

INQUESTS ARISING FROM

THE DEATHS IN THE LONDON BRIDGE TERROR ATTACK

ON 3rd JUNE 2017

SUBMISSIONS ON BEHALF OF

THE COMMISSIONER OF CITY OF LONDON POLICE ON DETERMINATIONS

1 **INTRODUCTION**

1.1 In addressing the issue of whether Art. 2 is arguably engaged and/or breached, the Commissioner wishes it to be made clear that these are principled legal submissions not intended, on the part of CoLP, to restrict the Coroner to a short form verdict with one paragraph narrative in respect of each of the victims, without more.

1.2 If the Coroner were to conclude that, as a matter of law, Art 2 is not engaged against any IP the determinations are required in law to be limited to short form verdicts with brief narrative, as set out in paragraph 59 of CTI's submissions. Notwithstanding that legal restriction, the Commissioner positively invites the Coroner to adopt the course taken by Hallett LJ in the 7/7 Inquests, more recently endorsed in R v HM Senior Coroner for the County of Cumbria, Ex Parte Worthington [2018] EWHC 3386 (Admin) [85] namely to make detailed findings of fact on the evidence contained in a summing-up or ruling. The Coroner has set aside 2 days for

delivery of his conclusions. In this case such a summing- up or ruling, together with the power to issue a PFD report, will ensure that the public interest in all the facts and issues arising in this inquest being subject to determination by the Coroner is met. It is submitted that the obvious need for detailed conclusions should not result in Art.2 being used as a vehicle for such conclusions if it does not apply as a matter of law.

1.3 The CoLP submissions follow the order of the CTI submissions

2. **SUMMARY OF CoLP SUBMISSIONS**

2.1 CoLP recognises that there are a number of relevant authorities which suggest that the Art 2 general duty is not capable of being engaged against any IP on the facts of this case. There is a duty to draw the relevant authorities to the attention of the Coroner. However, CoLP will not seek to address the Coroner on the issue of the general duty save to the extent that the scope of the duty is said to extend beyond that contended for by CTI.

2.2 It is submitted that the Art 2 (Osman) operational duty is not engaged on the facts of this case. Further any in any event, even if engaged, it has not been breached by CoLP.

3. **THE LAW**

3.1 CoLP agrees with and adopts the legal analysis in respect of the statutory provisions and legal principles governing determinations contained in paragraphs 5 - 7 of CTI's Submissions.

3.2 CoLP agrees with the summary of the legal principles governing Article 2 duties set out in paragraph 8 of CTI's submissions.

3.3 The legal principles concerning narrative conclusions in Art 2 cases set out at paragraph 9 of CTI submissions are agreed.

3.4 It is submitted that having correctly identified all of the individual legal principles, the Coroner will need to determine whether the authorities in fact support the conclusions reached by CTI.

4. **ARTICLE 2 IN THESE INQUESTS**

4.1 The starting point in any consideration of Art. 2 in the context of death resulting from the criminal acts of a third party (as in these inquests) must be *Osman v United Kingdom* [1998] 29 EHRR 245. The extent and nature of the State's duty is to be found at paragraphs 115 and 116 of the Court's judgment:

"115. The Court notes that the first sentence of Article 2 § 1 enjoins the State not only to refrain from the intentional and unlawful taking of life, but also to take appropriate steps to safeguard the lives of those within its jurisdiction (see the L.C.B. v. the United Kingdom judgment of 9 June 1998, Reports of Judgments and Decisions 1998-III, p. 1403, § 36). It is common ground that the State's obligation in this respect extends beyond its primary duty to secure the right to life by putting in place effective criminal-law provisions to deter the commission of offences against the person backed up by law-enforcement machinery for the prevention, suppression and sanctioning of breaches of such provisions. It is thus accepted by those appearing before the Court that Article 2 of the Convention may also imply in certain well-defined circumstances a positive obligation on the authorities to take preventive operational measures to protect an individual whose life is at risk from the criminal acts of another individual. The scope of this obligation is a matter of dispute between the parties.

116. For the Court, and bearing in mind the difficulties involved in policing modern societies, the unpredictability of human conduct and the operational choices which must be made in terms of priorities and resources, such an obligation must be interpreted in a way which does not impose an impossible or disproportionate burden on the authorities. Accordingly, not every claimed risk to life can entail for the authorities a Convention requirement to take operational measures to prevent that risk from materialising. Another

relevant consideration is the need to ensure that the police exercise their powers to control and prevent crime in a manner which fully respects the due process and other guarantees which legitimately place restraints on the scope of their action to investigate crime and bring offenders to justice, including the guarantees contained in Articles 5 and 8 of the Convention.

*In the opinion of the Court where there is an allegation that the authorities have violated their positive obligation to protect the right to life in the context of their above-mentioned duty to prevent and suppress offences against the person (see paragraph 115 above), **it must be established to its satisfaction that the authorities knew or ought to have known at the time of the existence of a real and immediate risk to the life of an identified individual or individuals from the criminal acts of a third party and that they failed to take measures within the scope of their powers which, judged reasonably, might have been expected to avoid that risk.** (Emphasis added) The Court does not accept the Government's view that the failure to perceive the risk to life in the circumstances known at the time or to take preventive measures to avoid that risk must be tantamount to gross negligence or wilful disregard of the duty to protect life (see paragraph 107 above). Such a rigid standard must be considered to be incompatible with the requirements of Article 1 of the Convention and the obligations of Contracting States under that Article to secure the practical and effective protection of the rights and freedoms laid down therein, including Article 2 (see, *mutatis mutandis*, the above-mentioned *McCann and Others* judgment, p. 45, § 146). For the Court, and having regard to the nature of the right protected by Article 2, a right fundamental in the scheme of the Convention, it is sufficient for an applicant to show that the authorities did not do all that could be reasonably expected of them to avoid a real and immediate risk to life of which they have or ought to have knowledge. This is a question which can only be answered in the light of all the circumstances of any particular case. On the above understanding the Court will examine the particular circumstances of this case."*

- 4.2 It is important to read both paragraphs in their entirety as it is only in this way that the juxtaposition between the general duty and the operational duty may be properly understood. A number of distinct principles may be derived from *Osman*:

- the existence of a duty to take appropriate steps to safeguard the lives of those within its jurisdiction which falls into 2 parts.
- the first part is the State's primary duty to put in place effective criminal-law provisions to deter the commission of offences against the person backed up by law-enforcement machinery for the prevention, suppression and sanctioning of breaches of such provisions. This is frequently referred to as the general duty.
- in addition to the general duty the Convention may also imply in certain well-defined circumstances a positive obligation on the authorities to take preventive operational measures to protect an individual whose life is at risk from the criminal acts of another individual.
- the 'well-defined' circumstances which give rise to the operational duty are made out where it is established to the satisfaction of the Court that the authorities knew or ought to have known at the time of the existence of a real and immediate risk to the life of an identified individual or individuals from the criminal acts of a third party and that they failed to take measures within the scope of their powers which, judged reasonably, might have been expected to avoid that risk

4.3 It is accepted that the scope of the Osman duty has been considered by both the domestic courts and the ECHR on many occasions and has evolved over the years. However, the essential elements of what was referred to in *In re Officer L (Respondent) (Northern Ireland)* [2007] UKHL 36, by Lord Carswell as the *locus classicus* have not changed.

The general duty

4.4 As is set out in paragraph 8 of CTI's submissions, the general duty concerns the obligation to put in place a legislative and administrative framework that will protect the right to life. This is the duty owed to the public as a whole where the operational duty does not arise.

- 4.5 As CTI identify at paragraph 8d it is well-established that the determination of the issue of breach of the duty involves a high-level assessment taking into account the effect of the overall package of measures in place. Thus in respect of the general duty the Coroner must consider whether the legislative and administrative framework in the UK discharges the **general** duty.
- 4.6 None of the cases relied upon by CTI to establish the proposition that the general duty applies on the facts of this case concern facts where the risk arises from the criminal acts of a third party:

Middleton – concerned a prisoner who committed suicide whilst in custody and was therefore under the care and control of the authorities

Savage – concerns a patient detained under the Mental Health Act and therefore under the care and control of the authorities.

Middleton and Savage are examples of a large body of cases involving a class of victims who are either patients or prisoners in respect of whom the State has assumed responsibility. This class of cases is clearly identified in *R(Humberstone) v Legal Services Commission [2011] 1 WLR 1460 [21]* as being a class of case which imposes on state authorities such as the police and prison authorities the duty to protect those in their immediate care from violence at the hands of others or at their own hands. This includes the need to adopt systems of work and policies to support that duty.

Oneryildiz – a case involving death caused by the collapse of a municipal rubbish tip. The tip was owned by the State, the risk having been created by the State

Budayeva – a case concerning a mudslide in an area prone to mudslides where a mudslide had been likely to occur. There was in existence no regulatory framework, land-planning policies or specific safety measures. The Court held that the authorities had, in effect, taken no measures at all with regard to the mudslides until the day of the disaster.

Parkinson – another hospital death

Kakoulli – Death at the hands of the State through armed State agents

Makaratis - Death at the hands of the State through armed State agents

4.7 It is submitted that the relevant principles in respect of the general duty are as follows:

- Where a death arises not as a result of any action or inaction of the State but from the criminal acts of a third party, the general duty is to put in place “effective criminal law provisions to deter the commission of offences against the person backed up by law enforcement machinery for the prevention suppression and sanctioning of breaches of such provisions see **Osman [115], Van Colle v Chief Constable of Hertfordshire Police [2008] UKHL 50 (per Lord Bingham) [38]**.
- The system which is in place in the UK has been the subject of a number of challenges both in the domestic and European context but to date has been held to satisfy the general duty under Article 2 including:
R (Humberstone) [2010] EWCA Civ 1479 at [52] and [67],
R(NM) v Secretary of State for Justice [2012] EWCA Civ 1182 [29] where the Court held that “In the absence of state complicity, the essential obligation of the state is only to provide a system under which civil wrongs may be remedied in litigation or criminal wrongs investigated and prosecuted: see *MC v. Bulgaria* (application no 39272/98, 4 December 2003), *Secic v. Croatia* (application no 40116/02, 31 May 2007), *Maryin v. Russia* (application no 1719/04, 21 October 2010)”.
Menson v UK 47916/99 [1998] ECHR 107 (16 September 1998) the court considered the scope of the general duty holding that the absence of any direct state responsibility for the death of Michael Menson does not exclude the applicability of article 2. It recalls

that by requiring a State to take appropriate steps to safeguard the lives of those within its jurisdiction (see *LCB v United Kingdom* (1998) 27 EHRR 212] para 36), article 2 para 1 imposes a duty on that state to secure the right to life by putting in place effective criminal law provisions to deter the commission of offences against the person, backed up by law enforcement machinery for the prevention, suppression and punishment of breaches of such provisions and concluded that *“the legal system of the respondent State ably demonstrated, in the final analysis and with reasonable expedition, its capacity to enforce the criminal law against those who unlawfully took the life of another, irrespective of their racial origin. For the Court, this must be considered decisive”*.

- 4.8 A large body of authority in respect of the existence of the general duty has been cited. There is no case in which the general duty has been held to require anything other than effective criminal-law provisions to deter the commission of offences against the person backed up by law-enforcement machinery for the prevention, suppression and sanctioning of breaches of such provisions in circumstances where the death has resulted from the criminal acts of a third party. All of the systemic cases relate to the death of individuals at the hands of the State or where the State had assumed responsibility, by reason of them being in custody or in hospital.
- 4.9 CoLP is concerned that the body of authority may not support the engagement of the general duty on these facts but does not seek to address the Coroner on the conclusions to be drawn from the said authorities save to the extent that the scope of the duty is said to extend beyond that contended for by CTI because any wider scope of duty is wholly unarguable.
- 4.10 The following factors are relevant as to whether the Art. 2 general duty, if engaged, was breached by CoLP. It should be borne in mind that the Court is required to give a wide measure of appreciation to judgments made by professionals and experts in the course of their duties :

- Notwithstanding the acknowledged problems with the crowded places model CoLP acted dynamically as expected by the Home Office and recognised that London Bridge was a potentially vulnerable location outside the Crowded Places model. This was described as ‘Gold Standard’ by Ms Nacey.
- CoLP commissioned the Cerastes report in an effort to improve and enhance Project Servator deployments at locations identified by CoLP.
- CoLP followed the first recommendation in the Cerastes report by increasing Servator Patrols by 35% in the relevant period. This was an interim protective measure.
- CoLP followed the second recommendation by considering of the installation of HVM.
- CoLP had an advisory role in respect of London Bridge. COLC were advised of the potential risk to London Bridge by the CTSA.
- On the facts the evidence is that it was not within CoLP’s power to put temporary HVM on the bridge – the National Barrier Asset was not available at that time for this purpose owing to the lack of intelligence.

The Operational (Osman) duty

- 4.11 It is submitted that the facts of this case fall so far short of the Osman test (even as developed) that it is not even arguable that Art 2 is engaged on the basis of the operational duty.
- 4.12 CoLP agree with paragraph 27 of CTI’s submission to the effect that it is not arguable that the Article 2 operational duty was breached on the facts of this case.
- 4.13 The operational duty cannot arise in this case for reasons which include but are not limited to:
- The fact that a location is regarded (along with many others) as being generally vulnerable to a particular type of terror attack falls far short of establishing that there was a real and immediate risk to the life of an identified individual or individuals.

- In Mastromatteo [74] the Court held: “a mere condition sine qua non does not suffice to engage the responsibility of the State under the Convention”. This is exactly what the vulnerability of the bridge amounted to on the facts of the present case.
- The submissions on behalf of the 6 families in Van Colle as to the definition of “knew or ought to have known” was not the judgment of the Court. Lord Phillips took a different view concluding that one should only look at information that was in fact available to the police, not information that they would have obtained if they had carried out further investigations.
- Mastromatteo can be distinguished from the present facts. The killers had been in the custody of the State and the risk was created by their release on licence. Further as Hallett LJ observed during the course of her ruling following the April 2010 pre inquest review [79] –[82] the Court rehearsed, without amendment, the Osman principles [79] and if the Court felt that they were departing from or extending the well-established principles.
- The absence of intelligence, which played such an important part in the decision making processes of all those involved post the Westminster Bridge attack, including DAC D’Orsi and DCC Gyford, is a key factor in the assessment of whether the Osman test was satisfied.

4.14 CoLP is in a position to address the issue of operational duty further in oral argument if necessary but agrees with CTI that on the facts of this case the operational duty simply cannot arise.

5. **PROPOSED DETERMINATIONS**

5.1 The proposed determinations are dealt with at paragraphs 55 -64 of CTI’s Submissions.

- 5.2 CoLP does not take issue with the suggested narrative conclusions at paragraph 59.
- 5.3 In respect of the proposed narrative conclusion in paragraph 63 it is submitted that this conclusion is not supported by the nature of the Art 2 breaches of general duty identified against IPs at paragraph 44 and 47 of CTI's submissions. The breaches of general duty are systems breaches not operational breaches. It is submitted that in the absence of a breach of the operational duty there is no basis for saying that there was a positive duty to place HVM on the bridge, it therefore follows that it cannot be a failure not to have done so. Further, if the systems for assessing the need for such measures on the bridge were inadequate it cannot be right that such systems were not implemented properly when the complaint is that adequate systems simply did not exist.
- 5.4 It is further submitted that the evidence of Ms Hayward TX/31/10 was that, if informed of the vulnerability, HVM could have been in place within a period of weeks. It is therefore far from clear that HVM could or would have been in place given that the period between the vulnerability of the location being identified and the attack was only 26 days (8th May – 3rd June).
- 5.5 In the circumstances, it is submitted that the following form of words should be substituted for those set out in paragraph 63:
- At the time of the attack described above, there was no form of physical protective security on London Bridge, despite the fact that it was a location which was particularly vulnerable to a terrorist attack using a vehicle as a weapon, this was due to a lack of adequate systems for assessing the need for such measures on the bridge.*
- 5.6 Whatever form of words is used, they must reflect accurately the nature and extent of any Art. 2 breach found. For this reason the form of words suggested by the families is not appropriate,

CoLP agrees with CTI's submissions that the form of words should not be applied to victims other than those killed on the bridge.

6. **PFD REPORTS**

6.1 The legal principles set out in paragraphs 65 – 71 of CTI's submissions are agreed.

6.2 The proposed order and timetable are also agreed.

25th June 2019

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5 Essex Court