INQUESTS ARISING FROM THE DEATHS
IN THE WESTMINSTER TERROR ATTACK OF 22 MARCH 2017

NOTE OF COUNSEL TO THE INQUESTS
IN RELATION TO SUBMISSIONS
BY THE SISTERS OF PC KEITH PALMER

Introduction

1. This short Note is prepared in response to written submissions provided by counsel for the sisters of PC Keith Palmer ("the Submissions") dated 10 September 2018. In short, our response is as follows:

   (a) We are anxious to assist counsel for the sisters of Keith Palmer in preparing properly for questioning of witnesses. At their request, the Inquests team has examined options for re-arranging witnesses. We are hopeful that a solution can be found which allows the evidence to be called in an order acceptable to them.

   (b) We would not be in favour of adjourning the inquest of Keith Palmer entirely. It will be possible to examine the key issues (including those of security in the Palace of Westminster) thoroughly in the hearing as presently planned. An adjournment of his inquest would be very disruptive. We understand that it would not be favoured by Keith Palmer's widow (who is represented separately by solicitors and counsel).

   (c) The issue of whether the procedural obligation under Article 2, ECHR, is engaged in this case (in the sense considered in *R (Middleton) v West Somerset Coroner* [2004] 2 AC 182) should be addressed at the end of the evidence, as part of the submissions to be made on the Coroner's conclusions.

Background

2. The Submissions focus upon the provision of evidence about security arrangements at the Palace of Westminster, and in particular evidence about the instructions given to and practices of firearms officers stationed in New Palace Yard (especially PCs Ashby and Sanders). The following chronology may assist:

(a) The Coroner conducted a PIR hearing on 15 January 2018 at which he determined the scope of inquiry for the Inquests and made directions for a disclosure process to commence. Over the following months, disclosure of statements and other documents was given by material being uploaded in tranches to the Opus system. The first statements of PCs Ashby and Sanders were uploaded on 26 April and 1 June 2018 respectively (and the two officers appeared on the first witness list, circulated on 18 May). Interested persons requesting access to the Opus system who signed confidentiality undertakings were promptly given access.

(b) The Inquests team has been provided with reports on Palace of Westminster security, which are for the most part highly secret documents. Based on reading of reports we had seen, we had a meeting on 17 April 2018 with a senior officer to discuss the topics on which evidence should be provided by the MPS. On 18 April 2018, we provided a note of topics for that evidence. We were informed that a substantial statement would be provided by Commander Usher on those topics.

(c) It had been hoped that Commander Usher's statement would be ready by the time of the PIR hearing on 2 July 2018, but it had not been completed by then. A direction was therefore given for it to be provided within 14 days, by 16 July 2018.

(d) Commander Usher's long first statement was duly provided on 16 July 2018, as was a DPS report on PCs Ashby and Sanders. These were uploaded to the Opus system on 18 July 2018 and were then available to all interested persons who had access to the system. An email was sent to alert all of them to this statement having been uploaded.

(e) The sisters of Keith Palmer instructed their present solicitors (Kingsley Napley) on 2 August 2018. Kingsley Napley requested access to the Opus system on 6 August 2018 and were given access that day. Unfortunately, as a result of an error by Opus, they were not initially given access to the Palace Security folder into which Commander Usher's first statement had been placed (and into which his later statements were later placed).

(f) Meanwhile, the Inquests team had put follow-up questions in writing to Commander Usher regarding his first statement on 23 July 2018. He provided a response in a detailed second statement on 10 August 2018, which was uploaded to the Opus system straight away.

(g) Opus corrected its error on 17 August 2018, giving Kingsley Napley access to the Palace Security folder which by then contained Commander Usher's two statements. The effect of the error had been to delay by 11 days their access to the first statement; and by 7 days their access to the second.

(h) On 28 August 2018, Commander Usher prepared a short third statement in response to questions posed by the Inquests team in relation to Operation Standfast, a security exercise conducted in the Palace. That was uploaded to the Opus system without delay.

(i) On 5 September 2018, counsel for the sisters of Keith Palmer first contacted counsel to the Inquests. She highlighted a concern about difficulties of preparing properly for the evidence of PCs Ashby and Sanders, who were scheduled to give evidence on 14 and 17 September. She asked whether it would be possible to defer their evidence by a short time.

Scheduling of Evidence / Suggestion of Adjourning the Inquest of PC Palmer

3. In response to the request made on 5 September, the Inquests team made enquiries about re-arranging evidence. On 10 September (the first day of the Inquests), we suggested the possibility of moving PCs Ashby and Sanders to 18/19 September. However, the problem then arose that counsel instructed by the widow of Keith Palmer was unavailable for part of 19 September. Following further discussions, it appears that the best solution

may be to keep PC Ashby on 14 September, but on the basis that counsel for the sisters of PC Palmer will not have to start her examination of the witness until 17 September.

4. We would not be in favour of adjourning the inquest concerning Keith Palmer, for the following reasons:

(a) It has been scheduled for some time. Witnesses have been called and have made arrangements to attend. Adjourning it would involve recalling all these witnesses, probably months in the future. The outcome would be disruptive to all of them, and probably distressing to a number of them.

(b) The Inquests have been organised in such a way that the evidence about the attack can be presented in a clear and coherent way, and appropriate conclusions expressed about all the victims in a single set of decisions. Adjourning Keith Palmer's inquest would prevent the Inquests hearing being a full examination of the attack. It would also mean that the shooting of Khalid Masood was examined in an inquest hearing before his killing of Keith Palmer.

(c) We understand that the widow of Keith Palmer does not advocate adjourning his inquest. Her wishes must be taken into account.

(d) We are confident that the Inquests hearing at this time can examine properly the security arrangements at the Palace of Westminster. A great deal of time and effort has gone into preparing and presenting material on this sensitive topic. Substantial statements of Commander Usher and Mr Hepburn have been disclosed, appending relevant evidence. The second and third statements of Commander Usher were prepared in response to written questions posed by the Inquests team. The firearms officers on duty have given multiple statements. While copies of security review reports are generally secret and cannot be disclosed, the Inquests team has worked with the MPS to ensure that relevant conclusions of the reports are set out in the evidence.

(e) As indicated above, efforts have been made to schedule the evidence in such a way as to assist counsel for the sisters of Keith Palmer in preparing for the witnesses. We shall continue to make every reasonable effort to assist.

Article 2, ECHR

5. At the PIR hearing on 15 January 2018, we made submissions on Article 2 engagement (in the sense considered in the *Middleton* case): see paras. 20-23 of our written submissions for that hearing. We submitted (a) that Article 2 was engaged in the inquest concerning Khalid Masood; (b) that, on the evidence then available, it was not engaged in the inquests concerning the victims of the attack; but (c) that the Court should keep under review the question of Article 2 engagement in the victims' inquests. In particular, we submitted that the issue should be kept under review in relation to Keith Palmer's inquest, taking account of security arrangements at the Palace (on which we had yet to receive detailed evidence). Interested persons were in agreement with those submissions, and the Court made directions in accordance with them: see para. 7 of the directions from that hearing.

6. It is now argued by counsel for the sisters of Keith Palmer that Article 2 is engaged in his inquest, and that the Coroner should make a ruling to that effect at an early stage in the Inquests hearing.

7. The governing legal principles may be summarised as follows:

   (a) Article 2, ECHR, (the right to life) has a procedural element which requires a state in certain circumstances to establish an independent investigation into a death satisfying certain standards. See *R (Amin) v SSHD* [2004] 1 AC 653 at [20].

   (b) Setting aside specific categories of case where the obligation is automatically engaged (e.g. suicides in prison and deliberate killings by state agents), the obligation to establish such an investigation 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 (Letts) v Lord Chancellor* [2015] 1 WLR 4497 at [71]-[91].

   (c) Where the Article 2 procedural obligation is engaged in relation to a death (in the relevant sense), the principal consequence for an inquest into the death is that the determination at the end must address the circumstances of death as well as its

immediate physical means. The determination may be in expanded narrative form and may encompass underlying and contributory causes of death, as well as possible causes of death. See *Middleton* at [35]-[38] (now given statutory force in section 5(2), Coroners and Justice Act 2009); *R (Lewis) v HM Coroner for Mid and North Division of Shropshire* [2010] 1 WLR 1836.

(d) The decision as to whether the Article 2 procedural obligation is engaged will have little, if any, effect on the scope of inquiry at an inquest or the conduct of the hearing. See: *R (Smith) v Oxfordshire Asst Deputy Coroner* [2011] AC 1 at [152]-[154]; *R (Sreedharan) v Manchester City Coroner* [2013] EWCA Civ 181 at [18(vii)].

(e) There are two relevant substantive Article 2 duties the breach of which may trigger engagement of the procedural obligation:

(i) a general duty on the state to establish a framework of laws, precautions, procedures and means of enforcement which will protect life so far as practicable (as to which, see *Oneryildiz v Turkey* (2005) 41 EHRR 20 at [89]; *Middleton* at [2], *Savage v South Essex NHS Foundation Trust* [2009] 1 AC 681 at [19]); and

(ii) an operational duty owed by state agents to take action to protect individuals from an appreciable "real and immediate" risk of death (as to which, see *Osman v UK* (2000) 29 EHRR 245 at [116] and *Rabone v Pennine Care NHS Trust* [2012] 2 AC at [36]-[39]).

Breach of such duties in relation to a death may be established without proof that a relevant failure probably caused the death. It is only necessary to prove that the deceased lost a substantial chance of surviving as a result of the breach: see *Van Colle v Chief Constable of Hertfordshire* [2009] 1 AC 225 at [138].

8. As we understand it, the nub of the argument advanced in the Submissions is that it is arguable on the evidence that the state breached the general duty by failing to have and maintain adequate security arrangements in the Palace of Westminster. In particular, it is said to be arguable that there was a failure to provide adequate, and properly located,

armed support for officers at Carriage Gates in March 2017. It is also said to be arguable that Keith Palmer lost a substantial chance of surviving as a result of such failure.

9. Our submission is that this argument should be addressed at the end of the evidence, as part of submissions on the conclusions to be given. We say that for the following reasons:

(a) Where a coroner has made a provisional decision on Article 2 engagement at a PIR hearing (as the Court did in this case), it must be a matter of discretion for the coroner to decide when and how to revisit that decision in the light of evidence as it emerges (subject of course to the obligation of the coroner to resolve the issue by the time determinations are made).

(b) In this case, deferring the decision as we propose would allow it to be taken on the basis of materially better information. The evidence to be given over the coming two to three weeks will address the security arrangements at the Palace of Westminster in great detail. That evidence will add substantially to our understanding of those arrangements. For instance, the Palmer family may now say that the authorities failed to ensure that Post Instructions to armed officers were observed. However, Commander Usher's evidence may materially influence a proper view on that issue. The evidence will also assist everyone's understanding about the effects of the armed officers' postings and instructions.

(c) A decision as to Article 2 engagement at this stage (in whichever direction) would not change anything about how the hearing is conducted or the scope of the inquiry. It has been made very clear at the PIR hearings that the scope of inquiry in these Inquests is no different than if they had all been treated as Article 2 inquests throughout.

(d) Addressing the issue of Article 2 engagement now would result in substantial argument being heard, which would require late sitting of Court and/or disruption of the scheduled evidence. The arguments might well then have to be reconsidered at the end of the evidence, in three weeks' time. It would make most sense to address the issue once and for all at the end of the evidence.

(e) Taking the approach we propose would allow other interested persons with an interest in the Article 2 issue (such as the MPS and the Parliamentary authorities) to prepare properly detailed submissions, and so would be a fairer approach so far as they are concerned.

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11 September 2018