in the matter of the Inquiry into Operation Burnham

REPLY SUBMISSIONS OF COUNSEL FOR JON STEPHENSON

30 November 2018

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MAY IT PLEASE THE INQUIRY

1. These submissions respond to various submissions made by the Inquiry, Counsel Assisting, the NZDF and wider Crown interests at the hearing on 21-22 November 2018.

The inquiry has both fact-finding and fault-finding purposes

2. Counsel Assisting and the NZDF made submissions on the differences between inquiries and court proceedings and emphasised the fact-finding purpose of this inquiry.

3. Under clause 7.1 of the TOR, however, the Inquiry is expressly tasked with reporting on "compliance [by NZDF] with the applicable rules of engagement and international humanitarian law". While this does not involve an adjudication of civil or criminal liability, it may involve the finding of fault.[1] This, in turn, brings into play fundamental rights of the core participants to natural justice and wider interests in open justice.

Review of classifications and s 22 orders

4. Before the hearing the Inquiry put forward the Draft Review Protocol. The Protocol was addressed in counsel's previous submissions. Since then the Crown has submitted: (at [59]-[61])

   (a) The Inquiry should only disclose to other participants such classified information as is necessary to ensure rights to natural justice are respected;

   (b) Only the classification of that information should be reviewed; and

   (c) Core participants do not need to be involved in the process.

5. The NZDF repeated this view (at [16] onward). Counsel Assisting addressed these issues only briefly (at [41]-[43]). Counsel make four submissions in response.

6. First, it is not correct to suggest that the only reason the Inquiry may order classified information to be disclosed to other participants is to give effect to natural justice. The Inquiry must have regard to a range of factors when considering whether and how to exercise its powers under s 22 of the IA, including considering whether disclosure would be necessary:

   (a) to help the Inquiry find the facts and fulfil its TOR (for example, by ensuring counsel for core participants who are permitted to cross-examine NZDF witnesses are able to prepare effectively); or

   (b) to give effect to the principle of open justice.

[1] See s 11 of the IA.

7. Second, the suggestion that consideration of the scope of disclosure should precede any review of classifications puts the cart before the horse. Notwithstanding it has no direct legal consequences, the classification of information will inevitably colour the Inquiry's decision-making about whether that information should be disclosed. It is therefore imperative that classifications are reviewed first so that s 22 orders can be considered on a proper footing. To address issues of cost and delay, it is submitted lower level classified information need not be reviewed, as it may be assumed this information, like other confidential information, could be safely disclosed if protective measures were put in place.

8. Third, the Crown cannot lawfully implore the Inquiry to withhold all classified information from core participants, and the Inquiry cannot withhold information, simply because the information is classified, regardless of the level of classification. This is inconsistent with *Bank Mellat,* in which the Supreme Court of the United Kingdom affirmed it is incumbent on all parties to proceedings involving classified information, including decision-makers, to avoid closed procedures to the maximum extent possible and for the Crown not to overclassify or over-assert claims to privilege or confidentiality.

9. Fourth, the Crown's submission that core participants should not be involved in the review process is based primarily on cost and delay arguments. These have been addressed in previous submissions. Participation of core participants is necessary if the Inquiry is to fulfil its TOR and uphold rights to natural justice.

Information from international partners

10. The Crown, NZDF and Counsel Assisting all emphasised the importance of taking into account the effect of disclosing information obtained from international partners on New Zealand's international relationships.

11. Such claims must be closely scrutinised. As the Crown admits, these claims will usually not be based on legal obligations but on moral or relational imperatives. In this context it cannot be sufficient for the Crown simply to assert in a generic way that relationships will be harmed if information is disclosed. Particulars of the *specific* harm that would result if *specific* information were disclosed should be demanded, which also address why limited disclosure subject to protective measures would not be sufficient.

12. The Crown submissions at [37] provide an example of unacceptable reasoning. The only information conveyed by the Cullen-Reddy report is that New Zealand receives more security reports from its "partners" than it makes available. That could not be directly relevant to any question of whether specific classified information could be disclosed to other participants subject to protective measures.

Value of cross-examination

13. Counsel Assisting have submitted that because the inquiry can have regard to classified information that might not be available to core participants, the value of cross-examination by core participants is significantly diminished (at [66]).

14. It is respectfully submitted this does not consider the "middle ground" of information being disclosed to counsel only subject to protective measures. Mr Stephenson's case is that because of his unique knowledge and experience of the matters before the Inquiry, it would be conducive to the Inquiry's main task of finding the facts if the Inquiry were to make orders for the disclosure of classified information to counsel under s 22 of the IA, subject to protective measures as appropriate. This would enable the Inquiry to get at the truth in a way which the courts have recognised is not possible via cross-examination by counsel assisting alone.

No difficulty in partly-open partly-closed hearings

15. Counsel Assisting submitted it would take too much time and cost too much money to have partly open and partly closed hearings of fact witnesses (at [73]). Counsel respectfully disagree. The Inquiry could simply clear the hearing room while confidential information is being discussed. This happens regularly in court proceedings without incident.

Protection of identities of members of NZSAS

16. The NZDF addressed this topic at length (at [24]-[31]). It is acknowledge NZSAS members have an interest in protecting their identities. This can be accommodated by having them give evidence from behind a screen. This should not preclude them from being cross-examined. This is what happened during Mr Stephenson's defamation trial, during which jury members were able to see the faces of serving NZSAS members.

Mr Stephenson's defamation trial is a useful precedent

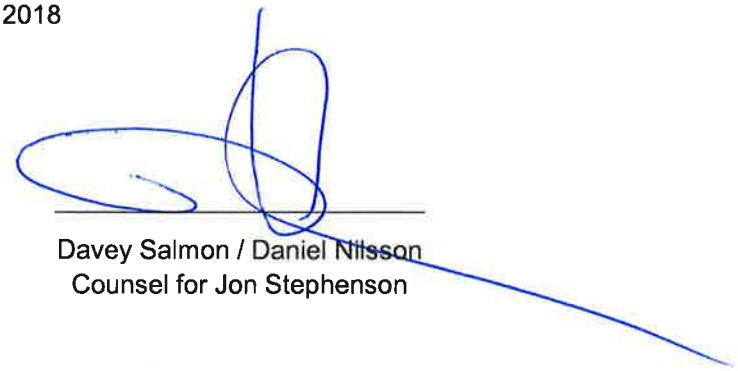
17. The NZAF submitted this trial is distinguishable from the present situation. That is not accepted.

18. That trial, like this inquiry, concerned the actions of NZSAS personnel in Afghanistan in 2010. The trial took place in 2013, only three years after the events at issue. Documents referring to NZSAS-assisted CRU operations were disclosed to Mr Stephenson and counsel. Counsel were also permitted to cross-examine key NZDF witnesses including actively serving members of the NZSAS subject to those witnesses being behind screens where they could only be seen by the judge, jury and counsel. The only material difference with this inquiry is the lapse of time: now eight years have passed since the events at issue, further eroding the legitimacy of the Crown's claims that almost all classified information should be withheld.

Open justice is a mandatory relevant consideration

19. During oral argument, the Inquiry suggested that in the context of inquiries the principle of open justice may not be relevant. This is inconsistent with the IA, which makes it a mandatory relevant consideration (s15). In addition, as submitted above, this inquiry has both fact-finding and adjudicatory purposes. There is a legal dispute between the Crown and non-Crown core participants, such that regardless of the status of the inquiry and its findings, in a very real and tangible sense, the inquiry is part of the process of the dispensation of justice in relation to what happened on Operation Burnham.

Dated 30 November 2018



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