



## **Application for a restriction order by Alan Paton**

### **Decision by Chair**

#### **Order**

[1] For the reasons set out in this decision, I shall make a restriction order under section 19 of the Inquiries Act 2005 in the following terms:

- members of the public will not be permitted to attend the Inquiry while the recording of the rule 9 examination of Alan Paton is played;
- attendance of the media will be restricted to the BBC and the Press Association News Agency (PA) who will supply other media organisations on a pooled basis;
- live and future public broadcasting of the recording on any medium, including social media, will be prohibited; and
- the transcript of the rule 9 examination of Alan Paton will be published on the Inquiry's website.

[2] I wish members of the families of Sheku Bayoh to have an opportunity of watching the recording. A number of family members are core participants, who may, of course, attend the playing of the recording. I recognise that there may be members of the families of Sheku Bayoh who are not core participants, but who wish to watch the recording. To accommodate them I shall consider varying the restriction order in respect of individual family members in this position, who should advise the Inquiry of such a wish. As I also recognise that it may not be possible for all family members to be present at the same time to watch the recording, I propose to put in place measures to allow the tape to be played on more than one occasion.

## **Background**

[3] At an earlier stage in the Inquiry I ordered that the evidence of Alan Paton should be taken using special measures: (a) his evidence should be recorded in a closed hearing; (b) he should be accompanied by an appropriate adult; and (c) the recording should subsequently be played in public.

[4] I permitted the taking of the evidence of Mr Paton in this way because I was satisfied, on the basis of medical reports, that Mr Paton suffers from mental illness. I received a report and a supplementary report prepared by a consultant forensic psychiatrist. Having considered these, I was satisfied, first, that if I required Mr Paton to give evidence in person or by a live television link, there was a real risk that he would be unable to give evidence at all, leading to the result that the Inquiry and the members of the families of Sheku Bayoh would be deprived altogether of hearing his important evidence. Second, I was satisfied that requiring Mr Paton to give evidence in person, or by live television link, would be likely to cause harm by having an additional adverse effect on his mental health. I concluded, therefore, that the surest and safest way to obtain his evidence for the Inquiry and to avoid causing further harm to his mental health, was to record his evidence in the manner that I have described.

[5] In due course the recording of the evidence of Mr Paton was played in public at a hearing of the Inquiry. Thereafter, having heard an application under rule 9 of the Inquiries (Scotland) Rules 2007, I permitted a limited number of lines of questioning. I constituted a further hearing, subject to the same special measures, at which the permitted examination was conducted by counsel to the inquiry.

[6] The closed hearing for the rule 9 examination took place on 29 September 2022 at a venue other than the Inquiry hearing room. The hearing was attended by the chair, the assessors, counsel to the inquiry and such inquiry staff as were necessary

to conduct the recording. An appropriate adult, Mr Paton's legal representatives and Mrs Paton were also in attendance. Unfortunately, as a result of a technical issue, a number of the questions asked by senior counsel to the inquiry were not recorded. The answers given by Mr Paton and interventions by the chair were recorded. Members of the Inquiry's staff have used their best endeavours, working with counsel to the inquiry, to reconstruct these questions and add them as subtitles.

[7] In anticipation of the recording of the rule 9 examination being played in public at a hearing of the Inquiry, Mr Paton's legal representative lodged an application for a restriction order under section 19 of the Inquiries Act 2005. I postponed the planned public playing of the recording in order to deal with the application.

[8] The application sought a restriction order (a) to allow the recording of the rule 9 examination to be played to core participants and Mr Bayoh's immediate family members only; (b) to prohibit public broadcasting of the recording; and (c) to restrict any further distribution of the recording. The application contemplated that while the transcript of the rule 9 examination could be published on the Inquiry website, the recording would not.

[9] The application was supported by a supplementary report by the consultant forensic psychiatrist who provided the original report in support of the special measures. The conclusions of the report are set out in paragraphs 11 and 12 of the application.

[10] In accordance with the Inquiry's protocol on applications for restriction orders, the application comprises open and closed sections. The protocol provides that the open section will be disclosed to core participants and the media, subject to the restriction order already in place. Accordingly, I made an order that the open section of the application should be disclosed to core participants and the representatives of

the media, subject to the general restriction order, and invited written submissions. I received a written submission on behalf of the Bayoh families and a written submission from the BBC.

## **Discussion**

[11] I consider that it is particularly important that members of the families of Sheku Bayoh are able to view the recording of the rule 9 examination, just as they were able to watch his evidence. I have consistently sought to put them at the heart of the Inquiry. I recognise that Mr Paton is a very significant witness in whom members of the families have particular interest. I note the reference in the submissions on behalf of the families to the witness statement provided by Deborah Coles, executive director of INQUEST, in *Chief Constable of West Yorkshire v Dyer*<sup>1</sup>, in which she stressed the importance of families being able to see important witnesses giving evidence. Her evidence was in the context of witnesses giving evidence behind screens so that they would not be seen at all by family members. While I accept that the special measures which I permitted in respect of Mr Paton fall short of family members being able to see him giving evidence in person, family members have been able to watch his evidence played already. I consider that they should be able to watch the evidence of the rule 9 examination in a similar way.

[12] This is a public inquiry under the 2005 Act. It is subject to the provisions of the Act. Section 18 of the 2005 Act provides for public access to the proceedings of an inquiry and information:

“(1) Subject to any restrictions imposed by a notice or order under section 19, the chairman must take such steps as he considers reasonable to secure that members of the public (including reporters) are able—

(a) to attend the inquiry or to see and hear a simultaneous transmission of proceedings at the inquiry;

<sup>1</sup> [2021] 1 WLR 1233 at para 121

(b) to obtain or to view a record of evidence and documents given, produced or provided to the inquiry or inquiry panel.

(2) No recording or broadcast of proceedings at an inquiry may be made except—

(a) at the request of the chairman, or

(b) with the permission of the chairman and in accordance with any terms on which permission is given.

Any such request or permission must be framed so as not to enable a person to see or hear by means of a recording or broadcast anything that he is prohibited by a notice under section 19 from seeing or hearing.”

In ordinary course, the Inquiry has sought to comply with the requirements of section 18 by putting in place a number of arrangements, including: (a) providing seating in the hearing room for members of the public and the media; (b) establishing a channel on YouTube for simultaneous transmission and broadcasting of the proceedings; and (c) establishing a website, on which the Inquiry makes available (i) links to the archived broadcasts; (ii) transcripts of oral evidence; (iii) statements of witnesses, whether or not they gave oral evidence; and (iv) documents to which witnesses made reference.

[13] Section 19 of the 2005 Act provides for restrictions on public access. So far as relevant for present purposes it provides:

(1) Restrictions may, in accordance with this section, be imposed on—

(a) attendance at an inquiry, or at any particular part of an inquiry;

(b) disclosure or publication of any evidence or documents given, produced or provided to an inquiry.

(2) Restrictions may be imposed...

...

(b) by being specified in an order (a “restriction order”) made by the chairman during the course of the inquiry.

(3) A restriction notice or restriction order must specify only such restrictions—

...

(b) as the ...chairman considers to be conducive to the inquiry fulfilling its terms of reference or to be necessary in the public interest, having regard in particular to the matters mentioned in subsection (4).

(4) Those matters are—

(a) the extent to which any restriction on attendance, disclosure or publication 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).

(5) In subsection (4)(b) “harm or damage” includes in particular—

(a) death or injury;

(b) damage to national security or international relations;

(c) damage to the economic interests of the United Kingdom or of any part of the United Kingdom;

(d) damage caused by disclosure of commercially sensitive information.

[14] The consultant forensic psychiatrist has identified a risk of harm or damage in terms of injury to Mr Paton’s mental health by (a) the attendance of members of the public during the playback of the video; (b) broadcasting of the evidence; and (c) subsequent playing of clips on social media. I have considered the matters set out in sub-section 19(4), in particular the matter identified in sub-section (4)(b): “any risk of harm or damage that could be avoided or reduced by the restriction”. “Harm or damage” is defined in sub-section 5 as including death or injury. I am satisfied on the basis of the supplementary report from the consultant forensic psychiatrist that viewing of the recording by members of the public, broadcasting of it, followed by

repeated playing of clips of it, particularly in the context of social media, would have a deleterious effect on the mental health of Mr Paton and tend to undermine his relative recovery. I am satisfied that it is necessary in the public interest, having particular regard to the risk of harm or damage to Mr Paton's mental health, to impose restrictions on attendance by members of the public at the playback of Mr Paon's rule 9 evidence, broadcasting of the evidence of and subsequent playing of clips of the tape, while ensuring that the particular and understandable interest of the families of Sheku Bayoh in this evidence is met by enabling them to attend and view the evidence for themselves. I do not, however, consider that it is necessary in the public interest to prevent attendance of the media. I consider that it would be appropriate to allow media coverage on a pooled basis, provided by the BBC and the Press Association.

[15] I accept that the principles of open justice apply to the Inquiry. I do not think that the principles of open justice require live broadcasting or subsequent use of broadcast material. Live broadcasting and the subsequent use of broadcast material in the courts is very limited indeed. It is clear from section 18 of the 2005 Act that broadcasting is a matter for the discretion of the chair. Some inquiries allow broadcasting; some do not. As to exclusion of the public from the playing of the tape, any impact on the principles of open justice will be mitigated by (a) publishing the transcripts of the recording on the Inquiry's website; and (b) the media coverage acting as the "eyes and ears" of the public. Because of the media coverage which I shall allow, I do not consider that any issue under article 10 ECHR arises.

**Lord Bracadale**

**10 May 2023**