RESTRICTION ORDER RULING

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1. The disclosure stage of this Inquiry, that is to say assembling the relevant evidential material and making it available to core participants, is unavoidably complicated by the need to identify and keep secure the substantial element of highly sensitive material which will have to be considered in CLOSED hearings. It was the presence of this material which led the Home Secretary, on the application of the then Coroner, Baroness Hallett, and with the concurrence of all interested persons, to establish this Inquiry in place of the then current inquest into the death of Dawn Sturgess.

2. Because it had become apparent that the issue of redaction of names appearing in potentially disclosable documents was likely to arise, I gave directions on 4 April 2022 that applications for restriction orders under section 19(2)(b) of the Inquiries Act 2005 ("the Act") in relation to such names were to be made in principle and early in the Inquiry, by 31 May 2022. That was designed to identify as soon as practicable the positions of HMG and Operation Verbasco and the factors which would fall for consideration.

3. Such applications have been lodged by HMG and Operation Verbasco (a joint operation between the Metropolitan and Thames Valley police forces).

4. The application by HMG seeks a restriction order in respect of

   "the names and designations (if appropriate) of:

   a. all staff below Senior Civil Servant ("SCS") grade and the military equivalent of below one star rank;
   b. all SCS and military equivalent, except when the person concerned has been officially publicly linked to the 2018 events in the role and capacity that is to be disclosed or published; and
   c. all UK Intelligence Community ("UKIC") staff, unless publicly avowed such as the Chief of SIS and MI5's Director General, and including any cover names used by such staff."

5. The application lodged by Operation Verbasco relates to a more limited group of persons. It seeks a restriction order in relation to the names of all Counter-Terrorism Policing ("CTP") staff, save for those who have been publicly linked to the 2018 events subject to this Inquiry.

6. Neither of the present applications seeks a restriction order in relation to any person who is in due course to be called as a witness before the Inquiry. Both HMG and Operation Verbasco accept that if anonymity of any potential witness is sought, a separate application will have to be made. The present applications are limited to the disclosure process, and to names appearing on documents potentially disclosable.

7. The starting point is that this is a public inquiry and so far as possible its proceedings must take place in public (section 18 of the Act). There is a clear public interest in transparency. Closed hearings, and restriction orders, are and must remain exceptions to that principle and must call for clear justification. Section 19(3)(b) of the Act correctly reflects this approach. A restriction order must specify only such restrictions as I consider conducive to fulfilling my terms of reference or necessary in the public interest. In the context of the present applications, restrictions which are necessary in the public interest will also be conducive in fulfilling my terms of reference, because they will enable me to make as much material as possible available in public but yet consider also confidential material in CLOSED hearings. The central question is thus whether the public interest makes a restriction order necessary. Necessity is the test, not desirability or convenience.

8. Section 19(4) of the Act goes on to identify particular factors to which regard must be had in determining the question of the necessity of any restriction order:

    a. the extent to which any restriction on attendance, publication or disclosure might inhibit the allaying of public concern;
    b. any risk of harm or damage that could be avoided or reduced by any such restriction;
    c. any conditions as to confidentiality subject to which a person acquired information that he is to give, or has given, to the Inquiry;
    d. the extent to which not imposing any particular restriction would be likely –
        i. to cause delay or to impair the efficiency or effectiveness of the inquiry; or
        ii. otherwise to result in additional cost (whether to public funds or to witnesses or others).

9. For this purpose, 'harm or damage' is further elucidated by section 19(5) of the Act. It includes, materially, "death or injury" and "damage to national security". These applications are premised on the contentions that, without the restrictions sought, there will be a serious risk of damage to national security, coupled with some personal risk to the persons whose names it is sought to redact.

10. Determining the necessity of restriction orders in this case thus involves balancing the risk of harm to national security and/or to individuals against the public interest in

transparency and the conduct of public inquiries as openly as possible. This is akin to the so-called *Wiley* balance (*R v Chief Constable of West Midlands ex p Wiley* [1995] 1 AC 274) test for public interest immunity ("PII"), with the difference that the consequences of upholding a claim for PII are to remove the material entirely from the hearing process, whereas if a restriction order is made in relation to an Inquiry, the material can still be considered in CLOSED session. The cases have however this similarity, that the test of necessity means that to make a restriction order, I must be satisfied that the interests of national security outweigh, on the facts, the public interest in open justice. The determination of where the interests of national security lie, and where risks to it exist, are particularly matters within the competence of the Secretary of State, but the drawing of the balance and the decision on the test of necessity is for me, and not for the Executive (*R (Binyam Mohamed) v SS FCA* [2009] 1 WLR 2653 and *SSFCA v Asst Deputy Coroner for Inner London North* [2013] EWHC 3724 (Admin)).

11. The responsibility for the events in Salisbury and Amesbury in 2018 is what is to be decided by this Inquiry. This is, however, at least a prima facie case (denied by those accused) that those responsible were Russian nationals acting in the interests of the Russian state and allegedly under its direction. The risk of damage to national security here lies in the risk that hostile actors, whether State or otherwise and, if State, whether Russian or otherwise, might target individuals identified as concerned in the UK reaction to those events, and/or might use access to their names as a means of disrupting UK public functions. I am satisfied, on all the material I have seen, both OPEN and CLOSED, that these are marked real risks to some of those who were involved in the 2018 events, and that Russia in particular has both an interest in such activity and a known capacity to carry it out. For most of these persons therefore, a restriction order is likely to be necessary. There will, however, be some officials, particularly but not only in relatively high-profile positions, for whom the risks explained exist, but who are already sufficiently identified publicly, and/or sufficiently resilient to the risks inherent in their posts, for a restriction order not to be justified because it would serve little or no purpose.

12. I have considered whether there is any practical alternative to a restriction order, where one or more of the identified risks exists. If there were, the order would not be necessary. I have considered –

    a. permitting disclosure of the names to core participants subject to an undertaking that the names would not be spoken in any public hearings, nor communicated to any other person; such undertakings are not appropriate to national security material (see *CMA v Corcordia International* [2018] EWCA 1881), nor could they be enforced, and they would meanwhile place those in possession of the information themselves at risk of hostile targeting; further, disclosure by means of a database such as Relativity may be penetrable by such hostile actors;
    b. as (a) but with disclosure to core participants in hard copy by way of numbered sets; save for the last-mentioned danger of penetration, the same objections apply;

c. permitting disclosure of the names to core participants by inspection of the document in a secure location, together with similar undertakings; the same applies as to (b);
d. permitting disclosure on a very limited basis to counsel appearing for particular core participants who are themselves DV cleared and who would be prepared to give strict undertakings not to reveal the information to anyone else; having considered oral and written submissions on this issue, I am satisfied that this is wrong in principle for the reasons explained in *CMA v Concordia*; further it places counsel in an impossible position vis-à-vis their clients and indeed their colleague lawyers.

I am satisfied that no practicable alternative to restriction orders exists which would avert the risks of danger to national security in this case.

13. These risks apply, I am satisfied, to any police Counter-Terrorism officer or staff, whether still working in that capacity or not. Such people have, as a result of their training and casework experience, access to secret information which would be of great value to hostile actors, and they are particularly vulnerable to attack by cyber and other means. It may well be that in lower-profile cases, or those not involving direct accusations made against a hostile State, Counter-Terrorism officers may be able to give evidence openly, but the risk to them has to be assessed case by case. I have no doubt that for such people in the present case the twin risks explained are real and marked. Nor do I think there is sufficient public interest in their being named in disclosed documents to justify overriding the risk involved in their names being public at this stage. I anticipate making a restriction order preventing the disclosure of the names of any such persons, save those publicly avowed by Counter-Terrorism authorities as connected to the 2018 events. If any are called as witnesses, their cases will be separately considered.

14. I am similarly satisfied that these same risks will apply also to many employed by, or acting for, HMG. A hostile actor would have a real interest in the UK reaction to the attack which occurred in Salisbury in 2018, in its investigation and in counter-measures taken, and in those who have functions associated with those reactions. It would have a similar interest in anyone amongst government staff who carried out any sensitive role; an obvious example would be any person concerned in the work of intelligence agencies, or other covert activities, but the risk will not be limited to them. General disclosure of the names of persons subject to these risks would indeed present a hostile actor with a convenient directory of suitable targets and/or a list of sensitive functions which would be of considerable value to a hostile actor accumulating intelligence about UK security and government systems.

15. It does not, however, follow, that these risks, or either of them, apply to everyone who has any kind of central government employment or commission. The material I have already seen demonstrates that some people in those categories fulfilled entirely innocuous and mundane functions. A simple example might be those who assisted in the cleaning up of toxic contamination, but again the case is not limited to that instance. There is no reason to fear hostile actor interest in such people or in their functions. For this reason, it is not appropriate to make a restriction order covering every person who

has, or has had, any kind of central government employment or commission, as the presently drafted Order does.

16. I have considered the additional submission of HMG that there is a necessity to make such a general restriction order now, as a precautionary measure. That might enable one to protect all such names from disclosure to core participants, whilst reserving the possibility of removing from the order those found on inspection to have no sensitive function carrying one or other of the twin risks explained. This cannot be a proper basis for making a restriction order unless there is no sensible alternative, because unless there is no alternative the order is not necessary. I have concluded that such an order is not necessary. I have directed that material disclosed to the ILT must be disclosed (on terms preserving security) largely unredacted, although with scope for suggested future redactions to be identified. Unavoidably, all such material has to be assessed by the ILT for relevance to the Inquiry. Unavoidably also, the question of redactions, whether of names or other content, must then be addressed by me in relation to everything potentially relevant, with the help of submissions by HMG, the Police, the ILT and others, before second stage disclosure to core participants. Since that has to be done in any event, the question of which names require redaction can and will be addressed then, alongside other questions of redaction. In the meantime, I shall be content to make a restriction order in relation to names if, but only if, one or more descriptors can be devised which identify government staff who attract one or both of the twin risks identified above.

17. A separate question raised in argument concerns persons who are identified not only by name but also by job descriptions or similar label, where the description or label will readily enable any hostile actor to discover the name. A hypothetical example given in OPEN court was a document naming Mr Boris Johnson, alongside the description "Prime Minister". Some such persons will be those considered at the end of paragraph 11 above, for whom restriction orders are inappropriate in any event. But if such a person is in need of protection, it is plainly pointless to make a restriction order preventing disclosure of the name without also preventing disclosure of the job description. If such a case arises, where I am satisfied that a real risk attaches to the person, I anticipate making a restriction order which prevents disclosure of the description as well as of the name.

18. Operation Verbasco helpfully proposes, in relation to the relatively limited number of persons covered by the order that it seeks, to provide ciphering of the names subject to the order. That is a necessary and valuable exercise, because it enables the reader to see whether the same unnamed person appears in more than one document, and thus better to follow the history, and it avoids misleadingly suggesting that two different people are involved. In relation to the much larger volume of HMG personnel, I accept the practical submission that ciphering of every name is not possible at the present point of first-stage disclosure. But once the field has been narrowed to those potentially relevant, it will be necessary for those who remain subject to a restriction order in relation to their names to be ciphered, and for the same reason. There is already a sensible proposal from the ILT and, as I understand it, generally agreed by the core participants, that a core list of relevant individuals should be ciphered as promptly as possible.

19 August 2022

THE RIGHT HONOURABLE LORD HUGHES OF OMBERSLEY