INDEPENDENT INQUIRY RELATING TO AFGHANISTAN

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RULING ON N1141's SECTION 21(4) APPLICATION TO REVOKE S.21 NOTICE DATED 27 MARCH 2025 (RE: PRIVILEGE AGAINST SELF-INCRIMINATION)

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1. On 28 January 2025, the Inquiry issued a request for evidence under Rule 9(1) of the Inquiry Rules 2006 ("the Rule 9 Notice") to Witness N1141 requiring N1141, to provide within 42 days, *i.e.* by 4 pm on 26 February 2025, a witness statement answering questions under nine topics, namely:

   (1) General Matters (including an overview of his career since leaving school and service history);
   (2) Pre-Deployment Training;
   (3) Role as an OC;
   (4) Relationships (with other individuals);
   (5) Relationships with Partner Forces;
   (6) Serious Incident Reviews;
   (7) The TTP Review;
   (8) An alleged confrontation with another witness; and
   (9) Other concerns

2. On 26 February 2025 N1141's lawyers, the MOD Witness Legal Team ("MODWLT"), wrote to the Inquiry requesting an extension of time to respond to the Rule 9 Notice to 26 March 2025.

3. On 27 February 2025 the Inquiry granted an extension of time for N1141 to respond to the Rule 9 Notice until 26 March 2025.

4. On 26 March 2025, MODWLT wrote informing the Inquiry that N1141 *"will be relying on his privilege against self-incrimination and will therefore not be providing a witness statement in response".* No further explanation was provided.

5. On 27 March 2025, the Inquiry issued a s.21 Notice requiring N1141 to respond to each of the questions in the Rule 9 Notice and, in the event N1141 declined to answer any question on the basis of the privilege against self-incrimination, to explain the basis of his reliance on that privilege.

MODWLT's submissions

6. On 11 April 2025, MODWLT served submissions on behalf of N1141, pursuant to s.21(4) of the Inquiries Act 2005, to revoke the s.21 Notice dated 27 March 2025 on the grounds that it was *"unreasonable"* for the Inquiry to require N1141 to comply with the s.21 notice for three reasons.

7. First, "*The direction to explain reliance upon the privilege is unreasonable, as set out in the s.21 Notice*": MODWLT submit the exercise which the Inquiry had directed N1141 to undertake was unreasonable and N1141 could not be compelled to *"go into details"* as to why the information and/or documents he had been asked to provide under the Rule 9 Notice may incriminate him (paragraph 18).

8. Second, "*The prospect of future criminal proceedings is obvious*": MODWLT submit it can be no surprise that individuals will respond by relying on their legal entitlements, which are submitted to be *"absolute"* in these circumstances (paragraphs 19-21).

9. Third, the s.21(4) application was "*Protecting N1141's future right to a fair trial Article 6 ECHR*". In this regard, the MODWLT make four submissions under the heading *"The Inquiry's Approach to Evidence Gathering"*:

   (1) The MODWLT list seven areas of *"disclosure"* about which they complain:

      (a) The 'higher classification' written strategy relating to DDO Phase 3;
      (b) All the evidence gathered by the Inquiry through its witnesses in relation to the conduct of DDOs;
      (c) Evidence of members of the Afghan Partner Unit(s);
      (d) Evidence which Questionnaires may yield;
      (e) Witness statements prepared by RMP witnesses (save 'Mini Cestro');
      (f) The DDO Phase 3A disclosure exercise remains ongoing;
      (g) Fresh documents which may emerge from the interrogation of ITS1;
      (h) Evidence which forensic examinations may yield.

   (2) These are described as "*very significant gaps in [the Inquiry's] disclosure*" which are *"compounded"* by the Inquiry's Witness Protocol which does not allow, unless permission has been requested and granted by the Inquiry for:

      (a) one witness to be shown the witness statement of another witness;
      (b) a witness to see any document that was not generated by that witness; or
      (c) a witness to see any document that was not previously copied to or shared with that witness (paragraph 23).

   (3) The MODWLT submit that the unwillingness of the Inquiry to provide N1411 with *"all of the evidence held by the Inquiry and/or the Witnesses Legal Team ("WLT") on which the Inquiry seeks to investigate his conduct, or all of the evidence that might materially undermine any criticism of him or assist his position"* gives rise to the *"potential for unfairness"* because the MODWLT is unable to advise their

client as to the matters in respect of which he might wish to invoke his privilege against self-incrimination (paragraph 24).

(4) The prominent and public nature of the proceedings, the gravity of the alleged offences, and the position held by N1141 at the time, mean that "*there will be significant press interest if [N1411] is ultimately charged with a criminal offence(s)"* and *"it would be unreasonable to ask N1411 to contribute to that discussion when any such answers he gives will likely turn into future headlines…*" (paragraph 25).

10. In these circumstances, the MODWLT state: "*[T]here are no questions in the s.21 Notice which N1141 can be advised are safe to respond to, and which would not invoke (either now or later) his privilege against self-incrimination"* (paragraph 27).

The Law

11. Section 17 of the Inquiries Act 2005 provides that:

> *17(1) Subject to any provision of this Act or of the rules under section 41, the procedure and conduct of an inquiry are to be such as the chairman of the inquiry may direct.*
> *…*
> *(3) In making any decision as to the procedure and conduct of an inquiry, the chairman must act with fairness and with regard also to the need to avoid any unnecessary cost (whether to public funds or to witnesses or others).*

12. Section 22 of the Inquiries Act 2005 provides that:

> *22(1) A person may not under section 21 be required to give, produce or provide any evidence or document if –*
> *(a) he could not be required to do so if the proceedings of the inquiry were civil proceedings in a court in the relevant part of the United Kingdom…*
>
> *(2) … Subject to any provision of this Act or of the rules under section 41, the procedure and conduct of an inquiry are to be such as the chairman of the inquiry may direct.*

13. Section 14 of the Civil Evidence Act 1968 provides that:

> ***Privilege against incrimination of self or spouse or civil partner.***
>
> *14(1) The right of a person in any legal proceedings other than criminal proceedings to refuse to answer any question or produce any document or thing if to do so would tend to expose that person to proceedings for an offence or for the recovery of a penalty—*

(a) shall apply only as regards criminal offences under the law of any part of the United Kingdom and penalties provided for by such law; ...

14. The general position concerning disclosure by an Inquiry to core participants or witnesses is set out in 'Public Inquiries' by Jason Beer KC (First Edition (2011), at 5.127) as follows:

> *It must be stressed that, subject to ensuring that no unfairness is caused to participants ... decisions on these matters are matters for the inquiry (and ultimately for the chairman of the inquiry): it is the inquiry that is doing the inquiring, not the participants in the Inquiry – decisions on disclosure should be made with the aim of assisting participants to help the inquiry conduct its inquisitorial work.*

15. A person giving evidence in civil proceedings is protected by the privilege against self-incrimination. This rule exists as a matter of English civil procedure (and under the ECHR in the concept of fairness as regards the use of answers in criminal proceedings - Article 6). In effect, therefore, section 22(1) gives a witness before an Inquiry the right to refuse to provide evidence by relying on the privilege against self-incrimination.

16. The classic statement of the rule (or principle) against self-incrimination is by Lord Goddard in *Blunt v. Park Lane Hotel* [1942] 2 KB 253 at 257:

> *[N]o one is bound to answer any question if the answer thereto would in the opinion of the judge, have a tendency to expose the deponent to any criminal charge, penalty, or forfeiture which the judge regards as reasonably likely to be preferred or sued for.*[1]

Witness Protocol

17. The Inquiry has published a detailed Witness Protocol (which was re-issued on 3 January 2024)[2] to assist witnesses and their legal representatives by setting out the Inquiry's expectations in respect of witness statements and which provides as follows:

> ***Memory Refreshing Documents and previous information, accounts or documents provided to Royal Military Police ("RMP") investigations or in the Judicial Review ("JR") proceedings***
>
> *15. Subject to paragraph 1[9](b), the Inquiry may allow or make arrangements for a witness to inspect any document which it considers relevant and necessary to complete their witness statement.*
>
> *16. A witness may refresh their memory from documents in their possession. A witness may also refresh their memory from documents in the possession of their employer, with their employer's permission, where:*

[1] Cited by *Phipson* on Evidence, 17th edition, 2009, paragraph 24-60 as 'the classic statement of the principle'.
[2] (https://iiaweb-prod.s3.eu-west-2.amazonaws.com/20240103_Witness_Protocol-Final.pdf)

a. it is a document which was created by the witness;

b. it is a document to which the witness provided significant input; or

c. it is a document to which the witness has had previous access during the course of their employment (e.g. where the witness was copied into an email sent by and to others).

17. Where a witness has refreshed their memory using documents in their possession or the possession of their employer, the title of the document together with its reference number (where applicable) should be listed in an annex to their statement if the documents have not been exhibited within the body of the statement.

18. Any document relied upon by a witness must be provided to the Inquiry in an unredacted form. The witness must list these documents in the witness statement.

19. Where a witness has provided documents, information, a witness statement and/or an account to the RMP or as part of the JR proceedings:

a. The witness can be shown:

i. Their own previous witness statements and/or drafts of such witness statements;

ii. Any notes they have written or drafted themselves;

iii. Any record of anything they have said even if that record consists of notes written by someone else;

iv. Any documents they created, have been shown previously, or were sent a copy of, including emails they were copied into or which were forwarded to them;

v. Any document which establishes whether another document was or was not in existence at the relevant time and which shows that the witness was or was not aware of the existence of that document.

b. The witness should <u>not</u> be shown any of the following, unless permission is requested from and granted by the Inquiry:

i. Any witness statement of any other witness;

ii. Any other document or thing which was not drafted by, created by, or otherwise generated by the witness;

iii. any document or thing that was not copied to or shared with the witness previously.

18. The Addendum to the Witness Protocol (issued on 6 January 2024)[3] further provides:

5. If, during the completion of a witness statement, it is considered that further documentation is required, then the pro forma published on the Inquiry website should be completed. The Inquiry will then determine the application and notify the applicant of the outcome.

[3] (https://iiaweb-prod.s3.eu-west-2.amazonaws.com/Addendum-Witness-Statement-Protocol.pdf)

6. *It should be noted that when witnesses are compiling their statements, the Inquiry neither expects nor wishes them to give detailed comments or opinions on the views or recollections of others. The Inquiry expects witnesses to provide their own recollections alone unless expressly stated.*

Analysis

19. The objection taken by MODWLT to the s.21 Notice on behalf of N1141 is misconceived.

20. First, as I explained in my Ruling of 23 August 2023 on Applications for Restriction Orders and Special Advocates, public inquiries are inquisitorial, not adversarial. Inquiries are fundamentally different from civil or criminal trials[4] and criminal investigations. Further, as the Divisional Court (Dingemans LJ and Garnham J) re-emphasised in *R (Cabinet Office) v. The Chair of the UK Covid-19 Inquiry*[2023] EWHC 1702 (Admin) at [52]:

> *It is well established that regard must be had to the investigatory and inquisitorial nature of a public inquiry. An inquiry is not determining issues between parties to either civil or criminal litigation, but conducting a thorough investigation. The inquiry has to follow leads and it is not bound by the rules of evidence.*

21. Second, if and in so far as the MODWLT purport to seek disclosure of *"all of the evidence held by the Inquiry and/or [WLT] on which the Inquiry seeks to investigate [N1141's] his conduct"* and *"all of the evidence that might materially undermine any criticism of him or assist his position"*, this approach would not reflect the construct of s.17 of the Inquiries Act 2005, nor the generally understood application of this to disclosure to be made by an Inquiry as set out at paragraph 14 above. A public inquiry is not a criminal investigation, nor is it a criminal trial and it has no power to determine criminal liability (see section 2 of the Inquiries Act 2005). The MODWLT appear to suggest that disclosure in an inquiry which would enable a witness to be properly advised is akin to the prosecutorial disclosure provisions in criminal proceedings (*e.g.* the Criminal Procedure and Investigations Act 1996). These provisions do not apply. Moreover, such an approach is inimical to, and would entirely undermine, the inquiry process.

22. Third, in accordance with s. 17 of the Inquiries Act 2005, the Witness Protocol strikes a fair and proportionate balance between:

[4] (https://iiaweb-prod.s3.eu-west-2.amazonaws.com/230821_IIA_Open_Ruling_Restriction_Sp_Adv.pdf)

(1) affording a witness a fair opportunity to refresh their memory from a wide variety of documents and material to enable them to give their best evidence and assist the Inquiry;

(2) protecting the anonymity of witnesses (including N1411);

(3) ensuring the integrity of the Inquiry, its processes and lines of inquiry, to enable it to fulfil its Terms of Reference;

(4) having regard to the cost to the public purse, and delay.

23. Fourth, the Addendum to the Witness Protocol also gives witnesses the opportunity to apply to see further specific documentation when preparing their witness statement (and explains that witnesses are expected to provide their own recollections and not comment on the views or recollections of others). No application for further specific documentation has been received from N1141 prior to or after his refusal to produce a witness statement in accordance with the Rule 9 Notice (whereas other witnesses have made such requests).

24. Fifth, if further relevant material becomes available and the Inquiry determines it would be assisted by the witness's evidence on that material, that material can be provided to the witness for comment.

25. Sixth, Rule 13 of the Inquiry Rules 2006 provides further protections and ensures that before a witness can be the subject of explicit or significant criticism, that witness must be notified by letter and must be given a reasonable opportunity to respond to the warning letter.

26. Seventh, if and in so far as it is submitted that, absent disclosure on a criminal trial basis, the MODWLT are unable to advise their client as to the privilege against self-incrimination – and in particular as to (a) the matters in respect of which he *"must"* (sic) invoke his privilege against self-incrimination, or (b) *when* to invoke his privilege against self-incrimination, or (c) questions which will engage the privilege against self-incrimination *"in the future"* (paragraph 24 of MODWLT's submissions) – for the reasons set out at paragraphs 20-24 above, this submission is rejected.

27. Eighth, the s.21 Notice did not compel N1141 to *"go into detail"* in the respect of his claim to be entitled to invoke the privilege against self-incrimination (*c.f.* *Rio Tinto Zinc Corporation v. Westinghouse Electric Corporation* [1978] AC 547). The s.21 notice merely required N1141 to set out why the questions asked may incriminate him.

28. Ninth, the MODWLT assert that the privilege against self-incrimination *"is engaged by the **question**, not the proposed answer"* (their emphasis – paragraph 15 of their submissions). No authority is provided in support of this assertion. Notwithstanding that, on the basis of this, the MODWLT go on to argue *"that reliance on privilege says nothing about what the substance of the answer would have been had the question been*

answered". However, this line of argument is in direct opposition to s.14 of the Civil Evidence Act 1968, correctly summarised on the previous page of their submissions (at paragraph 11), where MODWLT state that a person can refuse to answer any question if *"to do so"* (*i.e.* to provide an **answer** to the question) *"would tend to expose* [N1141] *to proceedings for an offence or for the recovery of a penalty"*. In other words, the substance of the ***answer to the question*** must be of the nature specified.

29. Tenth, MODWLT state that they have advised their client N1141 that *"…there are no questions … which are safe to respond to and which would not invoke privilege (either now or later) his privilege against self-incrimination*" (and have waived legal and professional privilege in respect of such advice – paragraphs 27-28 of their written submissions). However:

(1) A claim of privilege against self-incrimination must be taken by a witness personally on oath (*Downie v. Coe, The Times*, 28 November 1996, CA (Civ. Div.)).

(2) It is not proper to refuse to be sworn, or to claim a global or blanket protection by reason of the privilege (*Smith v. The Queen (1991) 25 N.S.W.L.R. 1*, 9).

(3) The proper procedure in a claim for privilege is to object to each question as it is asked (*Ex parte Reynolds, 1882, 20 Ch. D. 294*; *Brebner v. Perry [1961] S.A.S.R. 177*, 180).

(4) The practice is for witnesses to be warned at the beginning of their evidence of their right to claim privilege against self-incrimination and that they should immediately indicate to the presiding judicial officer if they chose to refuse to answer any question on the basis that the answer would incriminate them.

(5) It is for the presiding judicial officer to determine whether the objection taken is good and whether there are reasonable grounds for the belief on the part of the witness that they are, or may be, in peril of future criminal or like proceedings if the answer is given (*Accident Insurance Mutual Holdings Ltd. v McFadden* (1993) 31 NSWLR 412; *R(CPS) v. Bolton Magistrates' Court* [2003] EWHC 2697 (Admin); [2004] 1 Cr. App.R 33, DC).

(6) Just as the court must protect the privilege, it must also make sure that the rule is not abused but applied to each question asked only where its invocation is justified (*Triplex Safety Glass Co. Ltd. v. Lancecgaye Safety Glass (1934) Ltd.* [1939] 2 K.B. 395 , *403*.)

Decision

30. In summary, the privilege against self-incrimination is a legal privilege to be invoked by a witness in person, under oath, in court, in relation to each question asked – and not somehow by proxy through his lawyers, making generalised submissions on the witness' behalf.

31. Notwithstanding any legal advice which he may or may not have received, N1141 is required to attend and give evidence to the Inquiry. Accordingly, the s.21 Notice issued on 27 March 2025 will be replaced by a s.21 Notice mandating his attendance before the Inquiry on the date specified.

32. As Sweeney J observed in *Chairman of the Manchester Arena Inquiry v. Ismale Abedi* [2021] EWHC 3274:

> "*Like the Inquiry, it is the experience of this court that intransigent witnesses will often give evidence once they have been compelled to attend…*".

33. I am satisfied that N1141 has relevant evidence to give, and I look forward to his co-operation with the Inquiry.

Further observations on Privilege against Self-Incrimination

34. In line with the above established principles, I will consider each claim to privilege against self-incrimination by a witness at the time it is invoked. In relation to some questions, the justification for the invocation may be obvious; in relation to other questions, I may require persuasion that the invocation of the privilege is justified. The witness is entitled to decline to provide any justification if to do so would obviate the reliance on privilege but, in that instance, I will need to determine the matter absent any explanation from the witness.

35. I have received submissions from some Core Participants as to whether I may, as a matter of law, draw adverse inferences in relation to the evidence of a person who declines to answer questions on the basis of their privilege against self-incrimination. I have not yet determined that question as a matter of principle. I mention this now so that witnesses can be made aware that the drawing of an inference from a refusal to answer a question on the basis of the privilege against self-incrimination remains a possibility.

The Rt Hon. Lord Justice Haddon-Cave

Chair

2 May 2025