
NOTICE OF DETERMINATION
INQUIRY’S APPROACH TO THE USE, PUBLICATION AND
REPORTING OF BBC FOOTAGE

1. This determination deals with the proposals, which have been made by the Inquiry, concerning the use, publication and reporting of the BBC footage.

BBC footage

2. The Inquiry has obtained video footage from the BBC which was covertly filmed at Brook House IRC. It includes material which was broadcast in the *Panorama* programme “*Undercover: Britain’s Immigration Secrets*” aired on 4 September 2017 and also unbroadcast material.
3. In a determination dated 30 June 2021 I set out my decision that the unredacted BBC key footage should be disclosed to Core Participants (CPs), and sections of it to individual witnesses, subject only to a security review by the Home Office and a sensitivity review by those CPs represented by Deighton Pierce Glynn (DPG), Bhatt Murphy and Duncan Lewis, collectively “the DPG Group”. It did not deal with issues related to the use of the footage in the Inquiry’s public hearing and any consequent publication, which I said I would consider in due course.

Applicable principles

4. Section 18(1) of the Inquiries Act 2005 contains a presumption of openness in relation to a public inquiry’s proceedings and information. By section 18(1), I must take such steps as I consider reasonable to secure that members of the public (including the press) are able to:
 - a. Attend the inquiry or to see and hear a simultaneous transmission of proceedings at the inquiry; and

- b. Obtain or to view a record of evidence and documents given, produced or provided to the inquiry.

5. The Inquiry shares personal information with third parties when it can do so lawfully. The Inquiry's lawful basis for processing personal data includes:
 - a. The processing is necessary for the performance of a task carried out in the public interest or in the exercise of official authority vested in the controller. I have official authority to perform the core function of the Inquiry to investigate the matters falling within the Inquiry's terms of reference. This is provided for under Article 6(1)(e) of the GDPR.
 - b. The processing of evidentiary material is necessary for compliance with legal obligations, which is provided for under Article 6(1)(c) of the GDPR. This includes section 18(1) of the Inquiries Act 2005 (as set out above) that provides, subject to restriction orders, the public are to have access to Inquiry proceedings and information.

6. The legal basis for processing special category data is that it is necessary for reasons of substantial public interest, including the exercise of a function conferred by an enactment or rule of law (i.e., the Inquiries Act 2005), to the extent that it is necessary. This is provided for by Article 9 GDPR and section 10 of the Data Protection Act 2018.

7. My obligations of securing public accessibility under section 18(1) of the Inquiries Act 2005 are particularly important as regards the BBC footage, which has played a key role in the establishment of the Inquiry and underlies its terms of reference. I must however first ensure that the relevant data principles and conditions have been complied with in respect of personal data (whether or not the subject of a restriction order). It requires me to balance a person's individual rights and the public interest in transparency in relation to all personal data processed by the Inquiry.

CTI's Proposals

8. By a Note dated 10 September 2021, Counsel to the Inquiry (CTI) set out the Inquiry's proposals for the use, publication and reporting of unredacted BBC footage. In the Note, CTI sought representations from CPs on the Inquiry's proposals.
9. CTI set out for consideration three potential options the Inquiry could adopt regarding the use, publication and reporting of the footage:
 - a. **Option 1** – Open hearings with the showing of unpixelated/unblurred/unedited footage. Here, the Inquiry does not apply any pixelation, blurring or edits (to audio etc.) to any of the footage prior to adducing it during open hearings. The faces of the formerly detained individuals would thus be visible, and their names (usually only first name) would be heard and readable on the subtitling. To understand where the video evidence sits in context with other evidence (documentary and oral evidence) relating to the same individuals, it would be necessary to link their names with their ciphers.
 - b. **Option 2** – Open and closed hearings in which most of the footage would be shown in closed hearings, but some would be shown in open hearings with the pixelation/blurring and editing of the footage. Here, the Inquiry does not apply pixelation, blurring or edits (to audio etc.) to most of the footage prior to adducing it during closed hearings. By closed hearings it is envisaged that CPs and possibly members of the accredited media are present but where there is no livestream and members of the public cannot see the proceedings. An edited transcript of the hearing could potentially be produced for publication. It may also be possible to stream the audio, or stream the video of the witness giving evidence, but without showing what they are looking at on screen. However, this has the potential to be logistically complex and error-prone. Under this option, some footage might need to be pixelated so that it could be shown during the open hearings and so that the public at large could understand the type of incident covered by the footage.
 - c. **Option 3** – All the footage would be pixelated/blurred and edited and shown in open hearings; where necessary, unpixelated/unblurred and unedited footage would be shown in closed session. Here, the Inquiry will apply

pixelation/blurring and edits to all the key relevant BBC footage to edit or blur the faces of formerly detained individuals and edit the audio track, as well as amend the subtitles so that they refer to ciphers only (where the name can be discerned or where the person has been identified). The edited footage can then be used in the normal way during open hearings and published. It may still be necessary to hold some of the hearings in closed session with the public excluded if, for example, a witness needed to be shown unedited footage before the continuation of questioning on a particular incident (e.g., the incident on 25 April 2017 involving an attempt to self-harm by D1527 and a former DCO's use of force on him).

10. CTI set out a preliminary view, having reflected on all the applicable principles and the practical issues involved, that Option 3 was the most viable option and the option that would ensure that the Inquiry hearings can take place substantially in public (save to the limited extent that the public has to be excluded) and that the evidence could be published on the Inquiry's website and reported. It was also said to strike the right balance between the protection of formerly detained persons' individual rights and the public interest in transparency in relation to the personal data in the footage.

CPs Submissions

11. The Inquiry has received representations on the options for the use of the key relevant footage at the Inquiry hearings, its subsequent publication on the Inquiry's website and reporting by the press in due course from the Home Office, the BBC, the IMB, Mr Owen Syred, Bhatt Murphy on behalf of Medical Justice and D1275, and Deighton Pierce Glynn (DPG) and Duncan Lewis solicitors on behalf of their formerly detained individual clients. I am grateful to those CPs for their submissions, which I have carefully considered.
12. The Home Office confirmed that it has considered the footage and has no observations regarding that footage.

13. The BBC submits that it has two primary concerns:

“The first is transparency. The BBC is committed to ensuring that the important issues under this investigation in this inquiry are fully and transparently investigated. The starting point in considering these cases should be openness. This is consistent with the statutory scheme and the common law principle of open justice... The need for openness and transparency is heightened by the fact that the matters in issue in this inquiry are of the utmost public interest.

The second concern, as set out in the BBC’s previous correspondence, is respecting the privacy rights of the detainees who appear in the BBC footage. The footage is sensitive and contains personal data (including relating to health and other matters) from a large number of third parties...

The BBC accepts that there is a tension between these two concerns. However, that tension can best be resolved by ensuring that as much of this inquiry takes place in open, public hearings as possible. For these reasons, the BBC does not seek to argue against the Inquiry’s proposed option, option 3...”

14. The IMB has stated that whilst it does not wish to make any specific submissions, *“CTI’s proposal, i.e. Option 3, would appear to be the best proposal”*.

15. Innovo Law for Mr Syred support the proposal recommended by CTI (Option 3) as *“the most viable approach to balance the individual rights of formerly detained persons with the need to secure public access to inquiry proceedings and information, on the basis that the formerly detained persons shown in the key relevant footage may be vulnerable individuals and there may be practical difficulties in notifying them in advance of the intention to publish identifying and potentially sensitive personal information.”* They submit that a further factor in favour of this approach is the fact that the formerly detained persons were recorded covertly without their consent in their place of residence.

16. DPG, on behalf of their two formerly detained CP clients, D687 and D390, agrees with CTI's preliminary view and concurs with their reasoning. DPG sets out its understanding of how Option 3 will work in practice, and invites the Inquiry to confirm if it is broadly consistent with the practice it intends to adopt.

17. They state that they expect:

“it will mean that when footage needs to be shown, it will first be shown in open sessions with pixilation/blurring. If a witness then needs to see an unedited version of the footage before being questioned about an incident, (unless the formerly detained individual shown in the footage elects to have their unedited footage, or the relevant sections of it, shown in open session) we will enter a closed session to show that footage and, if necessary, agree a form of words for describing in open session the difference between the edited and unedited version. We would then return to open session to continue questioning of the witness in public.”

18. Bhatt Murphy submits:

“Medical Justice does not represent any of the individuals shown in the BBC footage and recognises that it is primarily for the individuals concerned to make representations about how that footage is used in the Inquiry, including in relation to issues regarding identification.

However the Inquiry has asked that CPs make representations on the 3 options set out in counsel's note. Medical Justice has extensive experience in dealing with vulnerable detained persons and considers that, where it is not possible to obtain specific representations from individuals, that the CTI's third option does achieve an appropriate balance between the need for the Inquiry to effectively fulfil its terms of reference, and the need to proportionately protect the sensitive personal data of ex-detained persons.”

19. Bhatt Murphy has also confirmed on behalf of their formerly detained CP client, D1275, that he would ask that the Chair apply CTI's third option in relation to the footage

relating to him and that he does not have any comments to make about how the Inquiry should treat other footage that does not relate to him.

20. Duncan Lewis submits, on behalf of their formerly detained CP clients, that Option 1 is the most appropriate, namely, that video footage should be shown without pixelating and in open hearings. They submit:

“In our view, in respect of video footage, we consider that it should not be pixelated either for the protection of detainees or for the protection of Home Office G4S and staff or for others.

The principle of open justice must extend to the public and the press understanding the nuance and detail of the evidence presented to the inquiry.

The physical abuse, verbal abuse, and dehumanising treatment inflicted by staff on detainees is part of the matrix of inhuman and degrading treatment with which the inquiry is centrally concerned and the evidence of that in video footage is obviously important. In our view, the inquiry, the press and the public need to be able to see and judge the impact of that treatment by seeing the faces of those affected, In our view that needs to occur in open session. Having viewed the footage we consider that pixelating the victim obscures what is happening, is itself dehumanising, and will have the undesirable consequence that key evidence of the un-pixelated footage will be viewed in closed session.

We also consider that in the specific case of assaults, there will be a need to question the officers responsible on the basis of, and in relation to specific video evidence and without pixelation. For example when [a former DCO] whispers in the ear of D1527 that he will “put him to sleep” it is necessary to see that and the full terror of the panic that induces in D1527. Questions put to [the former DCO] over this moment will be a key part of the process and we do not consider that it will be proper for that to be held in closed session.

We note and endorse what counsel to the inquiry say about the need to protect the identity of those who were detained. We agree that they were not there voluntarily, they did not consent to any data being processed; they did not consent to be filmed and in most cases they are vulnerable individuals.

However, we do not consider that pixelating their faces will minimise the trauma of having to relive these experiences, or seriously compromise their anonymity, nor do we consider that showing faces will compromise their willingness to participate. We do consider that their identities should otherwise continue to be safeguarded. We note and endorse the Inquiry observations that “the Inquiry was established to investigate the mistreatment of formerly detained persons, rather than to investigate their actions. It is therefore the view of CTI that it is not necessary for the identities of formerly detained persons to be revealed publicly and that it remains appropriate to protect their identities. In our view, sufficient anonymity of detainees can be preserved by taking the other measures proposed, such as the use of ciphers.”

21. Duncan Lewis further clarified, in response to a request by the Solicitor to the Inquiry:

“We can confirm that we think the principled general position should be in favour of full public disclosure of video footage but that does not preclude specific applications to be made to preserve anonymity or dignity if made by individual formerly detained persons. No objections were raised by our CPs who have been shown in the BBC unused footage that the Inquiry has so far confirmed they intend to use. We of course do not know at this stage if the Inquiry intends to show additional clips and if further instructions will be needed from individual clients but our starting point would be our general position above. Our primary concerns are that critical parts of the footage ends up being pixelated which may diminish its impact or quality of evidence, or that the questioning of key ex-G4S staff ends of taking place in closed sessions on some of the most important material with sufficient public scrutiny thus avoided.”

CTI’s Advice

22. In light of the submissions received from CPs, CTI’s advice remains that the preferred option remained Option 3 for the reasons set out in their Note dated 10 September 2021 and the submissions of those CPs also preferring that option.

My Determination

23. I have carefully considered the submissions received from CPs. I have taken into consideration the need to balance the principles of openness and transparency and the need for the public to be able to engage with the significant evidence shown in the key BBC footage against the protection of the privacy rights of vulnerable formerly detained persons.
24. I note that there is broad consensus on the preferred option being Option 3 from all CPs who chose to make representations, with the exception of Duncan Lewis on behalf of their formerly detained CP clients.
25. I have taken careful account of the need to ensure public scrutiny of the key BBC footage of the most significant incidents relevant to the Inquiry's terms of reference and of the desirability of minimising the use of closed sessions, which afford a lesser degree of such public scrutiny. I bear in mind though, that the purpose of redacting the footage is to protect the identity of formerly detained persons and consequently their privacy and not because the visualisation of the content of the footage is itself sensitive. In that regard I consider that the nature and effect of the evidence shown in closed session can nonetheless be described publicly and I can take account of it, having viewed it myself, and of the evidence given by the witnesses and can set out the basis for my findings publicly. I have carefully considered the vulnerability of those who appear in significant incidents in the key footage.
26. Taking all of these matters into account I have come to the conclusion that Option 3 is the preferred option in relation to all formerly detained persons shown in the key BBC footage whether involved in a particular incident or appearing in the background. Given the time it will take to undertake this work it is necessary for the Inquiry to start this work now.

27. I do however recognise that Duncan Lewis have advocated a different approach on behalf of their clients which is that the faces of formerly detained persons should not be pixelated. To the extent that any formerly detained individuals wish to request that the Inquiry does not pixelate their faces, then they may do so. The Inquiry will consider such requests, which should be made as soon as possible. In doing so the Inquiry will bear in mind a number of factors including the sensitivity of any other information that the Inquiry holds about the individual and is likely to make public (in ciphered form), the work required to effect the changes to the footage and when, in connection with the hearing, the request is made.
28. If the Inquiry agrees to such requests, the individual's anonymity would be maintained in terms of redaction of the audio track and subtitling and their name ciphered. I would reiterate and emphasise that any requests for the Inquiry to adopt a specific approach in relation to particular individuals should be made as soon as possible. It is unlikely to be possible to accede to any requests that are provided after **29 October 2021**.
29. The Inquiry will consider how the footage will be used in the hearings, including any arrangements for playing unpixelated footage, and the Inquiry Legal Team will circulate proposals for that in due course. However, provisionally I consider it likely that where it is necessary to question a witness about unredacted footage, the witness will be shown it in closed session with CPs present in the hearing room but with no members of the public present (unless I have made a decision, upon notification by an individual as set out above, that the unredacted footage may be shown publicly). As indicated above, it is possible accredited members of the press will be present during closed sessions.

Staff Members

30. In their Note dated 10 September 2021, CTI also set out the approach of the Inquiry thus far in relation to staff members and former staff members of G4S (Care & Justice and Health Services), the Home Office and others (such as individuals working for Inspectorates, NGOs and the BBC). That approach has been not to redact their names in documents disclosed, unless the Inquiry considers that their identities are wholly

irrelevant. The starting point is that the identities of such individuals are relevant. It is the conduct of many of these individuals (as well as the organisations for which they worked) which is the subject matter and focus of this Inquiry and requires the greatest public scrutiny. It remains the Inquiry's intention to continue with this approach in relation to staff members and former staff members for the reasons given.

31. It is again important for me to emphasise the presumption of openness provided in section 18(1) of the Inquiries Act 2005 in relation to a public inquiry, subject to any restriction imposed under section 19. I consider it important that the proceedings are open and transparent such that members of the public are fully able to engage with it and to understand the evidence given on significant issues.
32. Staff members and former staff members of G4S (Care & Justice and Health Services), the Home Office and others (such as individuals working for Inspectorates, NGOs and the BBC), will not be anonymised for the purposes of the public hearings and any consequent publication of the evidence. Their images will therefore not be pixelated or blurred. It is necessary and substantially in the public interest for the images of these individuals to be shown, for the reasons given by CTI and set out above
33. If any individual wishes to suggest that the Inquiry should adopt a different approach in relation to their image or information, I will of course consider any applications for a restriction order made under the Inquiry's Protocol for Applications for Restriction Orders.

Kate Eves

Chair to the Brook House Inquiry

13 October 2021