

## THE PUBLIC INQUIRY INTO THE DEATH OF JERMAINE BAKER

HHJ GOLDSTONE QC

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### SUPPLEMENTARY CLOSING SUBMISSIONS ON BEHALF OF JERMAINE BAKER'S FAMILY

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1. These supplementary closing submissions on behalf of the family address §§16 – 18 of the MPS closing submission which are to the effect that the Chair is prohibited from stating that the planning and undertaking of the firearms operation that led to Jermaine's death failed to comply with the requirements of Article 2 (see family's invitations to do so at §§29 – 30 and §§358 – 362 of their closing submissions).
2. The MPS position is erroneous; the Chair has a discretion to draw conclusions regarding Operation Ankaa's compliance with Article 2 principles and in the circumstances of this Inquiry it would be meaningless to conclude this investigation without the Chair stating his conclusions on this central issue in precise terms. The centrality of Article 2 to this Inquiry is addressed below at §§4 – 7. The MPS have fallen into error by failing to appreciate the relevant distinction between inquests and public inquiries; section 10 of the Coroners and Justice Act 2009 ("CJA 2009") and section 2 of the Inquiries Act 2005 ("IA 2005") respectively. We address this aspect at §§8-14 below.
3. It is also important to note that the dispute between the parties is a narrow one. The MPS accept that the Chair may make findings of fact or recommendations from which an inference may be drawn, inter alia, that there has been a violation of Article 2<sup>1</sup>. The family's submission is that the Chair may and should express his conclusions on this central issue in precise terms; the MPS submission – in effect – is that the Chair should conceal the precise nature of the conclusion drawn.

#### The Article 2 context

4. Article 2 principles underlie all police operations where force may be used, specifically, there is a requirement that police officers responsible for such operations plan and undertake them so as to minimise, to the greatest extent possible, recourse to force and, in particular, recourse

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<sup>1</sup> MPS closing submissions at §17.

to lethal force. These words - contained within APP-AP (and in the Code of Practice that preceded it)<sup>2</sup> – reproduce the standard legal formulation of the State's obligation to plan and conduct police firearms operations so as to protect the right to life guaranteed by Article 2<sup>3</sup>. Mr Arundale explained that the structure separating decision makers responsible for delivering the armed policing objectives from those with responsibility for the criminal justice imperatives had been developed to “ensure on every occasion there is a proper balance of responsibilities and that Article 2 issues are managed with good positive criminal justice outcomes<sup>4</sup>”. Every aspect of the threat and risk assessments undertaken by the SFC, TFCs and OFCs in relation to the 11 December 2015 deployment, including the decisions whether to seek and whether to grant a firearms authority, inevitably engaged the State's obligation to protect the right to life enshrined in Article 2. The maintenance of proper records of decision making and actions were not merely incidental to the discharge of those duties but constituted an integral part of them. Thus, Article 2 affords the obvious framework for this Inquiry's examination of the events leading to Jermaine's death including the pattern of systemic non-recording of decisions which has now been conceded – in part – by the MPS<sup>5</sup>.

5. Consistent with the centrality of Article 2 to this Inquiry is the prominence given to Article 2 principles within the terms of reference: §2.6 poses the question whether “the ... handling of information [was] reasonable, in particular having regard to the need to minimise to the greatest possible extent the risk to life”; §3.5 postulates whether “the command and control of the Operation” was “conducted reasonably, in particular having regard to the need to minimise to the greatest extent the risk to life”; and §3.6 seeks inquiry as to whether the operation on the ground was conducted reasonably “having regard to the need to minimise to the greatest extent the risk to life” (see also §3.7 and §3.8).
6. It is common ground that Article 2 should also be at the heart of this inquiry<sup>6</sup>. The investigative obligation under Article 2 imposes a requirement of particularly stringent scrutiny where the death has been inflicted at the hands of a State agent: *Da Silva v The United Kingdom* (2016) 63 EHRR 12 at [34]. The requirement that the investigation be adequate means that it must be capable of identifying any breach of the Article 2 principles including a determination of whether the force used was or was not justified in the circumstances: *Da Silva*, *ibid* at [233].

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<sup>2</sup>APP-AP COP0000024\_0011 and COP §3.4.4 COP0000054\_0011.

<sup>3</sup> *Mc Cann and Others v United Kingdom* [1995] 21 ECHR 97.

<sup>4</sup> Mr Arundale's evidence, 21 July 2021, p 65 | 10 – p 66 | 11.

<sup>5</sup> At §28 of the MPS closing submissions.

<sup>6</sup> See MPS closing submissions at §16.

Any deficiency in the investigation which undermines its ability to establish the cause of death or the person or persons responsible will risk failing foul of this standard: *Al-Skeini and Others v. The United Kingdom* [GC], no 55721/07, ECHR 2011 at [166].

7. It is the family's submission therefore that the most critical of the issues to which the Chair will need to give consideration in his conclusions is whether the planning and execution of the firearms operation failed to comply with Article 2 and that absent any statutory impediment, these are the conclusions that he should in fact draw.

#### Judgmental conclusions in Article 2 inquests and public inquiries

8. The short form conclusion of "*neglect*" entailing as it does the tribunal of fact being satisfied of a duty of care (of a particular nature), breach (of a serious nature) and causation is at one with the civil law of negligence, but such a finding does not determine *liability*; it is merely the tribunal's expression of its view on a central issue explored at an inquest (where appropriate).
9. Similarly, the short form conclusion of "*unlawful killing*" is a conclusion available under both CJA 2009 and the IA 2005 proceedings. It is a conclusion at one with the criminal law of homicide and the civil law of assault and/or negligence and yet there is no dispute that the conclusion may be drawn. There is no distinction to be drawn with a short form conclusion violation of Article 2. The prohibition is against naming any particular individual as being responsible for that violation.
10. Compliance with Article 2 is of course a responsibility that rests with the State collectively and a finding that Article 2 has been violated speaks to the State's failure. A finding that Article 2 has been violated is not even implicitly a finding against a single State body such as the MPS.

#### Distinction between section 10 CJA 2009 and section 2 of the IA 2005

11. In any event, s. 2 of the IA is more permissive than s. 10 CJA. S 10 (2) of the CJA 2009 prohibits a determination "*framed in such a way as to appear to determine any question of (a) criminal liability on the part of a named person<sup>7</sup>, or (b) civil liability*". By contrast section 2 (1) of the IA 2005 states that "*an inquiry panel is not to rule on, and has no power to determine, any person's civil or criminal liability*". Thus, the prohibition under the IA 2005 irrespective of whether a criminal or civil wrong is under consideration relates solely to the identification of the person

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<sup>7</sup> All emphasis added in this section.

responsible. Further, the CJA 2009 imposes a broader prohibition in its use of the term “*framed in such a way as to appear to determine any question*” than that imposed by the IA 2005 in the phrase “*an inquiry panel is not to rule on, and has no power to determine.*”

12. The Explanatory Notes to section 2 of the IA 2005 explain the purpose of these provisions as follows:

*“8. The purpose of this section is to make clear that inquiries under this Act have no power to determine civil or criminal liability and must not purport to do so. There is often a strong feeling, particularly following high profile, controversial events, that an inquiry should determine who is to blame for what has occurred. However, inquiries are not courts and their findings cannot and do not have legal effect. The aim of inquiries is to help to restore public confidence in systems or services by investigating the facts and making recommendations to prevent recurrence, not to establish liability or to punish anyone.*

*“9. However as subsection (2) is designed to make clear, it is not intended that the inquiry should be hampered in its investigation by a fear that responsibility may be inferred from a determination of a fact”.*

13. Thus, to the extent that section 10 CJA does prohibit a conclusion that a particular death is in violation of Article 2; it is not a prohibition that extends to the conclusions of the chair of an Inquiry convened under the IA 2005.
14. Thus, more pertinent than the views expressed by HHJ Lucroft QC in the London Bridge and Fishmongers Hall inquests<sup>8</sup>, are those expressed by the Chair of the AGPI and the current Chief Coroner, HHJ Teague QC who concluded at §10.2 of his report: “[*This Inquiry*] has established that Greater Manchester Police (“GMP”) did not conduct the armed deployment [that led to the death of Anthony Grainger] in accordance with the requirements of Article 2”.

### Conclusion

15. Properly analysed there is in fact no prohibition on the Chair stating that the planning and undertaking of the police operation that led to Jermaine’s death or the act of shooting him, was or was not in violation of Article 2. The family submit that it would be a travesty for this Inquiry to conclude without the Chair expressing his view on this absolutely central issue.
16. If the Chair nonetheless concludes that he is prohibited from drawing expressly the inference that follows from his judgemental factual findings, the CPs are in agreement that the Chair may

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<sup>8</sup> See MPS closing submissions at §18.

frame conclusions from which such an inference of an Article 2 violation may be drawn. He should therefore draw factual judgmental conclusions with respect to all those matters that go to the issue whether Article 2 has been violated, identifying all those failings which he concludes bear on the article 2 duties as well as whether in light of those failings and in accordance with the Terms of Reference e.g. *“the manner in which information was handled was unreasonable, in that the procedure adopted failed to have regard to the need to minimise to the greatest possible extent the risk to life”* (§2.6) or *“the command and control of the Operation was conducted unreasonably in that it failed to have regard to the need to minimise to the greatest extent the risk to life”* (§3.5) and so on.

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