INQUESTS ARISING FROM THE DEATHS IN THE

FISHMONGERS' HALL TERROR ATTACK OF 29 NOVEMBER 2019

SUBMISSIONS ON ARTICLE 2 AND JURY QUESTIONS

Introduction

1. These submissions are served on behalf of the Secretary of State for the Home Department ("SSHD") and the Secretary of State for Justice ("SSJ"). They address the written submissions of Counsel to the Inquests ("CTI") dated 21 May 2021, in particular: the short-form conclusion, whether the Article 2 procedural obligation is engaged, CTI's proposed questions for the jury and CTI's proposed approach to a Prevention of Future Deaths Report ("PFD Report").

2. In summary, the position of the Secretaries of State is that:

    a. Short-form conclusions of unlawful killing ought to be returned.

    b. It is accepted that the Article 2 procedural obligation is engaged on the basis that:
        i. The relatively low threshold of an arguable breach by 'the authorities' of the Article 2 operational duty is passed. There is a clear public interest in the jury being able to express conclusions on wider matters of public concern;
        ii. It is specifically not accepted that there was an arguable breach of the operational duty on the part of MI5;
        iii. For the avoidance of doubt, it is not accepted that there was an actual breach of the operational duty on the part of any agency;
        iv. On the basis of (i), it is not necessary for the Coroner to consider the Article 2 general duty. In any event, it is not accepted that there is an arguable breach of the general duty.

c. No issue is taken with the general approach to jury questions adopted by CTI, nor with the structure of the questions proposed, however it is submitted that Question 4 (addressed at §§73(b) and 74(b) of CTI's submissions) requires substantive amendment to the wording and further limited observations are set out below.

d. The Secretaries of State note and endorse CTI's summary of the legal principles and proposals for dealing with the issue of PFD reports.

Short-Form Conclusion

3. In respect of both Saskia Jones and Jack Merritt, the Secretaries of State agree with CTI (§§66-67) that a short-form conclusion of unlawful killing ought to be returned. They were both murdered by Usman Khan, who bears responsibility for their deaths. That simple, but important, fact should be clearly recorded. The Secretaries of State also agree with CTI's proposal (§§68-71) that the jury should be invited to adopt or amend a short narrative as to the factual circumstances of Saskia Jones' and Jack Merritt's deaths.

4. The nature and scope of such further matters as the jury may be invited to address depends upon whether or not the procedural obligation under Article 2 is engaged. The Coroner is familiar with the statutory scheme, which is set out in uncontroversial terms at §§6-8 of CTI's submissions, although §8(e) is addressed further below. In short, if the Article 2 procedural obligation is engaged the jury will be required to express their conclusions in a manner which adequately records 'in what circumstances' the deceased came by their deaths.

Article 2 Procedural Obligation

5. The Coroner has deferred the determination of the question of whether the Article 2 procedural (or investigative) obligation is engaged until the conclusion of the evidence. It is submitted that he was right to do so as it enables a balanced and properly informed decision to be taken in light of the totality of the evidence that has been heard. The Coroner has, in the exercise of his discretion as to the scope of his investigation, conducted a wide-ranging, thorough and detailed investigation of the circumstances surrounding the

deaths, which is clearly capable of meeting the requirements of the enhanced investigative obligation under Article 2, in the event that it is found to apply.

6. That being so, the resolution of the issue of Article 2 engagement will have no effect on the scope or rigour of the Coroner's investigation. This Inquest stands as a clear example of the frequently-made observation that the ultimate decision as to whether the procedural obligation is engaged will have little, if any, effect on the scope of the inquiry: see, for example, *R (Smith) v Oxfordshire Assistant Deputy Coroner* [2011] AC1 (at §§152-154) and *R (Sreedharan) v Manchester City Coroner* [2013] EWCA Civ 181 (at §18(vii)). The relevance of Article 2 engagement extends only to the form and content of the conclusions to be elicited from the jury and the extent to which they should be invited to consider the wider question of 'in what circumstances' the deceased came by their deaths.

7. The question of whether the Article 2 investigative obligation is engaged is a binary one: either it is engaged or it is not. If it is engaged then, per *Sreedharan*, an Article 2-compliant conclusion should be returned in respect of all material aspects of the evidence, and a Coroner should not attempt to address individual issues differently depending upon whether or not Article 2 was engaged in the relevant respect. Accordingly, it is unnecessary to undertake a micro-analysis of the roles and actions of each public authority involved in the case.

8. The Article 2 investigative obligation is parasitic upon the Article 2 substantive obligations. Setting aside specific categories of case where the obligation is automatically engaged (e.g. suicides in prison and deliberate killings by state agents), the investigative obligation is engaged where, on the evidence, it is arguable that the state or its agents committed a breach of a substantive Article 2 duty in relation to the death: see, *R (Humberstone) v Legal Services Commission* [2011] 1 WLR 1460 at [52]-[68], *R (Gentle) v Prime Minister* [2008] 1 AC 1356.

9. There have been a number of authorities which have defined arguability, in this context, in slightly different terms, some of which appear to set the bar higher than others[1]. However, the most frequently used formulation of the test is that there is an 'arguable

[1] See, for example, *R (Takoushis) v Inner North London Coroner* [2006] 1 WLR 461 ('reasonable grounds for thinking that the death may have resulted from a wrongful act'); R (AP) v HM Coroner for Worcestershire [2011] EWHC 1453 (Admin) ('anything more than fanciful').

breach' of the substantive obligation (here the operational duty): see, for examples of authorities using that concept, *Al Saadoon v MOD* [2017] QB 1015, per Leggatt J at §§281-5; *R v Home Secretary ex parte Wright* [2001] EWHC 520 (Admin) at §43 (approved in *Amin*); *R (Humberstone) v Legal Services Commission* [2010] EWCA Civ 1497 at §67. Regardless of the precise formulation, it is clear that the threshold is relatively low, and well below that which would be required to establish a breach of one of the substantive Article 2 obligations.

10. For present purposes, the relevant substantive obligations imposed by Article 2 are the 'operational duty' to take reasonable steps to protect life and the 'general' (or 'systemic') duty to establish a legal and administrative framework designed to protect life. These are addressed in turn.

Operational Duty

11. The scope of the state's positive obligation to protect life – often referred to as the state's operational duty - was described by the ECtHR in *Osman v United Kingdom* (2000) 29 EHRR 245, in a formulation that has been repeated and endorsed in domestic jurisprudence. At §116 in *Osman*, the Court defined the circumstances in which the procedural obligation arises to investigate whether the state has breached its positive obligation to protect life:

> *"… it must be established to [the court's] satisfaction that the authorities knew or ought to have known at the time of the existence of a real and immediate risk to the life of an identified individual or individuals from the criminal acts of a third party and that they failed to take measures within the scope of their powers which judged reasonably, might have been expected to avoid that risk."*

12. Lord Dyson explained in *Sarjantson v Chief Constable of Humberside Police* [2014] QB 411 that the reference in the *Osman* formulation to 'identified individual or individuals' does not limit the scope of the duty only to those individuals whose identities are known to the state authorities at the time. The duty can extend to the public at large, or a particular section of the public. The 'essential question' as formulated by Lord Dyson (at §25) is:

> "*whether the [state] knew or ought to have known that there was a real and immediate risk to the life of the victim of the violence and whether they did all that could reasonably be expected of them to prevent it from materialising*."

13. The real and immediate risk threshold for engagement of the state's positive obligation to protect life from the criminal acts of others is high, as was made clear by Lord Carswell in *Re Officer L* [2007] 1 WLR 2135, with whose speech all the other members of the Appellate Committee agreed. At §20 Lord Carswell said this:

> *"Two matters have become clear in the subsequent development of the case−law. First, this positive obligation arises only when the risk is "real and immediate". The wording of this test has been the subject of some critical discussion, but its meaning has been aptly summarised in Northern Ireland by Weatherup J in Re W's Application [2004] NIQB 67, where he said that: "a real risk is one that is objectively verified and an immediate risk is one that is present and continuing." It is in my opinion clear that the criterion is and should be one that is not readily satisfied: in other words, the threshold is high."*[2]

14. The reason for the height of the threshold is directly linked to the second element of the operational duty (the failure to take reasonable steps in the face of that real and immediate risk). The ECtHR's evident concern – highlighted in *Osman* and frequently noted both before and after that case – is that this operational duty must not impose unreasonable or disproportionate burdens on the state: see eg *Osman*, §116. The jurisprudence recognises that states face numerous and serious threats to their citizens from many sources, including specifically from terrorism, and they cannot reasonably be expected to react to, still less to prevent, all of them. The reasonableness standard accordingly brings into account "*the ease or difficulty of taking precautions and the resources available. In this way the state is not obliged to satisfy an absolute standard requiring the risk to be averted, regardless of all other considerations*": see *Officer L*, at §21.

15. It is apparent from cases such as *Osman* and *Van Colle* that even in a case where the state authorities can be said to have knowledge of a specific risk of harm to a person posed by an identified individual, it will not readily be shown that the positive obligation to protect life imposed by Article 2 has been breached. In *Osman*, the ECtHR found no violation of the UK's positive obligation to protect life, despite the extensive evidence (summarised at

[2] That the threshold is indeed high was noted by Hallett LJ at §83 of her ruling on the scope of the 7/7 Inquest:
https://webarchive.nationalarchives.gov.uk/20120216081134/http:/7julyinquests.independent.gov.uk/docs/orders/dec-april-2010.pdf

§§117-121) as to the police's knowledge of the specific risk posed by the murderer to his victim. In *Van Colle*, the Claimant's son, who was a witness in a criminal trial, was killed by the accused, following, *inter alia*, a telephone call in which the accused had spoken to the Claimant's son in an aggressive and threatening manner. Again, no violation was found.

16. It is also important that the assessment as to whether the state is, or arguably was, in breach of its positive obligation to protect life be undertaken on the basis of what was, or should have been, known at the time of the death. It must not be infected with hindsight: see e.g. *Bubbins v UK* (2005) 50196/99 at 147 "*the Court must be cautious about revisiting the events with the wisdom of hindsight*".

17. It is submitted that, on a proper application of these principles to the evidence that the Coroner has heard, no actual breach of the substantive operational duty has been disclosed.

    a. Khan's behaviour in prison was poor and he was consistently assessed to pose a (very) high risk to the public but that is insufficient, of itself, to establish a breach of the operational duty.

    b. There was no information to suggest that he was intending to carry out an attack in the long period of his release, and the extensive 11-month covert investigation revealed no intelligence to that effect.

    c. The intelligence (received by MI5 and passed to the West Midlands Counter-Terrorism Unit ("WMCTU")) when he was still in custody in late 2018 (that Khan intended to return to his old ways and to commit an attack on release) was not uncommon in many investigations in the context of a TACT prisoner socialising in a prison environment and boasting about extremist aspirations (see e.g. DCI Ryan Chambers, Day 26, p.70 and Witness A Day 22 p.71).

    d. The late 2018 intelligence was not only of unknown validity and uncorroborated, it was also over 11 months old by the time of the attack, and there had been no further intelligence in the intervening period that Khan intended to act in the manner apparently described to associates in prison.

e. Rather, Khan was manipulative: he complied with his stringent licence conditions and gave the impression to a large number of people involved in his management that he was committed to rehabilitation.

f. Throughout the 11-months after his release, Khan was free to go to Stafford town centre at any time. He could have travelled further afield without permission, provided that he did not take a train or plane. This was a low-sophistication attack with very limited planning and without any third-party involvement.

18. However, it is recognised that the question for the Coroner is not whether there has been a breach of the operational duty but whether, applying the relatively low threshold described above, there is an 'arguable breach'. It is further recognised that the effect of a conclusion by the Coroner that there has been an arguable breach will be to enable the jury to return conclusions on wider issues of clear public concern, such as whether the risks of Khan attending the Fishmongers' Hall event were adequately assessed and/or considered, about which a very great deal of evidence has been heard.

19. With those considerations in mind, the Secretaries of State do not seek to dissuade the Coroner from concluding that there has been an arguable breach of the operational duty such as to engage the Article 2 investigative obligation and require the jury to consider 'in what circumstances' the deceased came by their death. It is accepted that there is sufficient evidence before the Coroner to cross the low threshold of arguability, and that there is a clear public interest in the jury being able to express conclusions on wider matters of public concern.

20. It is important to note, however, that in advancing this submission the Secretaries of State should not be taken to accept that the actions of any particular agency or individual were sufficient, of themselves, to establish an arguable breach of the operational duty. The submission is based on the totality of the evidence concerning all the public authorities involved in the relevant event and it is neither necessary nor desirable to undertake a detailed analysis of the respective positions of each one, for two reasons.

21. First, a decision by the Coroner that the Article 2 investigative obligation is engaged will have the effect that an Article 2-compliant conclusion should be returned in respect of all material aspects of the evidence (per *Sreeharan*). Neither the questions to the jury, nor the approach of the jury to answering those questions, will be affected in the slightest if the

Coroner were to find, after a minute examination of the evidence, that some public authorities were arguably in breach of the operational duty while some were not.

22. Second, as a matter of principle, the Article 2 operational duty is imposed on the state and the relevant question, for present purposes, is whether there is an arguable case that the state has breached it. For present purposes, therefore, it is both artificial and immaterial to seek to analyse whether the actions of one particular public authority, viewed in isolation, might constitute an arguable breach of the operational duty. It would be unnecessary and inappropriate to engage in that exercise for the purpose of determining the scope of the questions to be posed to the jury.

23. Notwithstanding the general observations set out above, the SSHD makes the following brief observations as to paragraph 17 of CTI's submissions:

    a. There is no evidence before the jury to suggest that MI5 (para d) knew or ought to have known of a real and immediate risk to the lives of attendees at the Learning Together event or those in the vicinity. The covert investigation revealed nothing to give any cause for concern.

    b. MI5 did not form part of the Responsible Authority within the MAPPA structure, nor were they in any way responsible for the 'management' of Khan within the MAPPA framework. Insofar as their covert investigation revealed anything of national security concern or relevance MI5 passed this information to Counter Terrorism Policing, whose role it was to be the 'bridge' into MAPPA.

    c. The decisions about what Khan should be permitted to do under the licence conditions or about variation of licence conditions were for the Responsible Authority under MAPPA only.

    d. On the basis of the observations set out above, the Secretaries of State do not accept that there was even an arguable breach of the operational Article 2 duty in relation to MI5.

General/Systemic Duty

24. Article 2 also imposes a general duty on the state to establish a legal and administrative framework designed to protect life by establishing an effective system of deterrence. This general, or 'systemic' duty was defined by the ECtHR in *Oneryildiz v Turkey* (2005) 41 EHRR in the following terms (at §89):

> *"The positive obligation to take all appropriate steps to safeguard life for the purposes of Art.2 entails above all a primary duty on the state to put in place a legislative and administrative framework designed to provide effective deterrence against threats to the right to life."*

25. This formulation was adopted by the Supreme Court in *Rabone v Pennine Care NHS Foundation Trust* [2012] 2 AC 72, at §12. The 'systemic' duty consists of an obligation to establish, in the particular context of the criminal acts of non-state agents, a framework of criminal law, backed up by effective law-enforcement machinery, in order to deter the taking of life. It is, in other words, the basic obligation of a civil society to protect its citizens by establishing, and enforcing, the rule of law.

26. The relationship between the systemic duty and the operational duty discussed above is explained in *Mastromatteo v Italy* (Application No. 37703/97):

> *"67. The State's obligation extends beyond its primary duty to secure the right to life by putting in place effective criminal-law provisions to deter the commission of offences against the person backed up by law-enforcement machinery for the prevention, suppression and punishment of breaches of such provisions. Article 2 may also imply in certain well-defined circumstances a positive obligation on the authorities to take preventive operational measures to protect an individual whose life is at risk from the criminal acts of another individual."*

27. If the Coroner concludes that the Article 2 investigative obligation is engaged on the basis that there was an arguable breach of the operational duty then it will not be necessary for him to determine whether or not there was an arguable breach of the systemic duty as well. We agree with the submissions of CTI in this respect (see §4(b)). In the present context the Coroner is considering the issue of whether the state is in arguable breach of its Article 2 substantive obligations for a limited and specific purpose, namely to determine whether the jury should be asked to address the question of in what circumstances the deceased died, rather than merely how the deceased died. Once it is determined that the jury should be asked the wider question it is unnecessary for the

Coroner to go further and rule on the arguability of academic matters which will have no bearing on the scope of the jury's conclusions.

28. That said, and to the extent relevant, it is submitted that the evidence heard in the course of these inquests does not amount even to an arguable breach of the systemic duty. In order for the Coroner to find an arguable breach of the systemic duty to put in place adequate procedures to protect the general public from terrorist attack, it would be necessary for him to identify the specific respects in which the criminal law provisions and/or law enforcement machinery was arguably inadequate to meet the minimum standard imposed by Article 2 (as opposed to inadequately operated in the particular circumstances of this case). That is a conclusion that would have to be based on the evidence and cannot simply be established by the fact that, in the particular circumstances of this case, the provisions and/or machinery failed to prevent Khan from carrying out the attack: see, *Chief Constable of Devon and Cornwall Police v HM Coroner for Plymouth, Torbay and South Devon* [2013] EWHC 3729, Stuart Smith J at §§7, 16 (iii) and 20.

29. The fact that the detailed analysis of a case such as this might reveal aspects of the applicable criminal law provisions and/or law enforcement machinery that could be improved falls well short of establishing an arguable breach of the systemic duty. No system of law enforcement will be capable of preventing all criminal acts and the ECtHR has been careful to make clear that the systemic duty should not be interpreted or applied in a way which imposes an unrealistic burden on Member States, which enjoy a wide margin of appreciation in this area: *Budayeva and Others v. Russia*, (Application no. 15339/02) §§ 134-135; *Vilnes and Others v. Norway*, (Application no. 52806/09) §220; *Brincat and Others v. Malta*, (Application no. 60908/11) § 101.

30. In the case of an individual such as Khan there were 'effective criminal-law provisions to deter the commission of offences against the person backed up by law-enforcement machinery for the prevention, suppression and punishment of breaches of such provisions':

    a. Khan was subject to a P3 covert investigation run by MI5 and WMCTU. He was subject to an initial period of enhanced surveillance and a proportionate level of coverage was in place throughout 2019 (Witness A, Day 22, pp.83, 113, 133, 146);

b. On release, Khan was subject to stringent licence conditions (see Philip Bromley, Day 15, p.113);

c. Khan's management on licence was subject to discussion every six weeks at the specialist TACT MAPPA Panel. This brought together expertise from Counter Terrorism Policing, in the form of both Staffordshire Special Branch and WMCTU, the Staffordshire police Prevent team and various senior figures within the National Probation Service ("NPS"). CT policing was the conduit to MAPPA for MI5, if needed. Khan was managed at MAPPA Level 3, which meant that he was subject to senior management oversight;

d. While Khan resided at the Approved Premises, he was subject to checks and supervision including: room searches, drug and alcohol testing, regular key work sessions and participation in agreed activities (Kim West, WS5046/5);

e. Khan was subject to regular visits from the Staffordshire Prevent team, who passed on intelligence to Staffordshire Special Branch and the MAPPA Panel. They ensured Khan complied with his Part 4 requirements. There was no evidence to suggest a breach of the Part 4 requirements;

f. Khan was subject to regular visits from Probation staff who ensured that he was complying with his licence conditions and updated the MAPPA Panel on Khan's progress. There was no evidence to suggest a breach of the licence conditions, although there were procedures in place should Khan breach those conditions;

g. Khan was subject to an electronic tag which recorded his movements so that his patterns of movement could be analysed (as they were: see MAPPA minutes 14 November 2019 [DC6417/5]). In addition, the tag would have raised an alert if Khan had attended a train station, stayed out beyond his curfew etc (see [DC5203]);

h. Khan was part of the Desistance and Disengagement Programme ("DDP"). This meant that, until September 2019, he had regular meetings with practical mentors. The practical mentors provided reports that were distributed to probation and police staff. These highlighted various issues which were considered (DS

Stephenson, Day 24, p.55) but no serious concerns were raised. Khan had two intervention sessions with a Theological Mentor who found Khan to be a plausible and compelling character (TM, Day 17, p.156).

31. In relation to the issues raised by CTI at §64 of their submissions:

a. The effect of an ERG 22+ assessment completed with the assistance of a psychologist is purely speculative. There is insufficient evidence to reach the threshold for arguable breach regarding: the conclusions that would have been reached, when the report would have been finished or whether the report would have altered the actions of the MAPPA Panel. The MAPPA Panel did not see the draft ERG 22+ assessment prepared by Kenneth Skelton.

b. In relation to the experience of Sumeet Johal, it is clear that he was closely supervised by his line-manager, Lois Gell, a Probation Counter-Terrorism Lead (Day 17, p.160). Lois Gell was involved in the management of Khan and attended all but two MAPPA meetings.

c. In relation to the security clearance of Nigel Byford, it was his evidence that he had been able to receive sensitive information when involved with other panels (Day 23, p.43). In any event, he was privy to the "*old ways*" strand of intelligence. He was not privy to the "*attack planning*" strand of intelligence, however this was included in an Official Sensitive Subject Profile which could lawfully have been shared with other authorities (DCI Ryan Chambers, Day 26, p.10). In addition, it was the evidence of DCI Dan Brown that the "*attack planning*" intelligence would have been shared if this had been requested (DCI Dan Brown, Day 27, p.57);

d. The above reasoning applies also to the issue of pre-meetings at the MAPPA Panel. None of the police witnesses suggested that the absence of pre-meetings would have prevented them from sharing intelligence that needed to be shared.

e. In relation to the fact that Kenneth Skelton was unaware of the WMCTU/MI5 covert investigation, ACC Ward stated that he would not want all MAPPA attendees (who would not be subject to higher level security vetting) to be aware of such an investigation due to sensitivities (Day 27, p.26). In relation to PS Forsyth,

there is a factual conflict as to the extent of his knowledge and it has been suggested that he attended a Joint Operational Team meeting ("JOT") (DS Stephenson, Day 24, p.40-41).

32. To the extent that the Coroner considers there to have been arguable deficiencies in the way in which this machinery was operated in the case of Khan, any such deficiencies would bear on the assessment of the operational duty, not the systemic duty. The courts should not micro-manage systems under the general duty. Improvements to systems based on close, slow-time analysis of all the circumstances in retrospect and combined with hindsight, do not amount to arguable breaches of the general duty, but are properly matters for PFD considerations.

Questions for the Jury

33. No issue is taken with the general approach to jury questions adopted by CTI, nor with the structure of the questions proposed. However, the Secretaries of State make the following submissions:
    a. Page 3: "try" should be removed from paragraph (c);
    b. Qu.4 (p.10) must be reworded, given that the evidence before the jury regarding covert investigations into Khan has been properly limited by PII. It is suggested that the term "investigation of" is replaced with "information sharing regarding". This is consistent with the substance of the questions which CTI seek to address (see §74(b) of CTI's submissions). There has been no evidence upon which a jury could properly conclude that there was any omission or failure in the investigation.
    c. In light of (b) above, the fourth bullet point on p.11 should be removed and the fifth bullet point is redundant. There is no evidence to suggest that MI5 failed to share any relevant information with any other agency.
    d. In the light of the observations made at paragraphs 23(a)-(c) above, it must be made clear that bullet points 6 and 7 do not apply to MI5. MI5 did not form part of the Responsible Authority within the MAPPA structure who were responsible for managing Khan's licence conditions. Insofar as anything relevant to his management was revealed by the covert investigation it was for CT policing to feed this into the MAPPA process.

e. P.11: the word "prison" before "intelligence" should be removed from the second bullet point at (b) and (c) to avoid any suggestion that HMPPS was the owner of the intelligence (as clarified by DCI Brown in his evidence, Day 27, p.56). Appropriate alternative wording would be "(b) had been the subject of substantial intelligence, whilst he was in prison to the effect that…" and "(c) had been the subject of intelligence whilst he was in prison in late 2018…".

Prevention of Future Deaths Report ("PFD Report")

34. The relevant law has been set out in CTI's submissions: the summary at §§82-83 is agreed. The Secretaries of State also endorse the proposed approach to PFD reports set out at §84.

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24 May 2021