Chairman's Ruling

on

Applications by certain persons

to withhold their names from a list of core participants

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1. Some time ago I stated that it was my intention to publish on the Inquiry's website the names of all those who had been designated as core participants, subject to hearing applications from individual core participants that their existence should not be disclosed at all or that their identities should be withheld from publication by the use of initials or some other form of anonymisation. More recently I directed that anyone who wished to make submissions either on the principles of law applicable to matters of this kind or in support of applications by individual core participants to have their names withheld from publication should do so by 21 February 2018.

2. I have now received submissions from four different firms of solicitors representing a total of twenty core participants. Counsel acting for the group of solicitors comprising Bhatt Murphy, Bindmans, Hickman and Rose, Hodge, Jones and Allen and Irvine Thanvi Natas ("the five firms") made submissions on the general principles applicable to the publication of the names of core participants and I am grateful for their assistance. Specific submissions were directed to the particular circumstances of the individual core participants on whose behalf they were made. Some of them referred to matters of a personal nature affecting the particular core participants on whose behalf they are made and for that reason I was asked not to disclose them to other core participants or to the public generally. I will deal with that question a little later, but it is first necessary to consider the general principles which apply when deciding whether to publish the names

of core participants and whether to withhold publication in particular cases. This part of my ruling therefore applies to all applicants and will be made generally available so that it can be read by anyone who wishes to understand the basis on which individual applications have been decided.

General principles

3. Counsel took as their starting point the principle of open justice as enunciated in *Scott v Scott* [1913] A.C. 417, in which the House of Lords held that that the High Court had no jurisdiction to sit in camera in the interests of public decency. The court's jurisdiction to sit in camera was said to exist only when it was a matter of strict necessity because a public trial would defeat the whole object of the action. Viscount Haldane L.C. put the matter in this way at page 438:

   > " . . . the burden lies on those seeking to displace its application in the particular case to make out that the ordinary rule must as of necessity be superseded by this paramount consideration. The question is by no means one which, consistently with the spirit of our jurisprudence, can be dealt with by the judge as resting in his mere discretion as to what is expedient. The latter must treat it as one of principle, and as turning, not on convenience, but on necessity."

   The touchstone of necessity was reaffirmed in *Al Rawi v Security Service* [2012] 1 A.C. 531 per Lord Dyson J.S.C. at paragraph 26.

4. The importance of open justice as fundamental to the maintenance of the rule of law has been reiterated in many recent cases. In *Khuja v Times Newspapers Ltd* [2017] 3 W.L.R. 351 Lord Sumption expressed the view that its significance had if anything increased in an age which attaches growing importance to the public accountability of public officers and institutions and to the availability of information about the performance of their

functions (paragraph 13). Inevitably it may involve an interference with the right to respect for private life under article 8 of the European Convention on Human Rights ("ECHR"), but that right is not absolute, as article 8 itself makes clear. Interference will be justified if it is in accordance with the law and necessary in a democratic society for the protection of the rights and freedoms of others. Accordingly, the problem is essentially one of competing rights: the individual's right to respect for private life and the public's right to see that justice is properly administered. The decided cases support the conclusion that in general the importance of open justice is sufficiently great to override the right to respect for private life.

5. Section 17 of the Inquiries Act imposes a duty on the chairman to ensure that the inquiry is conducted fairly, so it is necessary also to have in mind that the common law imposes its own requirements. In paragraph 22 of his speech in *In re Officer L* [2007] UKHL 36, [2007] 1 W.L.R. 2135 Lord Carswell discussed the common law principles relating to the granting of anonymity to witnesses called to give evidence to public inquiries, which he described as distinct and in some respects different from those which govern a decision made the ECHR. Subjective fears, even if not well founded, can be taken into account, because it may be unfair and wrong to subject a witness to fears arising from giving evidence, particularly if it is thought that it might have an adverse impact on his or her health. However, it is still necessary to assess as far as possible the nature and seriousness of those fears and to strike a balance between the interests of the individual and the interests of the public as a whole: see (in a much more demanding context) *In the Matter of an Application by A and others (Nelson Witnesses) for Judicial Review* [2009] NICA 6 per Girvan L.J. at paragraph 23.

6. The principles of open justice apply with their full rigour to legal proceedings in the ordinary sense, but in my view they are also applicable to a public inquiry set up under the Inquiries Act 2005 to investigate matters of public concern. That is particularly so where there are reasons for scrutinising in some detail the conduct of public officials and others whose actions may have contributed to a substantial loss of life. Section 18(1) of the Inquiries Act itself makes it clear that the Inquiry's proceedings are to be open to the public, who must be given a reasonable opportunity to attend the hearings and access to the evidence presented to it. There is power in section 19(1) to restrict attendance at the inquiry or the disclosure or publication of any evidence or documents provided to it, but only insofar as such restrictions are required by law or are considered to be conducive to the inquiry's fulfilling its terms of reference or are necessary in the public interest. The clear thrust of these sections is that all aspects of the inquiry must be open to public scrutiny unless there are strong reasons to the contrary. I agree with counsel that in the present case publication of the names of core participants will be an important factor in the public's understanding of the Inquiry's proceedings and that greater understanding of the Inquiry's proceedings should engender greater confidence in its ability to fulfil its terms of reference. It follows that in principle all those who have been designated as core participants should be capable of being identified in the interests of openness and transparency. At this point I can turn to the question of the appropriate method of ensuring that the names of individual core participants are withheld from publication.

Remedies

7. All the applications I have received so far have been framed as applications for restriction orders under section 19(1)(b) of the Inquiries Act, but, as I have already

mentioned, section 19(1)(b) is concerned with "the disclosure or publication of any *evidence or documents* given, produced or provided to an inquiry." (My emphasis). It is not in my view directed to the question currently under consideration. That is not to say, however, that I have no power to restrict publication of the names of core participants; merely that in my view it is not one that arises under section 19. Section 17(1) of the Act gives me a general power to determine the procedure and conduct of the Inquiry, subject to a requirement to act with fairness. That includes, in my view, the power to decide whether a list of core participants should be published, and if so in what form, and whether the names of individual core participants should be omitted entirely or their identities masked by the use of initials.

8. The Inquiry is investigative in nature and formally there are no parties to it, but as the people and organisations most closely interested in its work, core participants are in a broadly similar position to parties to legal proceedings. I have no doubt that under section 17 of the Act I have the power to make orders of the kind under consideration and in appropriate cases a duty to do so, just as the court has power to direct that parties to legal proceedings are to be referred to in a way that does not disclose their identities where that is necessary in the interests of justice. It is recognised, however, that any such order involves a departure from the principle of open justice which must be justified on the grounds of necessity: see the discussion in *JX MX v Dartford and Gravesham NHS Trust* [[2015] EWCA Civ 96 [2015] 1 W.L.R. 3647, especially at paragraph 17.

9. It is unnecessary at this stage to identify particular factors that might justify omitting the name of a person from the list of core participants, but it is worth making some general observations. It is important to remember that, unlike the other cases in which questions

of this kind have arisen, what is proposed at this stage is nothing more than the publication of a list of the names of those who have been designated as core participants. It is not intended to include addresses or personal information of any kind. Nor is it intended to identify legal representatives. Core participants are in the same position as anyone else in relation to acting as witnesses; publication of their names will have no effect on that, one way or the other. Whether it is appropriate for the name of any particular witness to be withheld or other measures put in place to safeguard that witness is a matter that will be determined at a later date.

10. Applications by individual core participants to withhold their names from the list published on the Inquiry's website are similar in nature to applications for hearings to be held in private. To deal with them in public would undermine their very purpose. I am therefore satisfied that it is right not to disclose them to other core participants or to the public generally.