv) with the intention of permanently depriving the owner of it *R v Lawrence* (1971) 55 Cr. App.R 73

58. The two-stage test for dishonesty was articulated by the court in *Ivey v Genting Casinos Uk Ltd* [2017] UKSC 67; (the same test applies to criminal cases: *R v Barton and Booth* [2020] 2 Cr.App. R. 7).
    (i) What was the actual state of the individual's mind;
    (ii) Was this conduct honest or dishonest according to the objective standards of ordinary decent people.

59. Under section 1 of the Larceny Act 1916 an individual was not guilty of stealing if he had "a claim of right made in good faith". This defence is now found in section 2 of the Theft Act 1968 which reads (so far as is relevant):

> *"(1) A person's appropriation of property belonging to another is not to be regarded as dishonest –*
> *(a) If he appropriates the property in the belief that he has in law the right to deprive the other of it, on behalf of himself or of a third person"*

60. In order to come within the terms of section 2(1)(a) of the Theft Act 1968 the defendant must believe that in law he has the right to deprive the other of his

property and it is immaterial that there exists in law no basis for that belief [see *R v Bernhard* (1938) 26 Cr. App.R 137; *R v Turner (No 2)* (1971) 55 Cr.App.R. 137].

Breach of Confidence

61. In *Seager v Copydex* Ltd [1967] 1 W.L.R. 923 at page 931, Lord Denning summarised the principles of the law of confidence outlined in *Saltman Engineering Co. v Campbell Engineering Co* (1948) 65 R.P.C. 203 and refined in *Terrapin Ltd. v Builders' Supply Co (Hayes) Ltd*. (1960) 65 R.P.C. 128 as a "*broad principle of equity that he who has received information in confidence shall not take unfair advantage of it. He must not make use of it to the prejudice of him who gave it without obtaining his consent*".

62. The requirements for liability for breach of confidence were pithily articulated by Megarry J (as he then was) in *Coco v A.N. Clark (Engineers) Ltd* [1968] F.S.R. 415 at page 419 as follows:

> "*In my judgment, three elements are normally required if, apart from contract a case of breach of confidence is to succeed. First, the information itself, in the words of Lord Greene, M.R. in the Saltman case on page 215, must "have the necessary quality of confidence about it". Secondly, that information must have been imparted in circumstances importing an obligation of confidence. Thirdly, there must be an unauthorised use of that information to the detriment of the party communicating it.*"

63. The relationship between the entity from which the confidential information originates and the receiver of the information will very often be a contractual one however an obligation of confidence may arise whether the confidential information has been obtained deliberately or accidentally, whether it has been communicated directly or obtained by dishonest means, whether the parties are known to one another or not. In *Attorney General v Guardian Newspapers (No 2)* [1990] 1 A.C. 109 at page 281 Lord Goff, set out the "*broad general principle*" that:

> "*a duty of confidence arises when confidential information comes to the knowledge of a person (the confidant) in circumstances where he has notice, or is held to have agreed, that the information is confidential, with the effect that it would be just in all the circumstances that he should be precluded from disclosing the information to others*".

64. He went on to give as examples of circumstances where the obligation of confidence may arise: "*an obviously confidential document is wafted by an electric fan out of a*

window into a crowded street, or where an obviously confidential document, such as a private diary, is dropped in a public place, and is then picked up by a passer-by".

65. Further examples, as identified in Clerk & Lindsell on Torts 23rd Edition at paragraph 26.16, include; taping confidential material said in a private telephone conversation (*Francome v Mirror Court Newspapers Ltd* [1984] 1 W.L.R. 892) and taking a photograph of a closed and secret film set (*Shelley Films Ltd v Rex Features Ltd* [1994] E.M.L.R. 134). The duty of confidence arises from knowledge that the information is confidential.

66. Any party who comes into information by dishonest or unlawful means will be restrained from publication/onward disclosure of the information: in his judgment in *Lord Ashburton v Pape* [1913] 2 Ch 469 at page 475 (which, in fact involved privileged material) Swinfen Eady LJ stated

> "*The principle upon which the Court of Chancery has acted for many years has been to restrain the publication of confidential information improperly or surreptitiously obtained or of information imparted in confidence which ought not to be divulged. Injunctions have been granted to give effectual relief, that is not only to restrain the publication of confidential information but to prevent copies being made of any record of that information, and, if copies have already been made, to restrain them from being further copied, and to restrain persons into whose possession the confidential information has come from themselves in turn divulging or propagating it.*"

67. This general principle was reiterated in *ITC Film Distributors v Video Exchange Ltd* [1982] Ch.431; *Tchenguiz v Imerman* [2010] EWCA Civ 908; and *Brake v Guy* [2019] EWHC 3332 (Ch).

68. It would appear that where the confidential information subject to the breach is of a personal nature there may be no need for the Claimant to show a positive detriment [see Lord Keith's judgment in *Attorney General v Guardian Newspapers* citing *Duchess of Argyll v Duke of Argyll* [1967] Ch 302 which involved the disclosure of "*marital confidences*"] but in cases involving breach of confidence of a different nature there is no settled view as to whether the Claimant must prove detriment: In *Attorney General v Guardian Newspapers* Lord Goff, reiterating Megarry J (as he then was) in *Coco v AN Clark (Engineers) Ltd,* stated he wished "*to keep open the question whether detriment to the plaintiff is an essential ingredient of an action for breach of confidence*". Where the subject matter is State secrets, however, the State

must show that publication is detrimental to the public interest [per Lord Goff, *Attorney General v Guardian Newspapers*].

The public interest defence to breach of confidence

69. In *Attorney General v Guardian Newspapers (No 2)* [1990] 1 A.C. 109 at page 482 Lord Goff identified (so far as is relevant here) the following as a "limiting principle" to the general principles governing the protection of confidential information

> "..*although the basis of the law's protection of confidence is that there is a public interest that confidences should be preserved and protected by the law, nevertheless that public interest may be outweighed by some other countervailing public interest which favours disclosure. This limitation may apply … to all types of confidential information. It is this limiting principle which may require a court to carry out a balancing operation, weighing the public interest in maintaining confidence against a countervailing public interest favouring disclosure*".

70. In *Gartside v Outram* (1856) 26 L.J.Ch.113 one aspect of the public interest defence was expressed thus: "*there is no confidence as to the disclosure of iniquity*". Categories of information subject to the public interest defence, identified in *Beloff v Pressdram Ltd* [1973] 1 F.S.R. 33 include, "*matters, carried out or contemplated, in breach of the country's security, or in breach of law, including statutory duty, fraud, or otherwise destructive of the country or its people, including matters medically dangerous to the public: and doubtless other misdeed of similar gravity*". However, it is not necessary to show "*misdeeds*" on the part of the complainant. In *Fraser and Evans and others* [1969] Q.B.D 349 at page 362 Lord Denning, commenting on *Gartside v Outram*, stated "*I do not look upon the word 'iniquity' as expressing a principle. It is merely an instance of just cause or excuse for breaking confidence. There are some things which may be required to be disclosed in the public interest, in which event no confidence can be prayed in aid to keep them secret*". [Cited with approval by Stephenson L.J. in *Lion Laboratories Ltd v Evans* [1985] 1 Q.B. 526].

71. Disclosure of confidential material in the public interest must only be made to "*one who has a proper interest to receive the information*" [*Initial Service s Ltd v Putterill* [1968] 1 Q.B. 396]. In *Francome v Mirror Group* [1984] 1 W.L.R. 892, for example, a case regarding alleged irregularities in professional horse racing, the Court offered the view that disclosure to the police or Jockey Club may serve the public interest but any wider disclosure, for example to a national newspaper, could not serve the public interest.

72. The police are subject to same duties of confidentiality as private citizens in regard to confidential information and documents which come into their hands in the course of carrying out their public duties [see *Marcel v Commissioner of Police* [1992] Ch. 225] but in *Hellewell v Chief Constable of Derbyshire* [1995] 1 W.L.R. 804 the Court, citing *Malone v Metropolitan Police Commissioner* [1979] 1 Ch. 344 in support, held that the police will have a public interest defence to any action for breach of confidence where the information was used reasonably for the prevention and detection of crime, the investigation of alleged offences or the apprehension of suspects of persons unlawfully at large.

The European Convention on Human Rights

73. The Tranche 1 era postdates the right of a citizen of the United Kingdom individually to petition the European Court of Human Rights ("ECtHR") but pre-dates the coming into force of the Human Rights Act 1998. In those circumstances compliance with the Convention, in the Tranche 1 era, was not a matter of domestic law but it was required by virtue of the UK's membership of the Council of Europe (which entails being a party to the Convention) as an obligation under international treaty. Convention rights could in principle be enforced by an individual with the requisite standing through the ECtHR.

Article 8(2) and the Statutory Framework

74. An important aspect of compliance with the right to privacy is that any interference in private or family life must be in accordance with law if it is to be capable of justification for the purposes of Art.8(2) of the Convention. In accordance with law means in accordance with sufficiently clear, foreseeable and accessible laws. One of the purposes of the Regulation of Investigatory Powers Act 2000 was to ensure that such a legal framework was in place in relation to undercover policing before the coming into force of the Human Rights Act 1998.

75. Whether the statutory framework in the Tranche 1 era was adequate does fall within the terms of reference. The statutory framework for undercover policing in the Tranche 1 era was non-extant and, in the absence of alternative satisfactory arrangements to meet the requirements of the Convention, in relation to undercover policing, we submit, plainly inadequate.

Article 6

76. We do not deal in these submissions with the relevance of Article 6 (right to a fair trial) to the Inquiry's work identifying potential miscarriages of justice in Tranche 1. Nor do we deal here with the domestic law on miscarriages of justice. Should any specific issue arise, it can be dealt with on its facts.

Other Relevant Convention Provisions

77. We agree with the submissions as to Convention law set out in Part B of the Category H core participants' Legal Framework document produced as part of the Category H T1P3 written opening statement[6]. As set out in those submissions, Arts. 3,8,10 & 14 are all relevant to the legal framework in Tranche 1. However, we caution against an overly legalistic approach to the Tranche 1 report. The Inquiry's primary task is to find the facts and not to focus on whether or not the law was broken in the way that a Court must find.

Part 3 – Discussion

78. A number of key propositions, for the Inquiry, can be distilled from consideration of s.2 of the 2005 Act.

    78.1. The Inquiry must not determine any person's civil or criminal liability.

    78.2. The Inquiry must not be inhibited from making factual findings or recommendations by any likelihood that liability might be inferred from its findings.

    78.3. The language of civil or criminal liability is to be avoided.

    78.4. The terms of reference should be construed compatibly with s.2 of the 2005 Act.

    78.5. The role of the Inquiry is to find facts and make recommendations. It is not the Inquiry's function to determine legal disputes.

79. Whether undercover policing was conducted lawfully is relevant to aspects of the Inquiry's terms of reference. The legality of tactics such as entering the homes of activists, taking and disseminating confidential information needs to be considered. The lawfulness of the SDS's methods and operations generally is at least relevant to assessing the adequacy of justification, authorisation, operational governance, training, management and oversight of the undercover operations in Tranche 1. The lawfulness of undercover policing, as it was carried out by the SDS, is also relevant to the statutory and policy regulation of undercover policing (or, more specifically, the lack thereof) in the Tranche 1 era.

80. The Inquiry must not shy away from making the factual findings required to discharge the terms of reference. It can and must take into account the applicable legal framework, insofar as it is relevant to the terms of reference, but it must frame its

[6] 20220504-T1P3-Cat_H_CPs-Opening_Statement.pdf (ucpi.org.uk) starting at p.35 of the pdf.

findings in a way that avoids purporting to determine the civil or criminal liability of any person.

29 September 2022
Updated 4 October 2022

DAVID BARR KC

REBEKAH HUMMERSTONE

PAGE NYAME-SATTERTHWAITE

Appendix A

Examples of Findings of the Bloody Sunday Inquiry

1. **Vol.1 chapter 3 - 'The events of the day'**

   a. **3.70** None of the casualties shot by soldiers of Support Company was armed with a firearm or (with the probable exception of Gerald Donaghey) a bomb of any description. None was posing any threat of causing death or serious injury. In no case was any warning given before soldiers opened fire.

   b. **3.71** It was submitted on behalf of many of the represented soldiers that it was possible that some of the casualties were accidental, in the sense that the soldier concerned fired at someone posing a threat of causing death or serious injury, but missed and hit a bystander instead. It was also submitted that soldiers fired at and killed or injured other people who were posing such a threat, but that the existence of these casualties had been kept secret by those civilians who knew that this had happened, in order to deprive the soldiers of evidence that their firing was justified.

   c. **3.72** Apart from the firing by Private T, we have found no substance in either of these submissions.

2. **Vol.1 chapter 4 - 'The question of responsibility for the deaths and injuries on Bloody Sunday'**

   a. **4.1** The immediate responsibility for the deaths and injuries on Bloody Sunday lies with those members of Support Company whose unjustifiable firing was the cause of those deaths and injuries. The question remains, however, as to whether others also bear direct or indirect responsibility for what happened.

3. **Vol.1 chapter 5 - 'The overall assessment'**

   a. **5.4** …Our overall conclusion is that there was a serious and widespread loss of fire discipline among the soldiers of Support Company

   b. **5.5** The firing by soldiers of 1 PARA on Bloody Sunday caused the deaths of 13 people and injury to a similar number, none of whom was posing a threat of causing death or serious injury. What happened on Bloody Sunday strengthened the Provisional IRA, increased nationalist resentment and hostility towards the Army and exacerbated the violent conflict of the years

that followed. Bloody Sunday was a tragedy for the bereaved and the wounded, and a catastrophe for the people of Northern Ireland.

4. **Vol.4 – chapter 64 'The soldiers responsible for the Sector 2 casualties – Summary'**

a. **64.96** For the reasons we have given above, we have concluded that it is probable that Jackie Duddy was shot by Private R, Margaret Deery by Lance Corporal V, Michael Bridge by Lieutenant N, and Michael Bradley by Private Q. We consider that one or more of Sergeant O, Private R and Private S were responsible for the shots that indirectly injured Patrick McDaid and Pius McCarron.

b. **64.97** None of the soldiers who in our view were probably responsible for the casualties shot someone posing a threat of causing death or serious injury, though Private T (who probably fired the shot that injured Patrick Brolly) believed that his target was posing a threat of causing serious injury.

c. **64.104** It is important to note that none of the soldiers who in our view shot people in Sector 2 suggested that he had done so because of incoming fire. None of those killed or injured was deploying firearms or was even said by any of these soldiers to have been in possession of firearms. Thus there is nothing to suggest that incoming fire could somehow be regarded as providing an excuse for the shooting of the casualties in this sector.

5. **Vol 5 – chapter 89 'The soldiers responsible for the Sector 3 casualties'**

a. **89.3** In the second place we are sure that none of the casualties was armed or doing anything that could have justified any of them being shot.

b. **89.4** In the third place, we are satisfied that no soldier other than Corporal E, Lance Corporal F and Lance Corporal J of Anti-Tank Platoon, Sergeant K, Private L and Private M of Composite Platoon, and Corporal P and Private U of Mortar Platoon could have been responsible for any of the casualties in that sector.

c. **89.72** The soldiers were not justified in shooting any of the casualties in Sector 3. In our view Corporal E, Corporal P, Lance Corporal F, Lance Corporal J and Private U fired either in the belief that no-one in the areas towards which they were firing was posing a threat of causing death or serious injury, or not caring whether or not anyone there was posing such a threat; and Private L and Private M probably fired in the belief that they might have identified gunmen, but without being certain that this was the case.

6. Vol 6 – chapter 112 'The soldiers responsible for the Sector 4 casualties'

a. **112.2** In the first place,1 we are satisfied that the known casualties in Sector 4 were the only casualties of Army gunfire in that sector. These casualties were not using or seeking to use firearms or bombs, nor doing anything else that could have justified any of them being shot. Furthermore, we are satisfied that none of these casualties was doing anything that could have led a soldier to believe, albeit mistakenly, that any of them was posing a threat of causing death or serious injury.

b. **112.3** It follows that there was in our view no justification for the shooting of any of the Sector 4 casualties.

c. **112.4** In the second place,1 we are satisfied that no soldier other than Corporal E, Lance Corporal F, Private G and Private H, all of Anti-Tank Platoon, could have been responsible for any of the casualties in Sector 4.

7. Vol. 7 – chapter 145 'Conclusions'

a. **145.26** It remains to say, for reasons given elsewhere in this report,1 that Gerald Donaghey was not shot because of his possession of nail bombs; nor did anyone at any stage suggest otherwise. He was, in our view and again for the reasons that we have given, shot by Private G who neither had, nor believed that he had, any justification for firing the shot that mortally wounded Gerald Donaghey. It is likely that Gerald Donaghey was trying to escape from the soldiers when he was shot

8. Vol 8. – chapter 169 'General Ford'

a. **169.24** General Ford bears the responsibility for deciding that in the likely event of rioting 8th Infantry Brigade should employ 1 PARA as an arrest force on 30th January 1972. But in our view he neither knew nor should have known at any stage that his decision would or was likely to result in soldiers firing unjustifiably on Bloody Sunday.

9. Vol 8. Chapter 172 'Major Loden'

a. **172.18** In our view, at the time the casualties were being sustained, Major Loden neither realised nor should have realised that his soldiers were or might be firing unjustifiably at people who were not posing or about to pose a threat of causing death or serious injury. However, we consider that at the

time when he did tell his soldiers not to fire back unless they had identified positive targets, he probably did realise that the firing that was taking place then was, or might be, unjustified. By this stage all the casualties had been sustained and there had been a pause in the firing.

Appendix B

Summary of Conclusions of the Litvinenko Inquiry

Alexander Litvinenko was born in Voronezh, Russia on 4 December 1962. He was an officer in the Committee for State Security (KGB) and latterly the Federal Security Service (FSB). He was dismissed in 1998 after he made public allegations of illegal activity within the FSB.

Mr Litvinenko left Russia in 2000. He arrived in the UK with his wife and son on 1 November 2000. Mr Litvinenko was granted asylum in 2001 and became a British citizen in October 2006.

In 2006 Mr Litvinenko was living with his family at 140 Osier Crescent, Muswell Hill, London. He was a journalist and author. He also undertook investigatory work, including preparing due diligence reports on Russian individuals and companies.

On the evening of 1 November 2006, the sixth anniversary of his arrival in the UK, Mr Litvinenko fell ill. He was admitted to Barnet General Hospital on 3 November, and was subsequently transferred to University College Hospital in central London on 17 November. His condition declined. He became unconscious on 23 November. At 8.51pm Mr Litvinenko suffered a cardiac arrest. Resuscitation was commenced but terminated when it became clear that he would not regain spontaneous cardiac output. Mr Litvinenko was pronounced dead at 9.21pm on 23 November 2006.

Throughout the time that Mr Litvinenko was in hospital, the doctors had been unable successfully to diagnose his condition. In fact, the cause of his illness only became clear several hours before his death when tests on samples of his blood and urine sent to the Atomic Weapons Establishment at Aldermaston confirmed the presence in his body of extremely high levels of the radioactive isotope polonium 210. Subsequent examination of Mr Litvinenko's body and detailed testing of samples taken from it confirmed that he had died as a result of being poisoned with polonium 210.

As to the medical cause of Mr Litvinenko's death, I am sure of the following matters:

a. Mr Litvinenko died at 9.21pm on 23 November 2006 in University College Hospital, having suffered a cardiac arrest from which medical professionals were unable to resuscitate him

b. The cardiac arrest was the result of an acute radiation syndrome from which Mr Litvinenko was suffering

c. The acute radiation syndrome was caused by Mr Litvinenko ingesting approximately 4.4Gbq of polonium 210 on 1 November 2006

There is abundant evidence that Mr Litvinenko met Andrey Lugovoy and his associate Dmitri Kovtun for tea at the Pine Bar of the Millennium Hotel in Mayfair during the afternoon of 1 November 2006. The forensic evidence shows that the Pine Bar was heavily contaminated with polonium 210. The highest readings were taken from the table where Mr Litvinenko was sitting and from the inside of one of the teapots. No comparable levels of contamination were found in any of the other places that Mr Litvinenko visited that day.

I am sure that Mr Litvinenko ingested the fatal dose of polonium 210 whilst drinking tea in the Pine Bar of the Millennium Hotel during the afternoon of 1 November 2006.

I have carefully considered the possibility that Mr Litvinenko ingested the fatal dose of polonium 210 as the result of an accident. I have also considered whether Mr Litvinenko might have taken the poison deliberately, in order to commit suicide.

I am sure that Mr Litvinenko did not ingest the polonium 210 either by accident or to commit suicide. I am sure, rather, that he was deliberately poisoned by others.

I am sure that Mr Lugovoy and Mr Kovtun placed the polonium 210 in the teapot at the Pine Bar on 1 November 2006. I am also sure that they did this with the intention of poisoning Mr Litvinenko.

I am sure that the two men had made an earlier attempt to poison Mr Litvinenko, also using polonium 210, at the Erinys meeting on 16 October 2006.

I am sure that Mr Lugovoy and Mr Kovtun knew that they were using a deadly poison (as opposed, for example, to a truth drug or a sleeping draught), and that they intended to kill Mr Litvinenko. I do not believe, however, that they knew precisely what the chemical that they were handling was, or the nature of all its properties.

I am sure that Mr Lugovoy and Mr Kovtun were acting on behalf of others when they poisoned Mr Litvinenko.

When Mr Lugovoy poisoned Mr Litvinenko, it is probable that he did so under the direction of the FSB. I would add that I regard that as a strong probability. I have found that Mr Kovtun also took part in the poisoning. I conclude therefore that he was also acting under FSB direction, possibly indirectly through Mr Lugovoy but probably to his knowledge.

The FSB operation to kill Mr Litvinenko was probably approved by Mr Patrushev and also by President Putin.