

INQUEST INTO THE DEATH OF KHALID MASOOD

WRITTEN SUBMISSIONS OF COUNSEL TO THE INQUEST ON DETERMINATION AND DIRECTIONS TO THE JURY

Introduction

1. In these Submissions, we shall set out the legal principles relevant to the determination to be made by the jury in this case. We shall also make proposals for how the Coroner should direct the jury with a view to eliciting their determination. These submissions are being filed just before the end of the witness evidence and without sight of the submissions of Interested Persons. Our proposals are therefore provisional on our consideration of the remaining evidence and the submissions of others.

2. In outline, our position is presently as follows:
 - (a) A critical issue which this inquest needs formally to resolve is whether or not the killing of Khalid Masood in the confrontation with the two close protection officers (SA74 and SB73) was lawful. In our submission, it plainly was lawful and any finding to the contrary would be unsafe. It would also be inappropriate in the circumstances for the jury to be left the option of an open conclusion. Accordingly, the jury should be directed to return a short-form conclusion of “lawful killing”, the only short-form conclusion which is apt and one which is plainly justified by the evidence.

 - (b) The jury should be asked to draft a short supplementary narrative giving a fuller account of the means and circumstances of Khalid Masood’s death. They should be given directions that it may address (i) the acts of Khalid Masood before the confrontation with the close protection officers, notably his attack on PC Palmer in New Palace Yard and his pursuit of police officers; (ii) his intentions, as they appeared to others in the area (especially the close protection officers); (iii) his

movements towards Westminster Hall; (iv) the movement of the close protection officers towards him; (v) any warning(s) or challenge(s) they issued; (vi) his movements and actions after any such warning(s) or challenge(s); and (vii) the firing of the fatal shots. The jury should also be given guidance about the form and content of their narrative.

The Law

Statutory Provisions and Legal Principles concerning Determinations

3. The statutory provisions and legal principles concerning determinations under the Coroners and Justice Act 2009 (“CJA”) may be summarised as follows for present purposes:

- (a) Section 5(1) of the CJA provides that the principal purpose of a coronial investigation (which may include an inquest) is to ascertain the answers to four questions: who the deceased was; and how, when and where he/she came by his/her death. Section 5(3) provides that the coroner or jury may not express an opinion on other matters (subject to the coroner’s power to make Prevention of Future Deaths reports).
- (b) Section 10(1) of the CJA requires the coroner or jury at the end of an inquest to return a determination which answers the four questions identified above (as well as making findings as to formal particulars required for death registration). Rule 34 of the Coroners (Inquests) Rules 2013 requires the use of a prescribed Record of Inquest Form to record the determination. The notes to that form refer to a number of well-known short-form conclusions which may be used in answering the question how the deceased came to die (e.g. accidental death, suicide, etc.).
- (c) In this inquest, the Court has ruled that the state’s procedural obligation to establish an independent investigation under Article 2, ECHR, is engaged. In such cases, the question “how” the deceased came by his/her death is to be read as meaning “by what means and in what circumstances” the death occurred. This is a question which goes beyond the immediate physical means of death, encompassing associated circumstances and underlying factors. In such a case, the coroner should find a means to elicit from the jury their conclusions on the key

issues relevant to the circumstances of death (as referred to below). This may include directing them on an expanded form of narrative conclusion, either in addition to or instead of a choice of short-form conclusions. See: *R (Middleton) v West Somerset Coroner* [2004] 2 AC 182 (a decision now given statutory force by section 5(2) of the CJA). In a case where death resulted from deliberate killing of a person by agents of the state, the Article 2 investigation must be capable of leading to a determination whether the force used was or was not justified: see *Jordan v UK* (2001) 37 EHRR 2 at [107].

- (d) There is a statutory prohibition on the determination in an inquest appearing to determine any question of criminal liability of a named person or any question of civil liability at all: see section 10(2). The statutory formula however permits a coroner or jury returning in suitable cases the conclusion that death was due to an unlawful killing or a lawful killing.
- (e) In those inquests where a coroner sits with a jury, the coroner must make decisions and give directions as to what conclusions the jury may consider. In this respect, the coroner acts as a judicial filter and should not leave to the jury determinations which they could not properly return. A two-limb test is applied: (i) whether there is evidence on which the jury could properly reach the relevant conclusion; and (ii) whether it would be safe for the jury to reach that conclusion. See: *R (Bennett) v HM Coroner for Inner South London* [2007] EWCA Civ 617 at [30]; *R (SSJ) v Deputy Coroner for Eastern District of West Yorkshire* [2012] EWHC 1634 (Admin) at [17]-[23]; Chief Coroner's Law Sheet No. 2.
- (f) The role of a coroner as a judicial filter requires him or her to withdraw from the jury conclusions which would be unsafe (see above) or for which there is no proper basis in evidence: see *R (Chief Constable of Devon and Cornwall) v HM Coroner for Plymouth* [2013] EWHC 3729 (Admin). In appropriate cases, a coroner may properly conclude that there is only one conclusion open on the evidence: see *R v HM Coroner for West Berkshire, Ex Parte Thomas* (1991) JP 681 AT 697-698, Bingham LJ. The judgment in that case also makes the point that an open conclusion should only be left if it could fairly be said by the jury that "the evidence did not fully or further disclose the means whereby the cause of death arose."

- (g) Where (as here) Article 2 is engaged in relation to an inquest, there is no incompatibility between the Convention requirement that the inquest should produce a determination of the key issues and the duty of a coroner to withdraw conclusions for which there is no proper evidence. In particular, if a coroner directs a jury to return a lawful killing conclusion, that does not deprive the proceedings of their effectiveness as an Article 2 investigation. See *Bubbins v UK* (2005) 41 EHRR 24 at [163]:

“If an independent judicial officer such as a Coroner decides after an exhaustive public procedure that the evidence heard on all relevant issues clearly points to only one conclusion, and does so in the knowledge that his decision may be subject to judicial review, it cannot be maintained that this decision impairs the effectiveness of the procedure.”

Lawful Killing: Relevant Principles

4. The following legal principles govern the consideration of a lawful killing conclusion in the circumstances of the present case:

- (a) “Lawful killing” is a conclusion, which is reached on the civil standard of proof, that death resulted from the use of lawful force. It is a positive finding that death resulted from an act which would otherwise amount to the crime of murder, manslaughter or infanticide but for the presence of a factor which justifies the act under the criminal law. See *R (Duggan) v North London Asst Deputy Coroner* [2016] 1 WLR 525 at [69]-[72] (upheld on appeal: [2017] 1 WLR 2199). One such justifying factor would be a defence that force was used lawfully in self-defence and/or in defence of others.
- (b) Self-defence is a common law defence to offences of violence, while defence of others is a defence recognised by section 3 of the Criminal Law Act 1967. Both defences are now governed by section 76 of the Criminal Justice and Immigration Act 2008 (“CJIA”), which codifies some earlier common law rules and adds further provisions. In summary, when deciding whether force is justified, a two-stage test must be applied:
- (i) whether or not the person honestly believed that it was necessary for him/her to use force in defence of him-/herself or others (a subjective test); and

- (ii) if he/she did hold that honest belief, whether or not he/she used no more force than was reasonably necessary in the circumstances as he/she believed them to exist (an objective test).
- (c) At the first stage of the above test, the reasonableness of the belief is only relevant as an aid in determining whether the belief was in fact honestly held: *R v Gladstone Williams* (1984) 78 Cr App R 276 at 280-81. At the second stage, it should be stressed that the Courts do not require people in the heat of the moment to calibrate precisely the amount of force required (as confirmed by section 76(7)(a) of the CJIA).
- (d) An important feature of the test set out above is that it does not require a person who anticipates a threat passively to await an attack. Circumstances may justify a pre-emptive attack. See: *Beckford v R* (1987) 85 Cr App R 378 at 385, Lord Griffiths.
- (e) In *Bennett* (CA, cited above), at [15], the Court held that the training and instructions given to firearms officers could not alter the substance of the legal test but could be considered by the coroner or jury in applying the test to the facts.

These domestic law principles have been found compliant with the ECHR: see *R (Bennett) v Inner South London Coroner* [2006] HRLR 707 (Collins J); *Da Silva v UK* (2016) 63 EHRR 12 at [244]-[256].

Narrative Conclusions

5. Over the years since the *Middleton* case, the Courts have provided the following relevant guidance on the approach of coroners to eliciting and returning narrative conclusions in inquests in which the Article 2 procedural obligation is engaged:
 - (a) The objective of the narrative conclusion is for the coroner or jury to express conclusions on the key factual issues in the case, which might go beyond the immediate physical means of death. In particular, they may deal with underlying and contributory factors. Lord Bingham gave this further guidance in *Middleton* (at [36], in the context of a jury case):

“If the coroner invites either a narrative verdict or answers to questions, he may find it helpful to direct the jury with reference to some of the matters to which a sheriff will have regard in making his determination under section 6 of the Fatal Accidents and Sudden Deaths Inquiry (Scotland) Act 1976: where and when the death took place; the cause or causes of such death; the defects in the system which contributed to the death; and any other factors which are relevant to the circumstances of the death.”

He went on to say that interested persons could make submissions on the appropriate means by which a coroner could return, or elicit from a jury, conclusions on the key issues. However, he stressed that “the choice must be that of the coroner and his decision should not be disturbed by the courts unless strong grounds are shown.” In other words, a coroner has a considerable margin of judgment in deciding how to formulate or elicit a narrative conclusion.

- (b) On the facts of the *Middleton* case (a prison suicide case), the House (at [45]) suggested an appropriate wording for a narrative in that case: “The deceased took his own life, in part because the risk of his doing so was not recognised and appropriate precautions were not taken to prevent him doing so”. Lord Bingham explained (at [37]) that this embodied “a judgmental conclusion of a factual nature, directly relating to the circumstances of death”.
- (c) A narrative conclusion must not contravene the provisions of section 10(2), which (as noted above) prohibit any conclusion that appears to determine any question of criminal liability of a named person or any question of civil liability. See *Middleton* at [37].
- (d) The means of eliciting or stating appropriate conclusions on the key factual issues concerning means and circumstances of death will vary from case to case. In *R (P) v HM Coroner for Avon* [2009] EWCA Civ 1367 at [25]-[26], Maurice Kay LJ explained that the first task of a coroner is to identify the central issues, and the next is to devise a means for those issues to be resolved, which may be by a combination of (i) a choice of short-form conclusions and (ii) a supplementary narrative. See also *R (Bodycote HIP Ltd) v HM Coroner for Herefordshire* [2008] EWHC 164 Admin (at [23]), where Blake J found that, in the circumstances of the case before him, it might be appropriate to return a narrative either as well as, or as an alternative to, a short-form conclusion.

- (e) Any narrative conclusion must be limited to matters relevant to the death(s) under investigation. Where an event or circumstance may have caused or contributed to the death(s) but cannot be proved probably to have done, the coroner has a power to return or elicit conclusions about that event or circumstance: see *R (Lewis) v Mid and North Shropshire Coroner* [2010] 1 WLR 1836; *R (Le Page) v HM Asst. Deputy Coroner for Inner South London* [2012] EWHC 1485 Admin; *R (Tainton) v HM Senior Coroner for Preston and West Lancashire* [2016] 4 WLR 157.
- (i)
- (f) A narrative conclusion ought not to be too long or complicated.
- (i) In *Coroner for the Birmingham Inquests (1974) v Hambleton* (cited above) the Court of Appeal stressed (at [18]) that a finding of a failure by the authorities to act appropriately would be made by means of a “brief factual conclusion” similar to the short conclusion suggested in *Middleton* itself.
- (ii) In *Clayton v South Yorkshire Coroner* [2005] EWHC 1196 Admin at [31], the Court doubted the appropriateness of a three-page questionnaire put before it, apparently on the basis that it was disproportionate or overly complex.
- (ii) *R (de Menezes) v Assistant Deputy Coroner for Inner South London* [2008] EWHC 3356 (Admin) involved a challenge to decisions of the coroner hearing the Stockwell shooting inquest regarding the drafting of a “verdict questionnaire”. In rejecting the challenge, Silber J said (at [26]-[27]) that the coroner had been justified in taking an approach designed to minimise the risk of confusion or undue complexity in the conclusion.

See also Chief Coroner’s Guidance No. 17, at [35].

Short-Form Conclusion: Lawful Killing

6. Where a person is killed by agents of the state, such as police officers, the procedural obligation under Article 2 obliges the state to establish an independent investigation into

the death. As stated above, that investigation must be capable of resolving the issue whether the use of lethal force was lawful. So far as possible on the evidence, it should also address and seek to resolve the key issues in the case.

7. In this case, the question of whether the use of force on Khalid Masood was lawful (as opposed to a crime) is one which can be answered on the evidence. It is also a question which should be answered, both because of the state's legal responsibility and to satisfy the reasonable expectations of all those with an interest in the inquest. The clearest means of answering it is by the determination including a short-form conclusion.
8. On all the evidence, it would be unsafe for the jury to find that the killing of Khalid Masood was other than lawful. Likewise, a jury could not legitimately find that the evidence did not allow the issue of lawfulness of the force used to be resolved. We make those submissions on the following grounds:
 - (a) It cannot be doubted that SA74, the officer who fired on Khalid Masood, honestly believed that it was necessary to use force against him in self-defence and in defence of the numerous unarmed people in the Parliamentary Estate.
 - (i) He had heard a loud bang, heard screaming and seen people running (all of which had given him cause for concern).¹ As he moved forward, he then saw uniformed police officers running back into New Palace Yard, pursued by an apparent attacker.² It was evident that the attacker must have stormed the secure perimeter of the Palace grounds.
 - (ii) When first seen by SA74, Masood was coming after the unarmed officers and was visibly wielding two large knives.³ SA74 recalls the knives being covered with blood (indicating that they had already been used in an assault). Masood was a large man, coming forward “purposefully”⁴ and at

1 SA74, Day 20, p32.

2 SA74, Day 20, pp35-36.

3 Mario Gatt, Day 18, p45.

4 SA74, Day 20, p36.

some speed.⁵ SA74 described the knives being held above each of Masood's shoulders.⁶

- (iii) SA74 described the unarmed uniformed police officers as moving “frantically” trying to get away from something or somebody.⁷ SA74 was “certain that something terrible was happening.”⁸
- (iv) It was evident to both close protection officers,⁹ as it was to the other police and to the civilian onlookers who gave evidence, that Masood was intent on further violence¹⁰ and getting further into the Parliamentary estate.¹¹
- (v) SA74 said (plausibly) that he believed that Masood was going to kill him.¹² Insofar as the reasonableness of SA74's belief is relevant, Masood had already attacked and fatally wounded a police officer (although SA74 did not know that).
- (vi) The close protection officers attempted to keep open an appropriate reactionary gap and both say that they shouted warnings.¹³ Almost all witnesses recall at least one warning being shouted, and the slowed CCTV footage (showing the officers' faces) supports those accounts. The purpose of the warning(s) was to “verbally stun” Masood, and to stop him from advancing further. Masood ignored the warning(s) and kept coming forward.¹⁴ He did not change his course at all in response to the shouts.¹⁵ Short of using force, there was no apparent means of halting his advance.

5 His speed was variously described by witnesses as running or walking fast. The CCTV footage suggests a pace similar to jogging.

6 Day 20, p36.

7 SA74, Day 20, p35.

8 Say4, Day 20, p35.

9 SB73, Day 20, p15. SA74, Day 20, p36.

10 Deputy Commissioner Mackey, Day 19, p11. PC Carlisle, Day 19, p77.

11 Matthew Jordan, Day 18, p27.

12 SA74, Day 20, p36.

13 Temporary Chief Inspector Sheridan, Day 19, p46. Matthew Jordan, Day 18, p31.

14 Thomas McTague, Day 18, p59.

15 SA74, Day 20, p37.

- (vii) Both officers have given cogent and credible evidence that they honestly believed that their lives and the lives of others in the Estate were in danger and that they needed to stop Masood with force. There was no factual basis for disputing their evidence.
- (b) Equally, it cannot seriously be doubted that the level of force used was no greater than was reasonably necessary in the circumstances as the officers (correctly) viewed them.
- (i) Masood posed a very serious threat. He was advancing on the officers themselves with apparently murderous intent. Beyond them were many unarmed civilians¹⁶ and the path lay open to various parts of the Estate.¹⁷ It was essential to stop him.
- (ii) Faced with a large assailant, armed with bloodied knives and showing no sign of responding to commands, the only means available to the officers to stop him and defend those around them was the use of their firearms. Both SA74 and SB73 had given verbal commands and warnings.¹⁸ Further commands would evidently be ignored and in any case there was no time before he closed the gap. Engaging him hand-to-hand would have been to risk serious injury without any confidence that he would be stopped. SB73 had also prepared himself to shoot Masood, and had taken aim.¹⁹
- (ii) As Temporary Chief Inspector Sheridan has explained, officers faced with an apparently deadly threat are trained to fire at the central body mass, as the most effective and appropriate means of stopping the attacker.²⁰ He also explained that officers are trained to continue shooting until an attacker has been incapacitated. The actions of the close protection officers were in accordance with their training and guidance.²¹

16 Temporary Chief Inspector Sheridan, Day 19, p48.

17 Matthew Jordan, Day 18, p27.

18 SB73, Day 20, p15. SA74, Day 20, p36.

19 Day 20, p17.

20 Day 19, p43.

21 Day 19, p46.

9. Accordingly, we submit that the jury should be directed to return a conclusion of lawful killing as a formal and public recognition of the fact that the officer's use of force was lawful. It can and should be explained to the jury in directions that, where such a determination is important but there is only one legitimate answer to the issue, the law expects the coroner to direct the jury as to their conclusion. To assist the jury in explaining why "lawful killing" is the proper (and the only proper) conclusion, they should be directed on the elements of the legal test as articulated above. It should be explained to them that the Coroner has concluded that, on the facts of this case, it is beyond doubt (i) that the officers honestly believed that it was necessary to use force to defend themselves and others and (ii) that they did not use more force than was reasonable given the threat which they perceived to exist.

Supplementary Narrative

10. In our submission, it would be appropriate to ask the jury to prepare a short narrative to supplement the directed short-form conclusion of "lawful killing". By that means they, as primary fact-finders, can give a full determination as to how Masood came by his death. They should be invited to compose a short paragraph setting out the means and circumstances of death.
11. We have considered whether the jury should be asked to answer particular questions (as opposed to composing a short paragraph in the way described above). Although we are open to submissions from others, we are not presently in favour of that course. We are not persuaded that there are particular and targeted factual questions which they must answer, given that they are not to be asked to resolve the issues arising under the two-part test for lawful use of force.
12. In our submission, the jury should be directed as follows:
 - (a) They are to prepare a short narrative, consisting of a paragraph or two setting out the circumstances in which Khalid Masood met his death and the means by which he died.
 - (b) Their narrative may in particular address –

- (i) the acts of Khalid Masood immediately before the confrontation with the officers, notably his attack on PC Palmer in New Palace Yard and his pursuit of police officers;
- (ii) Masood's intentions, as they appeared to others in the area (especially the close protection officers);
- (iii) Masood's movements towards Westminster Hall;
- (iv) the movement of the close protection officers towards Masood;
- (v) any warning or challenge issued by the close protection officers;
- (vi) Masood's movements and actions after any such warning or challenge;
and
- (vii) the firing of the fatal shots.

(See Chief Coroner's Guidance No. 17 at [40] for confirmation that this form of direction may be an appropriate means of eliciting a narrative conclusion.)

- (c) The narrative should address only the means and circumstances of Khalid Masood's death. It should not make any statement or comment on any other subject.
- (d) The jury should try to be brief and to the point. So far as possible, clear and simple language should be used in a narrative of this kind.
- (e) The jury should avoid using words and phrases such as "crime / criminal", "illegal / unlawful", "negligence / negligent", "breach of duty", "duty of care", "careless", "reckless", "liability" or "guilt / guilty". However, the jury may use ordinary and non-technical language which expresses factual judgments. (See Chief Coroner's Guidance No. 17 at [52]-[53].)

It may be that Interested Persons will have further submissions on the directions to be given in order to elicit a permissible and legitimate form of narrative conclusion.

Record of Inquest

13. To assist the jury, a Record of Inquest form should be provided to them, with Masood’s personal details and the medical cause of death completed. Sections 3 and 4 should be noted with the entry: “See Determination Sheet attached”. The Determination Sheet should state in a note at the top that it is to set out the conclusions of the jury as to by what means and in what circumstances Khalid Masood came by his death. It should also contain an entry: “Short-form conclusion: Lawful Killing”. Beneath that conclusion, the jury should be asked to write their supplementary narrative. Once that has been written and checked, a fair copy can be printed and the jury can be asked to sign the Record of Inquest with the printed Determination Sheet attached.

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