IN THE MATTER OF THE JERMAINE BAKER INQUIRY

SUPPLEMENTARY WRITTEN SUBMISSIONS

ON BEHALF OF W80 IN RESPONSE

Applicable Legal Principles

1. The written submissions of CTI on the applicable legal principles in this Inquiry are accurate.

2. It is submitted that the Inquiry is neither required by its Terms of Reference nor by authority nor by the requirements of Article 2 to determine the issues which have been framed at paragraph 18-23 and 331-336 of the Family's Closing Submissions. This is a repetition of the request which was made in the Family's Opening Statement at paragraph 18-19.

3. The essential submissions on behalf of W80 in this regard may be briefly stated:

   i. The questions which are proposed at paragraph 331 do not accurately state the test for the Inquiry.

   ii. The resolution of those questions is not the correct approach to the applicable test on the circumstances of the killing. The Inquiry is invited to consider the reasoning and the decision of both the Divisional Court [2016] 1 WLR 525 (Leveson P, Burnett J and HHJ Peter Thornton QC) and the Court of Appeal [2017] 1 WLR 2199 (Sir Terence Etherton MR, Davis, Underhill LJJ) in *R v Duggan* in light of the question which is proposed at para 331(e) of the Family's Submissions (also formed as paragraph 19(c) of the Family's Opening Statement).

   iii. The case of *Pounder* is not authority for the proposition that the Inquiry is required to address these questions. Neither is it authority for the proposition that an Inquest would be required to address this question (as is implied by the wording of paragraph 22).

   iv. In connection with the submission made at paragraph 22 as to the proper function of an inquest, it may be noted that the litigation in *Duggan* did concern an inquest in which precisely these issues were said to arise.

The Decision of the Court of Appeal in *R v Duggan*

4. The principles of law concerning self-defence which apply in inquest proceedings are clear (See *Regina (Duggan) v North London Assistant Deputy Coroner* [2017] 1 WLR 2199 (at paragraphs 76, 79, 84, 93-95, 97).

5. The submissions which are being made to the Inquiry are conceptually similar to those which were made in *Duggan*. (See in particular,the Court of Appeal's analysis of the original case which had been advanced by counsel before the Divisional Court [2016] 1 WLR 525 (Leveson LJ, Burnett P and HHJ Peter Thornton QC) at paragraphs 46; 50-51 of the judgment of the Court of Appeal). It will readily be seen that the question identified at paragraph 331 (e) of the Family's Closing Submissions (paragraph 19 (c) of the Opening Statement) is precisely the question posed by the second ground of appeal in the judicial review brought in *Duggan*. As the Court of Appeal recorded at paragraph 51 of its judgment , this argument had been rejected by the Divisional Court prior to the decision of the Grand Chamber in *da Silva* (see para 30-82 of the judgment of the Divisional Court in which Leveson P conducted an extensive and detailed analysis of the law of self-defence, the significance and status of a coroner's verdict at an inquest in English law and the interplay, if any, of questions of civil liability and the true extent of the State's obligations under Article 2 under the jurisprudence of the European Court (see in particular paras 36, 45, 64, 69, 72, 76).

6. The Court of Appeal also similarly analysed the grounds of appeal advanced before it (see paragraph 57 penultimate sentence) and noted that the listing of the Appeal was adjourned pending the outcome of the judgment of the Grand Chamber in *da Silva* in order that the Court of Appeal could take into account the decision in Strasbourg. In the event, the effect of the judgment of the majority of the Grand Chamber (at para 244-245) was noted and summarised by the Court of Appeal at paragraph 59:

> *"it was held (at paras 244—245) that the use of lethal force by agents of the state may be justified under article 2 where it is based on an honest belief which, even if mistaken, is perceived for good reasons to be valid at the time, and that the reasonableness of that belief should be determined subjectively from the viewpoint of the person acting in self-defence at the time of the events and not assessed against an objective standard of reasonableness. It was also stated (at para 247) that, in applying the test, the ECHR*

had not treated reasonableness as a separate requirement but rather as a relevant factor in determining whether a belief was honestly and genuinely held."

7. At para 60 the Court of Appeal went on to note the conclusion of the ECHR at para 252 of *da Silva:*

> *The court held (at para 252) that the criminal test for self-defence in England and Wales, whose focus is on whether there existed an honest and genuine belief that the use of force was necessary, and where the subjective reasonableness of that belief (or the existence of subjective good reasons for it) is principally relevant to the question of whether it was in fact honestly and genuinely held, is not significantly divergent from the standard applied in McCann's case 21 EHRR 97 and in the post-McCann case law and does not fall short of the standard required by article 2.*

8. In the consequent appeal before the Court of Appeal, it may be noted that in an amended ground of appeal counsel sought to raise the objective reasonableness of the belief (See paragraph 67) and sought to distinguish between the requirements of a summing up in a criminal trial from those of an inquest (paragraphs 71 to 73).

9. The Court of Appeal went on to hold:

> *"There is nothing in either domestic legislation or the jurisprudence of the ECHR which requires that, in every case where a self-defence justification is raised at an inquest, a specific direction must be given to the jury that, in deciding whether a belief of imminent threat was honestly and genuinely held, the reasonableness or unreasonableness of that belief from the viewpoint of the person claiming the defence is a relevant consideration."* (para 76)

10. At paragraph 79 the Court of Appeal cited the judgment of Hughes LJ in <u>*R v Keane*</u> in R v Keane [2010] EWCA Crim 2514 (at paragraphs 4 and 5) which had opened with the observation *"The law of self-defence is not complicated"* before going on to set out the principles of self-defence in the criminal law which will be familiar to the Inquiry.

11. The logic of HHJ Teague QC's observation at para 6.10 in the Anthony Grainger report is clear and unassailable.

12. The Court of Appeal conclusion on the amended ground of appeal regarding the direction on belief is set out at paragraph 84:

> "*It is not a requirement of lawful killing, in the context of article 2, that the state agent's belief of imminent threat must have been reasonable. The only requirement is that the state agent honestly and genuinely held such a belief. The reasonableness of that belief is merely an implicit, and, it might be said, common sense, consideration in deciding whether that requirement is satisfied.*"

13. The Court of Appeal also went on to reject a submission that *"the Coroner ought to have directed the jury (but wrongly failed to direct them) to reach a conclusion on whether there had been a lawful or unlawful death for the purposes of the civil law."* (para 88).

14. The reasoning of the Court of Appeal was at paragraphs 93-95, and 97:

> *"93 We were not shown any domestic case which requires an enquiry as to breach of the civil law at an inquest. The judgment of the Divisional Court gave a succinct and lucid historical account of the former verdicts at an inquest of justifiable or excusable homicide and the modern conclusions of lawful and unlawful killing. As that account shows, it has never been the function of an inquest to concern itself with civil liability for a death, and the conclusion of lawful killing has always been understood to have been linked to crime and amounted to a statement that the jury believed that the deceased was probably not the victim of a homicide.*
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> *94. So far as concerns Article 2 , there is no decision of the ECHR which expressly states that the procedural requirements of Article 2 impose an obligation on the state to investigate a breach of the civil law. Indeed, such an interpretation of Article 2 would be contrary to the policy and purpose underlying Article 2 and was implicitly rejected in Da Silva .*
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> *95. The procedural requirements of Article 2 are imposed on the state. As was observed by Lord Scott in Ashley in the passages quoted earlier in this judgment, the criminal law identifies, and provides punitive sanctions for, behaviour that is categorised as criminal because it is damaging to the good*

order of society. The civil law of tort, on the other hand, is concerned with disputes between citizens or persons or bodies in the exercise of private rather than public functions. As was made clear in Da Silva , the procedural requirements of Article 2 are concerned with the public's confidence in the state's monopoly on the use of force and that, where appropriate, the official investigation must lead to the punishing of those responsible for the unjustified use of force. Similar points had been made by the ECHR in Nachova v Bulgaria (2006) 42 EHRR 43 (at para. 113) about the need for the investigation to be effective in the sense of being capable of leading to the identification and punishment of those responsible. Those requirements are consistent with standards and consequential penalties imposed by the criminal law rather than those imposed to resolve private disputes."

...

97. *Furthermore, the very question addressed by the ECHR in Da Silva was whether, for the purposes of Article 2 , the criminal law of self-defence in England and Wales was a sufficient justification of killing where the belief of an imminent threat was both mistaken and not objectively reasonable. In holding that it was sufficient justification, the ECHR was implicitly, if not explicitly, deciding that Article 2 does not require an investigation into the objective reasonableness of the belief which might found a civil action. That conclusion is given added weight by the fact, accepted by the parties to the appeal, that the ECHR in Da Silva was aware of Ashley and, hence, of the clear distinction made there between the subjective reasonableness of the defendant's belief for self-defence in a criminal prosecution and the objective reasonableness of the defendant's belief for self-defence in the civil law.*

(Emphasis added)

Factual and Evidential Matters

15. Other matters raised in the written submissions will be addressed on 8 September 2021, but in essence it is respectfully submitted that many of the allegations which have been made in writing against W80 in reality are without evidential foundation, ignore a body of other credible evidence and amount to speculation and postulation.

Duncan Penny QC

2 September 2021