INQUESTS ARISING FROM THE DEATHS

IN THE WESTMINSTER TERROR ATTACK OF 22 MARCH 2017

RULING ON ARTICLE 2, ECHR

Introduction

1. This ruling concerns the question whether the procedural obligation of the state under Article 2, ECHR, is engaged in relation to these inquests, in the sense considered in *R (Middleton) v West Somerset Coroner* [2004] 1 AC 182.

2. On 15 January 2018, at a Pre-Inquest Review Hearing, I gave a direction in the inquests of each of the five victims of the attack that Article 2 was not found to be engaged on the material then available to me. I indicated that I would keep that decision under review. In their submissions for that hearing, Counsel to the Inquests ("CTI") had submitted that the decision should be kept under review "especially in relation to PC Palmer's inquest, taking account of the security arrangements at the Palace [of Westminster] (as they stood in March 2017)".

3. On 14 September 2018, early in the inquests hearing, an application was made on behalf of the sisters of PC Keith Palmer that I should reconsider at that time whether Article 2 was engaged in relation to his inquest. I decided that the appropriate course at that stage was to defer the decision until the conclusion of the evidence, since (in summary) the issue would not affect the scope of the inquests or the conduct of the hearing and I would be able to reach a more informed decision after the evidence. The full reasons for that decision are set out in a separate ruling dated 16 September 2018.

4. Before I gave my determinations in the five inquests on 3 October 2018, I heard full argument on the issue of Article 2 engagement. After hearing the argument, I indicated briefly my decisions that:

    a. Article 2 was not engaged in the inquests of the four victims who were injured on Westminster Bridge (Kurt Cochran, Leslie Rhodes, Aysha Frade, and Andreea Cristea); and

b. Article 2 was engaged in the inquest of PC Keith Palmer.

5. This ruling gives the reasons for those decisions.

The Law

6. The relevant legal principles are set out in written submissions of CTI dated 1 October 2018. No Interested Person made submissions in respect of the law that were materially different and I accept the following summary of the law by CTI as accurate and comprehensive:

   a. Article 2 of the ECHR (the right to life) encompasses a positive procedural obligation on member states which includes a requirement to establish effective and independent investigations into deaths in certain circumstances. See *R (Amin) v SSHD* [2004] 1 AC 653 at [20]. 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]; *R (Parkinson) v Kent Senior Coroner* [2018] 4 WLR 106. The threshold of an "arguable" breach is low; "anything more than fanciful" (see *R (AP) v HM Coroner for Worcestershire* [2011] EWHC 1453 (Admin) at [60]).

   b. In *R (Middleton) v West Somerset Coroner* (cited above), the House of Lords held that, where the Article 2 obligation to establish an independent investigation into a death is engaged in connection with an inquest, the ordinary approach to inquest conclusions must be modified in one respect to satisfy Convention standards. The expression "how the deceased came by his/her death" in the

statutory provisions governing inquest determinations[1] is to be interpreted as meaning "by what means and in what circumstances the deceased came by his/her death": see [35]-[38]. In practice, this may require the coroner to return, or elicit from a jury, expanded narrative conclusions. The decision in *Middleton* has now been given statutory force by section 5(2) of the Coroners and Justice Act 2009.

c. 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)].

7. CTI described the legal principles governing substantive duties of the state under Article 2, ECHR, as follows. Again, I understood their summary to be agreed by Interested Persons.

a. Article 2 imposes a negative obligation on the state not to take life save in certain specified situations. It also imposes positive obligations to protect life, which fall into two categories: (i) a general duty on the state; and (ii) operational duties which are owed by state agents and agencies in certain types of case.

b. The general duty has been described as requiring the state to "establish a framework of laws, precautions, procedures and means of enforcement" to protect the lives of citizens. See: *Middleton* at [2]; *Savage v South Essex NHS Foundation Trust* [2009] 1 AC 681 at [18]-[19]; *Oneryildiz v Turkey* (2005) 41 EHRR 20 at [89]-[90]. The general duty is addressed in detail in the healthcare context in *Parkinson* (cited above) at [49]-[50] and [82]-[92]. There, the Court identified the distinguishing feature of any breach of the general duty as being a "systemic failure"; a dysfunction in systems and practices rather than "ordinary negligence" of individuals.

[1] The purpose of an inquest includes to determine "how" the deceased person came by his/her death: section 5(1)(b), Coroners and Justice Act 2009. The determination at the end of an inquest must answer that question: section 10(1).

c. The general duty may extend beyond written procedures, to encompass the planning and control of operations (including police operations): see *Kakoulli v Turkey* (2007) 45 EHRR 12 at [106]. It may extend to instructions to armed police officers: see *Makaratzis v Greece* (2005) 41 EHRR 49 at [57]-[59].

d. A determination of whether that general duty has been satisfied involves assessing the adequacy of legislation, policies, procedures and systems at a relatively high level of generality, taking into account their overall effect and the resources available to support them. See the discussion in *R (AP) v HM Coroner for Worcestershire* (cited above) at [52] and [65]-[74].

e. In certain types of case, it has been held that state agents / agencies may owe an operational duty to protect an individual citizen or group of citizens against specific kinds of danger. This type of duty was first recognised by the ECtHR in *Osman v UK* (2000) 29 EHRR 245, a case concerning the duty of the police to protect individuals against reported threats. The Court formulated the critical test as follows (at [116]):

> "It must be established to [the] satisfaction [of the Court] that the authorities knew or ought to have known at the time of the existence of a real and immediate risk to the life of the individual or individuals from the criminal acts of a third party and that they failed to take measures within the scope of their powers which, judged reasonably, might have been expected to avoid that risk."

f. The test of "real and immediate risk" of death has repeatedly been described as setting a high threshold: see *In re Officer L* [2007] 1 WLR 2135, at [20].

g. The *Osman* operational duty to take reasonable steps to prevent an appreciable "real and immediate risk to life" has been incrementally extended by the ECtHR to certain other classes of case. In *Keenan v UK* (2001) 33 EHRR 38 from [88], the Court found that the duty was owed to those in state custody. It has also been held to apply where police operations have given rise to a risk of people being killed or killing themselves (e.g. *Makaratzis* [49]-[72]; *Mammadov v Azerbaijan* (2014) 58 EHRR 18 at [113]-[116]).

h. In *Rabone v Pennine Care NHS Trust* [2012] 2 AC 72, the Supreme Court extended the *Osman* duty to the situation of a mental patient admitted voluntarily

to hospital. It held that a distinction between voluntary and detained mental patients was illogical, where a voluntary patient was in practice subject to a similar degree of control. Lord Dyson (from [22]) identified certain indicia which might assist in considering whether the *Osman* duty would exist in a given situation. These included: (a) assumption of responsibility for welfare of the deceased; (b) vulnerability of the victim; and (c) whether the risk involved is an ordinary one for individuals in a particular category. However, Lord Dyson stressed that these were merely factors which might be relevant, and that they did not provide "a sure guide" to whether the duty should be found to exist.

i. Breach of Article 2 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].

Decisions in these Inquests

8. The inquests of the four people who were injured on Westminster Bridge raise issues different from those arising in PC Palmer's inquest. I shall therefore consider them separately.

Kurt Cochran, Leslie Rhodes, Aysha Frade, Andreea Cristea

9. Neither CTI nor counsel for any Interested Person made submissions that Article 2 was engaged in respect of the deaths of the four victims on the Bridge. I indicated at the Pre-Inquest Review Hearing that I did not consider that Article 2 was so engaged and, having heard the evidence, I remained of that view.

10. There are two particular topics which I consider might have given rise to a suggestion that Article 2 was engaged, those being (a) investigations carried out by the Security Service into Khalid Masood in the years before the attack, and (b) physical security measures which might have been put in place on the Bridge. However, on the evidence I have heard, there is no ground for saying that Article 2 is engaged on either basis.

11. There is no arguable ground for finding a breach of the general or operational duties in relation to investigations by the Security Service. I have reached that conclusion for the following reasons:

a. The inquests heard evidence from Witness L, Deputy Director for International Counter Terrorism for MI5. Witness L gave evidence for more than four hours, having provided a substantial witness statement. The Inquests Team has had access to all the material underlying the evidence given by Witness L and is satisfied that the relevant material has been provided for the purposes of the Inquests. Witness L was cross-examined carefully and forensically by CTI as well as by Mr Patterson QC and Mr Adamson. He gave straightforward evidence as to why Khalid Masood was not investigated before 2009; why he was subsequently closed as a subject of interest in December 2010; and why an investigation was not reopened at any time prior to the attack.

b. Clear reasons were given for the decisions taken at each stage of the investigation. After December 2010, there was nothing to cause Masood to be treated again as a subject of interest and investigated again.

c. Under questioning by Mr Patterson QC, Witness L explained that, even had there been an investigation into Khalid Masood immediately prior to the attack, such investigation would not have exposed his attack-planning intentions, there being no evidence that Khalid Masood had revealed his plans or his extremist views to anybody.

d. As to the operational duty, there is no arguable case that MI5 knew or ought to have known that Khalid Masood posed a real and immediate risk of carrying out an attack (let alone that he posed a risk to identifiable persons). There is no evidence that the Security Service failed to act on any intelligence which was received. Furthermore, there is no basis for saying that any realistic action by the authorities could have materially improved the chance of stopping this particular attack.

e. As to the general duty, Witness L gave detailed evidence as to the policies and procedures followed by the Security Service in their investigation and

management of subjects of interest. It is not arguable that those procedures were either inadequate or were not observed.

12. Neither do I consider that it is arguable that there was a breach of Article 2 in respect of the absence of hostile vehicle mitigation measures on Westminster Bridge. I say that for the following reasons:

    a. Both Chief Superintendent Nick Aldworth and Siwan Hayward were questioned about whether barriers or other physical security measures should have been in place on Westminster Bridge on 22 March 2017. I heard evidence as to the structures in place nationally for determining and providing advice as to counter-terrorism physical security measures in public places. Advice is given locally by Counter Terrorism Security Advisors ("CTSAs"), distilled from information received from the National Counter Terrorism Security Office ("NaCTSO") and the Centre for the Protection of National Infrastructure. Transport for London ("TfL") would also receive circulars directly from NaCTSO from time to time.

    b. Both witnesses were clear that they were aware of no intelligence amounting to a specific threat to London bridges (as opposed to any other form of roadway) prior to the attack, let alone any particular threat to Westminster Bridge. Chief Superintendent Aldworth said that, prior to the attack, the Metropolitan Police Service ("MPS") and the nation's network of CTSAs understood how vehicles might be used as part of a terrorist attack, as well as how terrorist organisations intended to carry out such attacks. However, in Westminster alone there are nearly 2,000 roads. The MPS had not given any advice to TfL to erect barriers on Westminster Bridge prior to the attack, nor was there any intelligence to suggest that such guidance should have been given.

    c. On the evidence, there is no arguable breach of either the general or operational Article 2 duties, arising from the absence of barriers on Westminster Bridge on 22 March 2017. There were adequate systems and procedures for considering protective security measures. Given the lack of threat intelligence, there can be no argument that the authorities failed to act against an appreciable "real and immediate" risk of death to those on the Bridge.

PC Keith Palmer

13. In respect of the death of PC Keith Palmer, my judgment is that Article 2 is engaged. For the avoidance of any doubt, I have come to that decision on the basis that it is arguable that there was a breach of the general duty under Article 2. I have not had to decide, and I do not decide, whether or not any Article 2 duty was in fact breached.

14. In the particular circumstances of this case, the Court is in a far better position to determine whether Article 2 is engaged at this stage, having heard the evidence, compared to the position before evidence was called.

15. CTI submitted that there was an arguable case that the state's general duty under Article 2 was breached. As regards the operational duty, they submitted that it could not be said that there was a "real and immediate risk" to the lives of unarmed officers at all times and accordingly they submitted that there was no arguable breach of that separate form of duty. The widow of PC Palmer and his siblings and parents submitted that there was (at least arguably) breach of both the general duty and the operational duty. Counsel for the MPS submitted that no arguable breach of either form of duty was established. As regards the general duty, they submitted that no systemic (rather than individual) failing had been shown, and in the alternative that any failings lacked the requisite causal connection to PC Palmer's death.

16. Since I have concluded that there is an arguable case that there was a breach of the general duty, I shall confine my observations to that issue and shall not further address the operational duty. I shall first explain why I consider that it is arguable that there was a systemic failing, and then give reasons as to why there is arguably a sufficient causal link to PC Palmer's death.

17. Throughout questioning of witnesses and submissions, there has been agreement between Interested Persons that the Carriage Gates entrance was one of the most vulnerable entry points to the Palace of Westminster Estate (if not the most vulnerable) and that accordingly it was appropriate for there to be a constant (or near constant) armed police presence at the Gates when they were open.

    a. Such a conclusion was borne out by MPS firearms tactical assessments. The fact that the Gates, and officers guarding the gates, were particularly vulnerable was

accepted by PC Ashby, PC Sanders, Commander Usher, Chief Superintendent Aldworth and Inspector Rose. Commander Usher said that armed officers ought to be "tethered" to the Gates, to provide a visible deterrent to attack and a protection for this entry point.

b. During sitting hours of the Houses of Parliament, there was very limited physical protective security at Carriage Gates, adding to the importance of authorised firearms officers ("AFOs") being close to them. The large black metal gates (which have since been replaced with a modern and less ornate version) were too heavy to open and close with any frequency. Moreover the three-feet high crowd control barriers could not practicably be closed all of the time, and would remain open for example when there were several cars leaving in a short period of time, and during a Division (i.e. at a predictable time).

c. The post instructions (or "post notes") for AFOs which were in force at the time of the attack, updated in December 2015, specified that AFOs should be "in close proximity to the gates when they are open, but not outside", and that their duty "should include a short patrol into New Palace Yard towards the exit point of the Cromwell Green Search area" (a short distance away).

18. Despite the accepted need for AFOs to be posted to, or in close proximity to, Carriage Gates whenever they were open, and despite this being mandated in the post notes, the AFOs in New Palace Yard were not close to the Gates at the time of the attack.

a. It is common ground among Interested Persons that PC Ashby and PC Sanders were not acting in accordance with the post notes at the time of the attack. Commander Usher was clear that the post notes were mandatory, not advisory.

b. PC Ashby and PC Sanders were at the back of New Palace Yard, a substantial distance from (and out of view of) Carriage Gates, when Khalid Masood began his attack on PC Keith Palmer. There had been no armed officer at the Gates for at least 46 minutes. While this does not prove that there was a systemic failure, it raises proper questions as to whether the absence of armed support from the Gates was commonplace or unusual.

c. Commander Usher accepted that in their position, by the colonnades, PC Ashby and PC Sanders would not have had any real opportunity to respond quickly to a threat of the type that arose at Carriage Gates.

d. PC Ashby and PC Sanders gave evidence that their actions on the day were typical of their personal routines and of the routines of their colleagues, to the best of their knowledge. They claimed that their duty involved a "roving patrol" all around New Palace Yard, with no focus on the Gates. It appears from CCTV that PC Gerard also patrolled in this way, at least on the day of the attack (and contrary to the post notes). It is not necessary for me to conclude whether or not it was all or a majority of officers who acted contrary to the post notes; instead, I must ask whether the system for protecting the Estate and vulnerable unarmed officers was fit for purpose and functioning as it should have done.

e. The evidence of PC Ashby and PC Sanders received some support from Inspector Rose, who stated that the post notes required some degree of interpretation. Inspector Rose said that he, and the sergeants he supervised at the time of the attack, would not have expected AFOs to remain at or near the Gates but would have expected them to patrol as far as Members' Entrance. In that position, AFOs would not have been following the post notes and would have been unable to respond quickly to a threat at the Gates. They would have presented no visible deterrent at the Gates.

f. Moreover, Inspector Wilson, who prepared an "MM1" record of a review concerning PCs Ashby and Sanders, concluded that the "misjudged and misguided interpretation" of PC Ashby and PC Sanders was "not unique to these officers, and that wider command practice was reflective of the same misunderstanding." I infer that this conclusion was based upon a proper investigation, and nobody has suggested otherwise.

g. The supervisory record maintained by Inspector Munns from September 2015 to February 2016, which is the only such record of which the MPS is aware, contains an indication suggesting that AFOs were not expected to remain close to the Gates. It contains an entry indicating that a sergeant on one occasion

instructed AFOs not simply to stand at Carriage Gates but to patrol more widely. That was not an entry relating either to PC Ashby or to PC Sanders.

h. I accept the submission of CTI that it would be a strange co-incidence if the attack occurred on the afternoon when the only two or three officers who carried out "roving patrols" in this way were on duty.

i. For all of these reasons, it is at least arguable that PC Ashby and PC Sanders are right, and that their actions were typical of the AFOs who patrolled New Palace Yard every day (or at least typical of a significant number of such officers).

19. The system for ensuring that officers acted in accordance with the post notes and/or that they provided protection at the Carriage Gates entrance was at least arguably deficient.

a. If PC Ashby and PC Sanders are right that, as a general rule, a significant number of AFOs would carry out a "roving patrol" around New Palace Yard without remaining generally close to the Gates, this is a good indication of there being a systemic failing. Assessments were carried out which identified the need for armed officers to be near the Gates but practices of supervision and assurance failed to ensure that this need was met.

b. There was evidence of some disagreement as to whether post instructions ought to be strictly followed. Commander Usher said that they allowed for no interpretation. Inspector Rose, who was the duty Inspector for some time, gave evidence that the post notes required some interpretation. The MM1 document suggests that others took the same view.

c. There was evidence of officers failing to make use of the ADAM system to access post instructions. This is the computer system which, as described by Commander Usher, AFOs "should regularly access" as it was "the sole repository of the definite guide to post notes". However, on the one occasion when ADAM usage was checked (in August 2016), only 13% of officers on the Parliamentary and Diplomatic Protection Command had accessed it in the eight months since the last iteration of the post instructions. It demonstrably was not being used as intended, especially when one considers that officers were supposed to be

specifically reminded to log on to ADAM when a new version of post instructions was issued.

d. It cannot be said that systems for supervision and assurance were watertight and could not readily be improved. The MM1 document provides evidence that simple changes were promptly introduced following the review which identified widespread failure to follow post instructions. The system is now auditable and there is now a "dip-sampling regime" in place to ensure that ADAM is used appropriately by officers. It may be that further improvements can be made.

e. In written submissions, the MPS accepts that the evidence "revealed some shortcomings in the system by which the AFOs' adherence to post instructions was supervised". This is a telling concession. Although the MPS does not accept that the shortcomings were indicative of a systemic failing, I consider for the reasons given above that such a failing was at least arguably present.

20. As to the question of causation, I remind myself that the question for me is whether it is arguable (a low threshold test) that there is a real and substantial chance (a loose causal test) that better security arrangements would have saved PC Palmer's life. Although one cannot be sure what result such better arrangements would have had, I have concluded that the test is satisfied. My reasons are as follows, in summary:

a. As I have mentioned already, Commander Usher accepted that there was no real opportunity for PC Ashby and PC Sanders to prevent the attack on PC Palmer, given their location at the back of New Palace Yard. That must be right, and was not disputed by anyone.

b. The first question is whether there is a real prospect that, had there been properly enforced arrangements for AFOs to remain at the Gates, armed officers would have been in that area when Masood tried to enter. In my judgment, there must be a real prospect that armed officers would have been close at hand. There is no reason why PCs Ashby and Sanders would not have followed instructions had they received and understood them. It is possible that one or both of them would have moved towards the sound of the vehicle crashing into the perimeter railing on Westminster Bridge Road, and so been drawn away from the Gates, before

Masood arrived there. However, even if that had happened, it is distinctly possible that one or both of them would have walked only a short distance from the Gates and then been drawn back by the sounds of people running past and the later shouts referring to a man with a knife. Although PCs Ashby and Sanders initially moved towards the site of the collision, they did so at a relatively slow pace. Had they started from the Gates, they may well have been only a short distance away or may have been back there by the time Masood arrived.

c. The second question is whether there is a real prospect that, had PCs Ashby and Sanders been at the Gates, they could have taken a shot at Masood in the seconds after he entered. In my judgment, there is such a real prospect. There is a chance that the unarmed officers would not have moved towards the Gates if the AFOs had been close by, in which case they may have had a relatively clear shot. Otherwise, there is a real chance that they could have shot Masood as he was advancing on PC Palmer. The fact that the close protection officer SA74 was able to take a shot at Masood in seconds and with other officers in the area illustrates the speed and accuracy with which trained firearms officers can act.

d. The third question is whether there is a real prospect that Masood could have been shot before inflicting his fatal injury on PC Palmer. Again, in my judgment there is such a real prospect. Masood did not inflict the fatal injury until he had engaged with PC Palmer by the low wall surrounding the grassed area in New Palace Yard. There was a period before that time when a clear shot might have been taken and prevented the fatal assault.

e. It is only right to acknowledge that the analysis above involves a number of speculative judgments. However, it is only necessary for me to decide whether it is arguable that deficiencies in the security systems deprived PC Palmer of a real and substantial chance of survival.

21. On these grounds, I decided that Article 2, ECHR, was engaged in the inquest into the death of PC Keith Palmer, it being arguable that there was a breach of the state's general duty. In light of my conclusion in respect of an arguable breach of the general duty, it is not necessary for me to resolve whether there is also an arguable breach of the operational duty.

HH Judge Lucraft QC

Chief Coroner of England and Wales

12 October 2018