INQUIRY INTO THE DEATH OF DAWN STURGESS

RESPONSE OF HER MAJESTY'S GOVERNMENT TO THE PROPOSAL TO PERMIT VETTED COUNSEL FOR THE FAMILY TO VIEW UNREDACTED MATERIAL

1. At the preliminary hearing on 15 July 2022, Counsel for the Family proposed that two members of the Family's counsel team, both of whom hold Developed Vetting, should be permitted to view unredacted documents, and so should see the names of government staff that would be redacted from documents made available to Core Participants and to the public.

2. This Note contains the response of Her Majesty's Government ["HMG"]. In essence, HMG opposes the proposal. HMG emphasises from the outset that its stance in no way reflects any lack of trust in the Family's Counsel. HMG has no doubt that they would act with absolute integrity and would never knowingly divulge information disclosed to them as part of the proposed process. However, HMG submits that both legal and practical objections render the proposal inappropriate. Most importantly, the arrangement proposed would place Counsel for the Family in an impossible position.

3. This response, inevitably, is drafted on the assumption that the Restriction Order sought by HMG is granted. HMG recognises that the Chair has not yet ruled on the application.

Judicial consideration of "confidentiality rings"

4. Counsel for the Family are proposing the creation of a confidentiality ring of which just two members of the Family's legal team would be a part. No other members of the Family's legal team and no members of the Family would be permitted to know what these two members of their legal team know.

5. The difficulties caused by such an arrangement, in the context of material subject to a claim for public interest immunity, have been repeatedly considered by the courts. In *Somerville v Scottish Ministers* [2007] UKHL 44, the House of Lords considered a confidentiality ring in which senior counsel for the petitioner was permitted to view material over which Ministers had claimed PII. Lord Rodger observed:

> "153. ... *counsel for the petitioners was left in a very difficult situation where, as a result of reading the documents, he had information that he was not able to reveal to, or discuss with his clients or instructing solicitors. He even felt inhibited from revealing it to the Lord Ordinary. The result was a certain paralysis in the procedure. In agreement with all of your Lordships, I am satisfied that no such procedure should be followed in future.*"

6. In *AHK v Secretary of State for the Home Department* [2013] EWHC 1426 (Admin), Ouseley J again considered the proposal for a confidentiality ring restricted to lawyers. The judge considered (and disagreed with) the suggestion by Moses LJ in *R (Mohammed) v Secretary of State for Defence* [2012] EWHC 3454 (Admin) that a confidentiality ring could be created in respect of material which was the subject of an application for PII but in respect of which the claim had not (yet) been upheld. Ouseley J noted [paras. 23-26] that there were three reasons for which confidentiality rings were undesirable:

   (i) the risk of inadvertent disclosure;
   (ii) the risk that, if disclosure took place, the source would be unknown and suspicion would fall on the innocent; and
   (iii) the difficulty that the Court would face in deciding who could be trusted to be in the confidentiality ring (a factor that would not arise in the present case).

7. The risk with which HMG is principally concerned in the present case is that of inadvertent disclosure, coupled with the practical difficulties that arise with

confidentiality rings of this sort. In *AHK* Ouseley J addressed at length the problem of inadvertent disclosure, and quoted from a ruling of the Special Immigration Appeals Commission in *BB v Secretary of State for the Home Department* SC/39/2005:

> *"32... First, there is an obvious risk of inadvertent disclosure by the representative, e.g. in discussions with other representatives or clients, or to others, or in paper management. It is self-evident that the more who have the material, the greater the risk of inadvertent disclosure. The difficulties in managing the separation between open and closed material is terms of questions of witnesses, discussions with advocates in submissions, indeed judgment writing including technical support and publication, would all be greatly increased. All this increases the risk of accidental disclosure. It is easy to see why the experience when these suggestions were tried was an unhappy one. If cross-examination is proceeding on a topic which involves a restricted open document or point. It would have to stop while people left court; the point wold be potentially highlighted and inferentially it could be revealed widely. It might give rise to very strong questions from a client to his representative as to why a point had not been pressed, leading to inadvertent disclosure. The answer to a judicial question raised in open submission might make avoidance of reference to such material very difficult, and asking questions in open is already inhibited enough by knowledge of the closed material. The ability to remember which different system applied to which material during a hearing would make for error on all sides. These might be very difficult to correct and could sell the pass for resistance to full disclosure, as we have already seen happen with inadvertent disclosure. If those risks do not matter in relation to any particular material, that is because it is in reality open."*

8. While giving Counsel to the Family access to unredacted names might not give rise to all of the difficulties identified in *BB*, some at least of the problems outlined there would almost inevitably materialise.

9. In *Competition and Markets Authority v Concordia* [2018] EWCA Civ 1881 the Court of Appeal reviewed the authorities. King LJ, with whom the other members of the Court agreed, held [para. 74]:

> *"In my view, the use of a confidentiality ring in competition cases, and specifically in relation to the obtaining and challenging of warrants, has no place in relation to material protected by PII for all the reasons articulated in* Somerville *and* AHK v SSHD. *The use of confidentiality rings is limited to the protection of commercially sensitive information..."*

10. HMG recognises that material subject to a restriction order is not precisely analogous to material that is protected by PII. In the latter case, such material cannot be disclosed to anyone; in the former, the chair of a statutory inquiry has a wide discretion as to the form and terms of any restriction order that he imposes. But HMG submits that the difficulties created by a lawyer-only confidentiality ring would be the same.

Further considerations

11. The need to protect sensitive information is a very real one, and processes are put in place to reduce to an absolute minimum the risk of inadvertent disclosure. Everyone given access to sensitive material is trusted, and everyone tries to take care to protect that material. But mistakes are inevitable. It is for that reason that the Need to Know principle was established by security agencies and is rigorously applied; the more people who know a secret, the greater the risk of inadvertent disclosure.

12. In this instance, it is HMG's position that Counsel for the Family do not need to know the names that HMG wishes to redact. In many instances, the names will relate to individuals whose identity and/or role was of no particular significance to the issues being determined by the Inquiry. When an individual had a significant role, then that person's name will be replaced by a cipher so that all Core Participants, lawyers and clients, can follow the actions of that individual throughout the disclosed documents.

13. Second, as Ouseley J highlighted in *AHK*, a particular risk of inadvertent disclosure exists in the interaction between lawyers who know a secret and their fellow lawyers and clients who do not. It can be very difficult for an individual, however conscientious, to distinguish instantly between information obtained from CLOSED documents and information derived from OPEN ones. Further difficulties are caused when a lawyer is, for example, discussing a particular issue

with a client, and the client – because he does not know the secret information – has drawn a mistaken conclusion. The lawyer then has to try to find a way of correcting the error without either misleading the client or revealing (even by implication) the secret information. If the lawyer does accidentally disclose some protected information, for example to one client, the position can never be retrieved. Worse, the circle of knowledge will probably expand because it would be impractical to expect one family member to conceal the secret information from other family members.

The appropriate use of confidentiality rings

14. Although courts have disapproved the use of confidentiality rings, there may be circumstances in which their use is not only appropriate but necessary. A confidentiality ring may be needed when sensitive information has come into the possession of a person not cleared to see it (for example, when a redaction error has been made and information has inadvertently been disclosed, or even when a malicious actor has stolen information and then made it available to a Core Participant who would otherwise not have seen it). In those circumstances, a confidentiality ring, in which those who have seen the material are permitted to refer to and rely on it, but are subject to stringent safeguards to prevent further dissemination, may be the most appropriate means of both using and protecting that material. In such circumstances, Her Majesty's Government might support or even propose the use of a confidentiality ring.

15. However, it is the government's submission that the use of confidentiality rings should be a recourse of last resort, and that it would be wrong for the Inquiry to accede to the current request made by the Family.

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