



Mr Ellis Pinnell
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Brook House Inquiry
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By email only to: solicitors@brookhouseinquiry.org.uk

Response requested by 4pm on Thursday 6 May 2021

Dear Mr Pinnell

Brook House Inquiry: Home Secretary's Undertaking

We write further to your letter of 23 April 2021. We do so jointly on behalf of the legal teams instructed by the victim and NGO Core Participants, including DPG, Bhatt Murphy and Duncan Lewis solicitors.

With your correspondence, you provided us with a copy of a letter from the Minister for Immigration Compliance and the Courts, dated 20 April 2021. That letter confirmed the Minister's decision to grant an undertaking ("Minister's Undertaking") in terms different to those sought by the Chair, through her request dated 23 November 2020 ("Chair's Request").

Initial observations

We have serious concerns about the terms of the Minister's undertaking, which marks a significant departure from the undertaking sought by the Chair. Before we set out those concerns, we must raise three initial comments about the approach that the Secretary of State has adopted to the Chair's request.

First, the Chair considered that an undertaking was required from the Home Secretary in the terms she sought. Her determination to seek an undertaking in those specific terms followed very careful consultation: she received detailed written submissions from Core Participants (including the Home Secretary), and she heard oral submissions in public at the Inquiry's Preliminary Hearing on 25 September 2020, including from the Home Secretary.

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In these circumstances, the Chair should be extremely reluctant to proceed with a different undertaking to that which she sought. Acceptance of terms other than those sought should only be considered if they do not jeopardise the purpose or effectiveness of the undertaking as originally sought. Here, they do undermine that purpose and effectiveness to a substantial degree.

Second, the significant five-month delay in providing a response to the Chair's Request is a matter of serious concern. It undermines the promptness and effectiveness of the Inquiry. Victim, NGO and CP confidence is undermined as a result. It would, absent the recent adjournment of the June 2021 start date, have made it highly likely that the Inquiry's start date would have to be postponed. Nonetheless, it may still prevent the November 2021 start date being effective.

The Minister's letter apologises for the delay without offering any explanation for it. If the reasons for the delay are apparent from correspondence between the Inquiry and the Home Secretary, that correspondence should be disclosed. If that is not the case, we request that the Inquiry seeks a detailed explanation from the Minister for the significant delay and provides that explanation to us.

Third, the terms of the Minister's undertaking differ to those which were sought by the Chair. The difference is significant in its effect, yet no explanation has been given for the variation. That is not acceptable. If the Home Secretary, through the Minister, wishes to provide a weaker undertaking which will undermine the ability of the Inquiry to discharge its Terms of Reference, she should be required to say that that is what she is doing and explain why.

Submissions

The relevant changes made by the Minister are to savings clause (i) in the Chair's request. For convenience, the two savings clauses are set out below:

- Chair's request: *"the Secretary of State may use such evidence where that person has themselves chosen to rely on such evidence and it is necessary for the Secretary of State to correct a false impression or assertion thereby made."* (emphasis added to show variation)
- Minister's undertaking: *"the Secretary of State may use such evidence provided to the Inquiry by a current or former detainee where it is necessary to do so to correct a false impression or assertion".*

The effect of the Minister's variations to this savings clause is significant. It substantially undermines the protection afforded to detained and formerly detained persons who may wish to provide evidence to the Inquiry. It does so by removing two preconditions that the Chair's request included.

(1) Control

The Chair's wording of savings clause (i) is clear. It provides that ultimate control over whether a person's Inquiry evidence may be adduced within their immigration proceedings, lies with that person. A person can choose not to rely on their Inquiry evidence within their immigration proceedings, which has the effect of barring the Home Secretary from being able to do so. This provides certainty and predictability for the individual, a key feature of the undertaking's fairness. It is that certainty and predictability that is essential to make the undertaking effective in encouraging detained and formerly detained persons to give evidence. Without it, they will not.

In contrast with the certainty provided by the Chair's wording, the Minister's formulation has the opposite effect. By removing the wording "*where that person has themselves chosen to rely on such evidence*", irrespective of whether the person providing Inquiry evidence chooses to rely on such evidence in their immigration proceedings, the Home Secretary may elect to do so. This variation completely undermines the certainty and predictability provided to individuals seeking to provide evidence to the Inquiry. The effect of the Minister's revised terms is to render the undertaking ineffective and illusory. It will result in detained and formerly detained persons refusing to provide evidence to the Inquiry.

It is important that the Inquiry recalls the wording "*where that person has themselves chosen to rely on such evidence*" was proposed by the Home Office, for a specific purpose, in its written submissions to the Solicitor to the Inquiry dated 2 September 2020, ahead of the 25 September 2020 Preliminary Hearing. In those written submissions, the Home Office stated as follows:

"Finally, the current wording does not prevent a current or former detainee from making selective use of their own evidence from the Inquiry, whether intentionally or unintentionally, which may require correction or contextualisation. This has the potential to leave a Court or Tribunal without submissions from one party at best, and at worst to lead to conflict between the undertaking on the one hand and the duty of candour and duty not to mislead the Court or Tribunal on the other. For example, were a former detainee to rely in proceedings on part of a witness statement that they provided to the Inquiry, it would be unhelpful for the Court or Tribunal if the Home Office representative was prevented by the undertaking from assisting with any submissions on the same document or correcting any misleading impression that is given. It may therefore be appropriate to make it clear that the undertaking does not apply if an individual themselves chooses to introduce into the decision making process, or into proceedings, documents or evidence that they provided to the Inquiry (and which is not otherwise available to both parties)." (emphasis added)

Those written submissions were not withdrawn by the Home Office in oral submissions on 25 September 2020. CTI, Ms McGahey QC, introduced the issue as follows (T/32/4-6 and 32/21-33/1):

4 The core participants know what the issues are, but
5 for those members of the public attending the hearing
6 I can say that the key questions raised are.

...

21 Finally, should the wording of the Home Secretary's
22 undertaking make clear that it applies to the evidence
23 supplied by detainees only and that it will not apply if
24 the detainee seeks in any immigration application to
25 rely selectively on evidence that he provided to the
1 Inquiry

In response, Mr Blake, representing the Home Office, said this (T/45/25-46/22, emphasis added):

25 On the Home Secretary's undertaking, I make clear
1 that although I represent the Home Office today, the
2 decision as to whether to grant an undertaking and in
3 what form will be an independent decision for the
4 Secretary of State, and it is important to keep that
5 separation. It would not be right for me, today, to
6 make submissions on the wording, other than to point
7 out, as we already have in correspondence, the
8 difficulties that may arise with the current wording.
9 But, once again, the wording that's been proposed by
10 the Inquiry is clearly the result of a great deal of
11 thinking on the issue. All we suggest at this stage is
12 to seek to avoid any misunderstanding or misuse of the
13 undertaking and ask that any proposed undertaking makes
14 very clear who it applies to, makes clear what it
15 applies to, and is worded in such a way that it can't be
16 misused to one party's advantage. Whether that is by
17 some sort of discharge provision, as suggested by
18 Mr Armstrong, or by way of some other clarification.
19 In other words, all we ask for is that the proposed
20 form of words that is sent to the Secretary of State is
21 clear and is fair.
22 Apart from that, I have no further submissions.

The wording requested by the Chair was clear as to who it applied to and when it would be disapplied, i.e. it would be disapplied when a detained person sought to rely on their Inquiry evidence during immigration proceedings and thereby created a false

impression or assertion. That clarity was provided in accordance with the Home Office's own written submissions.

It is unacceptable for the Home Secretary, through the Minister, to seek to vary the Chair's request by removing, five months after the initial request, the very wording that the Home Office itself suggested in previous submissions to the Inquiry.

(2) Causative link

The Chair's wording provided that the undertaking would only be disapplied where the person made a false impression or assertion by relying on their Inquiry evidence in the relevant immigration proceedings. The cause of the false impression or assertion was therefore clear and limited. The Chair's wording provides necessary clarity to detained and formerly detained persons. In doing so, it strikes a necessary and proportionate balance, attaching appropriate weight to the importance of, and public interest in, the Inquiry obtaining information from detained or formerly detained individuals.

In contrast, the Minister's undertaking removes the clarity that the Chair's wording provides by excluding the causal link between the "false impression or assertion" and the individual's Inquiry evidence. That is highly significant. Absent that causal provision, the Home Secretary may seek to argue for the disapplication of the undertaking where the evidence giving rise to a purported "false impression or assertion" exists in the immigration proceedings and the Home Secretary wishes to adduce Inquiry evidence into those immigration proceedings. The consequence of permitting that approach is obvious: detained and formerly detained persons will not give evidence to the Inquiry that they otherwise would have done.

The Minister's letter correctly recognises that "the fact that new information made available to the Inquiry that might give rise to immigration consequences would not ordinarily have been volunteered to the Home Office". Despite this, his variation undermines the very protection afforded to individuals that the Chair sought to achieve, by allowing the Home Secretary to take advantage of people who have given evidence to the Inquiry by deploying that evidence against them.

Effect of the Minister's variation

The terms provided by the Minister fundamentally undermine the effectiveness of the undertaking. In short, savings clause (i) has been expanded to such an extent that it negates the purpose and effect of the undertaking.

That is because the Minister's version of the undertaking allows the Home Secretary to deploy in immigration proceedings anything an individual says to the Inquiry (in any form) that could be used to question their character, conduct or credibility. The Home Secretary could do so on the basis that the individual had given a "false impression or assertion" in the immigration proceedings compared with their evidence to the Inquiry.

It is not difficult to envisage evidence which is highly relevant to the Inquiry (e.g. concerning involvement in drug use, supply or smuggling into Brook House, violence or bullying) which an individual may disclose to the Inquiry, that the Home Secretary may wish to deploy against them.

The purpose of the undertaking is to allow such evidence to be given. The Minister's wording will not allow that. Further, it will be impossible to advise clients with certainty and predictability as to when and how the undertaking will apply, and when and how the Home Secretary may seek to deploy Inquiry evidence against them. Relevant evidence will therefore be withheld, in whole or in part.

If the Inquiry does not gather relevant evidence from detained and formerly detained individuals, that will undermine the ability of the Chair to discharge the Inquiry's Terms of Reference, hamper the effectiveness of the Inquiry, and compromise the ability of the Inquiry to discharge the Article 3 investigative obligation.

Accepting the Minister's undertaking would also create an unfair and worrying asymmetry: current and former G4S and Home Office staff, as well as G4S corporate and the Home Office as an organisation, would be protected by the undertaking provided by the Attorney-General, while detained and formerly detained persons would not be given the necessary protection from the Home Secretary. That outcome would be unfair, it is likely to generate a significant evidential imbalance within the Inquiry, and it will undermine compliance with the Inquiry's Terms of Reference. It will also give rise to significant wider public concern and will undermine confidence in the Inquiry.

Next steps

For the reasons given above, we invite the Chair to respond to the Minister, rejecting the varied terms that have been offered, and requesting that an undertaking is given in the terms sought in the Chair's request original request in November 2020. We request that a response is required from the Minister within 7 days given the delays to date and the need to resolve this issue to allow the Inquiry to make progress.

We request that the Chair confirms her decision in respect of the above by no later than **4pm on Thursday 6 May 2021**.

Yours faithfully



DEIGHTON PIERCE GLYNN