IN THE MATTER OF THE INQUIRIES ACT 2005
BEFORE HH CLEMENT GOLDSTONE QC

THE PUBLIC INQUIRY INTO THE DEATH OF JERMAINE BAKER

WRITTEN SUBMISSIONS OF COUNSEL TO THE INQUIRY ON THE APPLICABLE LEGAL FRAMEWORK

Introduction

1. This Public Inquiry concerns the death of Jermaine Baker. Mr Baker was killed when he was shot by an armed police officer of the Metropolitan Police Service ("MPS"). That police officer has been known in these proceedings by the cipher W80. W80 discharged his SIG carbine rifle during an armed operation to arrest the occupants of an Audi A6 car parked in Bracknell Close, N22 on the morning of 11 December 2015. Mr Baker was in the front passenger seat. The single round which W80 fired was fatal. Mr Baker died at the scene.

2. These written submissions are made at the conclusion of the evidential phase of the Inquiry. The purpose of this document is to assist the Chairman in providing a legal framework through which to consider certain key aspects of the evidence and the closing statements of Core Participants ("CPs").

3. We do not intend to make written or oral submissions on the facts or to make a closing statement. Instead, we restrict our submissions to the law as it applies to specific matters which the Chairman must consider.

4. The Chairman has directed that CPs serve written closing statements by 10am on 31 August 2021. It is anticipated that in those submissions, CPs will assist the Chairman to identify whether any matters of law are in dispute. Each CP has been allocated two hours on 6 and 8 September 2021 to make an oral closing statement.

5. The primary focus of these written submissions is to address two closely linked matters of law that the Chairman must resolve. These matters go to the heart of the Terms of Reference of this Inquiry and will inform his approach to reporting on the evidence: first, the test to

be applied in the assessment of whether Jermaine Baker was lawfully or unlawfully killed, and secondly the standard of proof to which those findings should be made.

6. Before turning to consider those issues, we shall first address the function and Terms of Reference of the Inquiry.

The Function of a Public Inquiry

7. In our Opening Statement we made the following observations at paragraph 47 which we repeat here for ease of reference.

8. It must be recognised at the outset that the function of a public inquiry is very different from that of either civil or criminal proceedings. A public inquiry is inquisitorial, whereas civil and criminal proceedings are adversarial. That distinction is reflected in the fact that a Public Inquiry is specifically prohibited by section 2 of the 2005 Act from determining any person's civil or criminal liability but goes on to specifically state that it is not to be inhibited in the discharge of its functions by any likelihood of liability being inferred from facts that it determines or recommendations that it makes. [1] In making any decision as to the procedure or conduct of the Inquiry the Chairman must act with fairness[2] and must deliver a report setting out the facts, recommendations and anything else that he considers to be relevant to the terms of reference including any recommendations he sees fit to make despite not being required to do so by the terms of reference.[3]

Terms of Reference and the Form of the Chairman's Report

9. The Terms of Reference ("ToR") of this Inquiry were set when it was established on 12 February 2020.[4] The Inquest proceedings were suspended by the Chairman, sitting as Coroner, under paragraph 5 of Schedule 1 Coroners and Justice Act 2003 ("CJA").[5]

10. In statements to both Houses, Baroness Williams of Trafford and the Home Secretary said:

[1] Inquiries Act 2005, section 2
[2] Ibid., section 17.
[3] Ibid., section 24.
[4] https://jermaine-baker.public-inquiry.uk/wp-content/uploads/2021/03/Terms-of-Reference-for-the-Baker-Inquiry.pdf
[5] Read with paragraph 3 of Schedule 10 CJA.

> "[i]t has been necessary to establish an inquiry so as to permit all relevant evidence to be heard. The inquiry will have the same scope as the current inquest, which will be suspended after the establishment of the inquiry."[6]

11. The ToR begin by requiring the Inquiry to investigate who the deceased was, and where, when and in what circumstances he came by his death. Furthermore, the ToR require the Chairman to establish the particulars required by the Births and Deaths Registration Act 1953 for the registration of Mr Baker's death.

12. Paragraph 3.4 of the Scope of the Inquiry is *"The shooting, namely the circumstances in which the officer who fired the fatal shot came to discharge his weapon."* Paragraph 3.6 is *"Was the Operation conducted reasonably on the ground, in particular having regard to the need to minimise to the greatest possible extent the risk to life?"*

13. Although the Chairman does not need to complete a Record of Inquest form, that only being a requirement of a coroner in an inquest (see Rule 23 Coroners (Inquests) Rules 2013), the Chairman must answer the four statutory questions of any inquest in his report. In this instance, the fourth question ("how") has a gloss on it because the state's Article 2 investigative obligation is engaged in the circumstances of Mr Baker's death (see section 5(2) CJA).

14. In a narrative conclusion, a coroner may make findings on the key factual issues in the case, including those which go beyond the immediate physical means of death. This may include "defects in the system which contributed to the death; and any other factors which are relevant to the circumstances of the death".[7] It may be judgmental, in the case of an inquest in which the Article 2 obligation is engaged.

15. As to the test for causation, matters may be included in a narrative conclusion where such a factor more than minimally contributed to the death.[8] In *Tainton* (cited above), the Divisional Court held that serious failings (which, in that case, were admitted failings) ought to have formed part of a narrative conclusion given that they formed part of the circumstances of the death, even where that tribunal of fact could not find them to be causative.

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[6] https://questions-statements.parliament.uk/written-statements/detail/2020-02-12/HLWS104; https://questions-statements.parliament.uk/written-statements/detail/2020-02-12/hcws111.
[7] *R (Middleton) v West Somerset Coroner* [2004] 2 AC 182 at paragraph 36.
[8] *R (Tainton) v HM Senior Coroner for Preston and West Lancashire* [2016] 4 WLR 157 at paragraph 41; *R (Chidlow) v HM Senior Coroner for Blackpool* [2019] EWHC 581 (Admin) at paragraph 37.

16. Likewise, because the Chairman is not completing the Record of Inquest form, he is not required to enter a short form conclusion or give a narrative. However, in the circumstances of this Inquiry we submit it would be wholly appropriate for the Chairman to make findings of fact in his report which are equivalent to such a conclusion. Particularly, the Chairman should seek to resolve the question of whether Jermaine Baker was lawfully killed. We note that the current Chief Coroner, sitting as the Chairman of the Anthony Grainger Inquiry, included a short chapter in his report titled "Narrative Conclusion".[9] We commend the same approach here.

Standard of Proof, Lawful and Unlawful Killing and Self-Defence

17. This Inquiry was established when the Inquest into the death of Jermaine Baker was suspended. That Inquest would have been required to answer the four statutory questions in section 5 CJA: who the deceased was and how, when and where the deceased came by his death. The ToR of this Inquiry reflect those same questions.

18. Although the scope of this Inquiry has stretched far wider than the few seconds which directly preceded Jermaine Baker's death, the immediate cause of Jermaine Baker's death is plain: he was killed when an armed police officer fired on him. The central issue for the Chairman therefore to determine is whether that officer's decision to discharge his weapon amounted to a lawful or unlawful killing. The officer, W80, has given evidence that he acted in self-defence, firing because "I believed that he was going for a weapon that was in the man bag"[10] and that he did so pre-emptively because "his actions could beat my reactions, so I reacted to his actions moving towards the bag."[11]

19. In determining whether the actions of W80 amount to lawful self-defence the Inquiry will consider if his actions were limited to the use of reasonable force. Different tests in respect of the decision to use reasonable force for self-defence are applied in respect of the civil tort of battery and in respect of the criminal offence of murder. In short, a defendant in criminal proceedings may rely on an honest mistake where the belief was reasonable, but a defendant in civil proceedings may not.

[9] Chapter 12, Report into the Death of Anthony Grainger, 11 July 2019 at https://webarchive.nationalarchives.gov.uk/ukgwa/20200401132549/https://www.graingerinquiry.org.uk/
[10] Day 21, page 168.
[11] Day 21, page 150.

a. In civil proceedings, a person using force in self-defence must establish that there were reasonable grounds for his belief that it was necessary to do so. An unreasonable and mistaken belief that there was an imminent threat provides no defence, even where that belief was honest.[12]

b. In contrast, the position in criminal proceedings is set out in section 76 Criminal Justice and Immigration Act 2008 ("CJIA"):

> (3) The question whether the degree of force used by D was reasonable in the circumstances is to be decided by reference to the circumstances as D believed them to be, and subsections (4) to (8) also apply in connection with deciding that question.
>
> (4) If D claims to have held a particular belief as regards the existence of any circumstances—
>
> > (a) the reasonableness or otherwise of that belief is relevant to the question whether D genuinely held it; but
> >
> > (b) if it is determined that D did genuinely hold it, D is entitled to rely on it for the purposes of subsection (3), whether or not—
> >
> > > (i) it was mistaken, or
> > >
> > > (ii) (if it was mistaken) the mistake was a reasonable one to have made.

20. There is no rule of law determining whether the Chairman of a public inquiry should apply the civil test or the criminal test for self-defence ("the Reasonableness Question").

21. Furthermore, in civil proceedings the questions of fact will be resolved on the balance of probabilities, whereas in criminal proceedings a person will only be convicted where the case is proved beyond reasonable doubt. The Chairman of a public inquiry is not bound by any statutory or common law principles to apply either the civil or criminal standard of proof ("the Standard of Proof Question").

22. The Chairman of the Anthony Grainger Inquiry grappled, at paragraphs 6.3 – 6.13 of his report, with these two questions, in the context of a police shooting in which it was said the

[12] *Ashley v Chief Constable of Sussex Police* [2008] 1 AC 962 at paragraph 85

firearm was discharged in self-defence. The same issues come before the Chairman of this Inquiry, although the law has moved on in one significant way.

23. HH Judge Teague QC, now the Chief Coroner of England and Wales, noted the distinctions between the law in civil and criminal proceedings in respect of both the Reasonableness Question and the Standard of Proof Question. HH Judge Teague QC then turned to consider the answer to these questions "in the context of a different species of inquisitorial proceeding, namely inquests" (paragraph 6.8). He determined that in the Anthony Grainger Inquiry he should apply the same principles which would apply in an inquest, reaching that conclusion for the following reasons (paragraph 6.10 – 6.13):

    a. The Terms of Reference in that Inquiry required the Chairman to answer the questions of who the deceased was and when, where and how the deceased died. Those are precisely the same questions that a coroner investigating the same death would be required to ask and answer in an inquest;

    b. The Inquiry was set up because it was impossible to conduct an inquest which would hear all relevant evidence;

    c. It "would be odd indeed" if the need to convert the inquest to an inquiry "had the unintended consequence that a different substantive legal framework fell to be applied when judging the legality" of the officer's use of force; and

    d. The Inquiry proceedings were "truly inquisitorial proceedings" and had "very many similarities with coronial proceedings", citing *R (Duggan) v Assistant Deputy Coroner for the Northern District of Greater London* [2017] 1 WLR 2199 at paragraph 91 to 97. The important question is not whether inquiry proceedings are more akin to civil or criminal proceedings, given the strength of the proper analogy between an inquiry and an inquest which preceded it.

24. In our submission, each of these points applies with equal force to the present case. The Chairman should apply the same principles in respect of the Reasonableness Question and the Standard of Proof Question as he would have done had he inquired into Jermaine Baker's death as a coroner in an inquest.

25. With that in mind, we turn to consider the principles as would apply in an inquest.

Unlawful Killing, Lawful Killing and Self-Defence

26. Although the Chairman will not complete a Record of Inquest, Form 2 in the Schedule to the Coroners (Inquests) Rules 2013 is of some assistance in describing the principles which should be followed. Note (i) to Form 2 provides a list of short-form conclusions. The list is not exhaustive but the former Chief Coroner's guidance is that "straying from the list will usually be unwise" in an inquest.[13]

27. One short-form conclusion in that list is "lawful killing". Another is "unlawful killing".

    a. A lawful killing is one which is deliberate, and which would amount to murder or voluntary manslaughter but for the presence of an additional factor which justifies it. One such factor is self-defence.[14]

    b. A conclusion of unlawful killing is one which may be entered to reflect an act which amounts of murder, manslaughter (including corporate manslaughter) and infanticide.[15]

28. In answer to the Reasonableness Question, the principles to be adopted are those of the criminal law. As the Court of Appeal held in *R (Duggan)* at paragraph 93:

> "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."

29. Accordingly, the significant principles which the Chairman should follow in this case may be summarised as follows:

    a. A police officer who kills a person may have a defence at common law of self-defence to the use of otherwise unlawful force. A closely related statutory defence is provided by section 3 Criminal Law Act 1967:

[13] Guidance No 17 on Conclusions, paragraph 27.
[14] R *(Duggan) v North London Asst Deputy Coroner* [2016] 1 WLR 525 at paragraphs 69 - 72.
[15] R *(Wilkinson) v Her Majesty's Coroner for the Greater Manchester South District* at paragraph 70.

"3.— Use of force in making arrest, etc.

(1) A person may use such force as is reasonable in the circumstances in the prevention of crime, or in effecting or assisting in the lawful arrest of offenders or suspected offenders or of persons unlawfully at large.

(2) Subsection (1) above shall replace the rules of the common law on the question when force used for a purpose mentioned in the subsection is justified by that purpose."

b. Section 76 CJIA provides a two-limb test to be applied when determining whether a person's use of force is justified. The first limb provides a subjective test: whether or not the person honestly believed that it was necessary to use force in defence of him- or herself or others. If this limb is satisfied, an objective assessment is then made under the second limb: whether or not the person used no more force than was reasonably necessary, given the circumstances as he or she believed them to be.

c. As regards the first limb of the test, the reasonableness of the belief is only relevant insofar as it tells upon whether the belief was honestly held.[16] In accordance with section 76(7)(a) of the CJIA, an assessment of reasonableness under the second limb does not require a person acting in the heat of the moment to "weigh to a nicety" the precise degree of force required.

d. The Crown Court Compendium of the Judicial College (updated December 2020) describes that the "defence is available even if D is mistaken as to the circumstances as he/she genuinely believed them to be, whether or not the mistake was a reasonable one for D to have made",[17] citing section 76(4).

e. The question of reasonableness is a question of fact for the tribunal, after considering various factors, including all the circumstances in which the person concerned made the decision as to whether to use force and the level to use.[18] A pre-emptive strike may be lawful in the right circumstances.[19]

[16] *R v Gladstone Williams* (1984) 78 Cr App R 276 at 280-81.
[17] Page 18-2, Paragraph 3.
[18] *Attorney General for Northern Ireland's Reference* [1978] A.C. 105, HL; *R. v Whyte* [1987] 3 All E.R. 416, CA.
[19] *Beckford v R* [1988] AC 130 at 144.

f. Where a person is entitled prima facie to rely on the defence of self-defence but the force used was excessive and more than reasonable, they are outside the scope of the defence. However, in the case of a police officer arresting an offender, a choice as to what force to exercise will sometimes "be exercised on the spur of the moment, without time for measured reflection."[20]

g. The training and instructions given to firearms officers do not alter the substance of the legal test, however, they are material facts which may be taken into account in assessing whether a person acted reasonably by reference to the facts as he honestly believed them to be.[21]

Standard of Proof

30. Across a Chairman's various findings of fact, a public inquiry typically adopts a flexible and variable standard of proof,[22] but the Chairman should indicate, when making findings, the standard of proof to which they are made.

31. However, for the reasons of principle set out above, the standard of proof in respect of the central question of whether Jermaine Baker was lawfully killed should be the same as the standard of proof which would have applied had this investigation been an inquest concerning the same matters.

32. The Notes to Form 2, which came into force on 25 July 2013, are now out of date in one respect, stating that the standard of proof applicable to most conclusions in an inquest determination is the civil standard (i.e. balance of probabilities) but that the standard of proof required for the short form conclusions of "unlawful killing" and "suicide" is the criminal standard.

33. In November 2020, the Supreme Court gave judgment in *R (Maughan) v HMC for Oxfordshire* [2020] UKSC 46. The appeal concerned the standard of proof required for the determination of the result of an inquest into a death where the question is whether the deceased committed suicide. The Court held not just that the standard of proof in respect of suicide is the balance

[20] R *v Clegg* [1995] 1 AC 482 at 497-498.
[21] R *(Bennett) v HM Coroner for Inner South London* [2007] EWCA Civ 617 at paragraph 15.
[22] E.g. Sir Thayne Forbes, the *Al Sweady Inquiry Report*, paragraph 1.169.

of probabilities, but that the standard of proof for all short form conclusions is the balance of probabilities. This includes a conclusion of unlawful killing or lawful killing.[23]

Inquest Proceedings

34. Having suspended the Inquest under paragraph 5 of Schedule 1 CJA, the Chairman (as Coroner) has a general power to resume the Inquest under paragraph 10:

> "An investigation that is suspended under paragraph 5 may be resumed at any time if the senior coroner thinks that there is sufficient reason for resuming it."

35. In our submission, if the Inquiry fulfils its ToR, there is no merit in the Inquest being resumed. This is a provisional submission, and one which we shall review in light of the submissions of CPs and the matters which are addressed in the Chairman's report. In deciding whether to resume the Inquest, the Chairman will wish to consider whether there is sufficient reason to resume an adjourned inquest, including whether it has been sufficiently established who the deceased was, and how, when and where he came by his death,[24] this being a highly discretionary decision.[25] We would invite the Chairman, as Coroner, to confirm upon the publication of his report that he does not intend to decide that the Inquest should be resumed.

36. Separately, the Chairman will wish to provide the local authority with the information needed for it to issue a final death certificate.

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23 August 2021

[23] Paragraph 143.
[24] *Re Downes' Application* [1988] 4 NIJB 91, HC (NI).
[25] *R v Inner West London Coroner, ex p. Dallaglio* [1994] 4 All ER 139 at 155e.