PUBLICATION OF NAMES AND IDENTIFYING DETAILS OF APPLICANTS PROHIBITED BY ORDER OF THIS COURT MADE ON 15 MARCH 2019

IN THE HIGH COURT OF NEW ZEALAND
WELLINGTON REGISTRY

I TE KŌTI MATUA O AOTEAROA
TE WHANGANUI-A-TARA ROHE

CIV 2019-485-145
[2019] NZHC 854

BETWEEN	K and G First Applicants
AND	K Second Applicant
AND	THE GOVERNMENT INQUIRY INTO OPERATION BURNHAM AND RELATED MATTERS First Respondent
AND	THE ATTORNEY-GENERAL Second Respondent

Hearing: 15 April 2019

Counsel: R E Harrison QC and D A Manning for Applicants
K P McDonald QC and A N Isac QC for First Respondent
U R Jagose QC and A F Todd for Second Respondent
A Martin for First Interested Parties (Crown Agencies)

Judgment: 16 April 2019

JUDGMENT OF ELLIS J

---

[1] K, G and K (the applicants) once lived in two villages in Baghlan Province, Afghanistan. Those villages were, on 22 August 2010, the subject of an attack by New Zealand military personnel in an operation codenamed "Burnham". It has subsequently been alleged that a number of civilian occupants of the villages were killed.[1] It is alleged that the Operation involved breaches of international humanitarian law.

[2] On 11 April 2018, a Government Inquiry into Operation Burnham (the Inquiry) was established under the Inquiries Act 2013 (the Act).[2] In accordance with the Act the Inquiry subsequently designated certain people with a specific interest in the Inquiry, including the applicants, as "core participants".[3] Messrs Hager and Stephenson (the authors of the book *Hit & Run*, which effectively triggered the Inquiry) are also core participants, as is the New Zealand Defence Force (NZDF). Under the Act, core participants have "the right to give evidence and make submissions to the Inquiry, subject to any directions of the Inquiry".[4]

[3] What has become a somewhat vexed issue is the scope and content of the applicants' natural justice rights in relation to the Inquiry. The applicants have consistently maintained (for example) that the Inquiry be conducted in a way that meets (what they say are) New Zealand's "right to life investigative obligations".[5] In general terms, they are critical of the Inquiry's inquisitorial approach and its decision to question many witnesses in private and on a confidential basis. More specifically, they maintain that:

---

1 Most notably the March 2017 book *Hit & Run* by Nicky Hager and Jon Stephenson contained a number of serious allegations against New Zealand Defence Force (NZDF) personnel involved in the Operation. These allegations are strongly denied by NZDF.

2 There is also a separate and parallel inquiry being conducted by the Inspector-General of Intelligence Services (IGIS) into the involvement of the Government Communications Security Bureau and the New Zealand Security Intelligence Service in the same Operation, under s 176(1) of the Intelligence and Security Act 2017. This inquiry is required by law to be conducted in private. On 16 November 2018 a memorandum of understanding was entered into between the IGIS and this Inquiry.

3 Inquiries Act 2013, s 17.

4 Section 17(3).

5 Citing *Jordan v United Kingdom* (2003) 37 EHRR 2 (ECHR).

> … their Counsel should be part of any closed hearing process, and indeed part of any evidence-gathering process. … this is their natural justice entitlement, required so that they may properly respond to and challenge evidence which contradicts their accounts. In particular, … they should be entitled to make full response and meaningful challenge to both past and likely future claims that they or their fellow villagers were enemy combatants or otherwise legitimate targets of, or during, Operation Burnham.

[4] The dispute about these matters came to a head with a formal Ruling made by the Inquiry in December 2018 which the applicants say precludes them from participating in the Inquiry in these ways. The applicants have now brought judicial review proceedings to challenge that ruling.[6] They have also applied for interim relief which would prohibit the Inquiry from holding any further hearings pending determination of their substantive application for review. And in that context, the applicants have sought permission to administer interrogatories to the Inquiry. It is that application which is the subject of this judgment.

[5] But before turning to consider whether leave to administer those interrogatories should be granted, it is necessary to say a little more about the Inquiry itself.

The Inquiry

[6] As noted earlier, the Inquiry was established in April 2018. Initially it was required to report within 12 months but the reporting date has now been pushed out to the end of this year.

[7] The Inquiry's Terms of Reference (TOR) state that:

> 5. The matter of public importance which the Inquiry is directed to examine is the allegations of wrongdoing by NZDF forces in connection with Operation Burnham and related matters. Operation Burnham took place during a non-international armed conflict, and the applicable legal framework (including international humanitarian law) will be considered.
>
> 6. To this end, the Inquiry will:
>
> 6.1. Seek to establish the facts in connection with the allegations of wrongdoing on the part of NZDF personnel during the Operations;

---

6 The application for review makes other claims which are set out in more detail at [18] below.

6.2. Examine the treatment by NZDF of reports of civilian casualties following Operation Burnham;

6.3. Examine the circumstances of Qari Miraj's transfer and/ or transportation to the Afghanistan National Directorate of Security;

6.4. Examine the extent to which NZDF rules of engagement authorised the predetermined and offensive use of force, whether this was apparent to those approving the rules of engagement, and whether NZDF's application of this aspect of the rules of engagement changed;

6.5. Report its findings and any recommendations to the Attorney-General as appointing Minister.

[8] The Inquiry's scope is specifically to inquire into and report on

7.1. The conduct of NZDF forces in Operation Burnham, including compliance with the applicable rules of engagement and international humanitarian law;

7.2. The assessment made by NZDF as to whether or not Afghan nationals in the area of Operation Burnham were taking direct part in hostilities or were otherwise legitimate targets;

7.3. The conduct of NZDF forces in the return operation to Tirgiran Valley in October 2010;

7.4. The NZDF's planning and justification/basis for the Operations, including the extent to which they were appropriately authorised through the relevant military chains of command, and whether there was any Ministerial authorisation of the Operations;

7.5. The extent of NZDF's knowledge of civilian casualties during and after Operation Burnham, and the content of written NZDF briefings to Ministers on this topic;

7.6. Public statements prepared and/ or made by NZDF in relation to civilian casualties in connection with Operation Burnham;

7.7. Steps taken by NZDF after Operation Burnham to review the conduct of the operation;

7.8. Whether NZDF's transfer and/ or transportation of suspected insurgent Qari Miraj to the Afghanistan National Directorate of Security in Kabul in January 2011 was proper, given (amongst other matters) the June 2010 decision in R *(oao Maya Evans)* v Secretary of State for Defence [2010] EWHC 1445;

7.9. Separate from the Operations, whether the rules of engagement, or any version of them, authorised the predetermined and offensive use of lethal force against specified individuals (other than in the course of direct battle), and if so, whether this was or should have been

apparent to (a) NZDF who approved the relevant version(s) and (b) responsible Ministers. In particular were there any written briefings to Ministers relevant to the scope of the rules of engagement on this point; and

7.10. Whether, and the extent to which, NZDF's interpretation or application of the rules of engagement, insofar as this involved such killings, changed over the course of the Afghanistan deployment.

[9] From time to time the Inquiry has issued minutes and rulings which record and govern aspects of its processes. Most (if not all) of these, as well as the Inquiry's public updates on its progress, are publicly available on its website.

[10] Of particular relevance for present purposes are the Inquiry's:

(a) Minute No 4 (dated 14 September 2018); and

(b) Ruling No 1 (dated 21 December 2018).

Minute 4

[11] Minute No 4 sets out the Inquiry's preliminary thinking on the process to be followed at evidence-gathering hearings.[7] The Inquiry's view was that the process should be one that was essentially inquisitorial, but incorporating elements of a traditional adversarial approach, where appropriate. It said that there were two considerations "point[ing] powerfully to an inquisitorial and substantially non-public process", namely that:[8]

(a) Some witnesses were vulnerable and/or would seek confidentiality as a condition to giving evidence. Accordingly the Inquiry considered that a non-public evidence gathering process was likely to enhance the Inquiry's ability to "get at the truth".

(b) The majority of documentary material relevant to the Inquiry was classified and so is required to be dealt with in a non-public process.

---

7 The Inquiry emphasised that it had "not yet reached a final view on the question of procedure" and that it intended to provide an opportunity for further submissions on that topic: at [9].

8 At [7].

[12] As regards the former consideration, the Inquiry said:[9]

> The book *Hit & Run* contains numerous references to confidential sources. Some of these sources are, as we understand it, past or present members of NZDF. We also understand that, while some sources are likely to be willing to give evidence on an open basis, others will do so only on a confidential basis. To the extent that these latter sources express views adverse to the interests of NZDF, NZDF would presumably wish to cross-examine them. However, it is difficult to see how NZDF could be permitted to do this, given the need to preserve confidentiality.
>
> In addition, the Inquiry will be calling for people who have relevant information to come forward, if necessary on a confidential basis. Some who come forward may have been, or may continue to be, employed by NZDF. Some within this group may be, in effect, whistle blowers who are giving information to which they are privy as a result of their work experience, but which is contrary to the official narrative. These people are likely to have concerns about both their privacy and anonymity and will need to be protected from the possibility of organisational pressure and intimidation. The Inquiry has already received contacts from people who say they have relevant information but wish to speak on a basis of confidence. Again, it is difficult to see how such witnesses could be cross-examined by other parties while preserving the requested confidentiality. The procedure adopted by the Inquiry will have to accommodate these eventualities.
>
> In addition to these categories, there are others who may be prepared to give evidence but only on a confidential basis, for example intelligence officials, who may be compromised if their identity is known and/or their sources of intelligence are disclosed.
>
> …
>
> The international experience of inquiries such as the present one is that there is a significant risk that vulnerable witnesses will be further harmed if inappropriate information-gathering procedures are used. To take the most obvious example, it may not be appropriate to expose Afghan villagers to a process such as cross-examination by counsel for NZDF. Rather, as is the case with classified information, the Inquiry may have to utilise other means to engage fairly and effectively with the evidence. There are others who may also be vulnerable, such as past or present members of NZDF or the local Afghan forces who participated in some of the activities at issue, so as to require an approach other than an adversarial one.

[13] After considering the requirements of natural justice and open justice and the relevant provisions of the Act in some detail the Inquiry proposed that:

(a) all witnesses would be treated as the Inquiry's witnesses, rather than witnesses of a particular participant; and

---

9 At [56]–[58] (citations omitted).

(b) evidence would be tested by the Inquiry, either directly or through counsel assisting and that "all or most of its evidence-gathering activities will have to occur in private".

[14] In terms of the involvement of core participants, the Inquiry noted that its proposed process did not mean core participants would have no ability to influence the evidence-gathering process. The Inquiry said:[10]

> We envisage core participants will, for example, put forward or suggest people for the Inquiry to approach to be interviewed and/or to give evidence, suggest topics to be pursued in questioning and suggest particular questions or sequences of questions to be put to particular witnesses.

[15] The minute concluded by setting out a proposed evidence-gathering process which is further elaborated in a Witness Protocol (the Protocol) annexed to it.[11] The Protocol distinguishes between sensitive witnesses (those who will only give evidence to the Inquiry under conditions of confidence) and other witnesses (who do not require the same protection).

Ruling No 1

[16] After the release of the Inquiry's Minute No 4, there was a further hearing in which the core participants were given the opportunity to address the Inquiry's proposed processes. Counsel for the applicants continued to oppose their (general) exclusion from the evidence gathering process and maintained their position that the Inquiry was in breach of its "right to life" investigative obligations.

[17] Aspects of the outcome of that hearing is recorded in the Inquiry's Ruling No 1. In it, the Inquiry set out and addressed the arguments made but (relevantly):

(a) concluded that it was not required to determine whether the Inquiry was intended to meet New Zealand's "right to life" investigative obligation

---

10 At [77].

11 The process distinguishes between interviews and evidence. Evidence given by witnesses would be required to be given under oath or affirmation.

and that its task was to investigate and report in accordance with its TOR;[12]

(b) declined to make a number of "natural justice" orders (including for discovery/disclosure and declassification) sought by the applicants;

(c) that part of the Inquiry which overlapped with the inquiry by the Inspector General of Intelligence Services (IGIS) should be conducted in private in order not to undermine thee Inquiry's memorandum of understanding with the IGIS[13] or the IGIS' statutory obligation imposed to conduct her inquiry in private;

(d) ruled that:[14]

(i) all witnesses would be witnesses of the Inquiry and not of a particular participant;[15]

(ii) interviews and evidence-gathering would be carried out in accordance with the Witness Protocol annexed to Minute No 4;

(iii) evidence would be taken in private, by which is meant that only the witness, the Inquiry members and counsel assisting will be present;

(iv) the testing of witnesses' evidence will be carried out by Inquiry members and counsel assisting;

(v) core participants would not be entitled to cross-examine witnesses, except where the Inquiry considers it would be assisted by such cross-examination or where there is no other

---

12 At [40] – [42].
13 See above n 2.
14 At [79].
15 At [79(a)].

way in which the Inquiry can meet its natural justice obligations; and

(vi) core participants would be able to suggest topics and lines of questioning for the Inquiry to consider pursuing in its questioning of witnesses.

The judicial review proceedings

[18] These proceedings were filed in March 2019. Their gist has already been noted above. To elaborate slightly, however, the applicants plead that:

(a) the "right to life" decision in Ruling No 1 was unlawful, in breach of natural justice and unreasonable;

(b) "any or all" of the procedural rulings contained in Ruling No 1 are unlawful, in breach of natural justice and unreasonable;

(c) the "overlapping inquiries" ruling (see [17(c)] above) is unlawful, in breach of natural justice and unreasonable; and

(d) the Attorney-General's setting of the TOR and/or his refusal to amend the TOR to incorporate a specific right to life investigative obligation and/or to initiate a separate inquiry that met that obligation is unlawful, in breach of natural justice and unreasonable.

[19] In response to the claim:

(a) the Inquiry has indicated that it will abide the decision of the Court and has not filed a statement of defence;

(b) the Attorney-General has filed a statement of defence and will, more generally, act as the contradictor in relation to the claims against the Inquiry;

(c) NZDF (a core participant in the Inquiry), the Ministry of Defence, the Ministry of Foreign Affairs and Trade, the New Zealand Security Intelligence Service, the Government Communications Security Bureau and the Department of Prime Minister and Cabinet (for ease of reference collectively referred to as the Crown Agencies) have been joined as interested parties;

(d) Mr Stephenson (one of the authors of the book *Hit & Run*) has been joined as an interested party; and

(e) in the course of the hearing yesterday, Mr Hager (the other author of *Hit & Run*) was also joined as an interested party.

[20] As also noted earlier, the applicants have applied for interim relief, pending determination of the substantive application for review. The relief sought is an order:

> ... prohibiting the [Inquiry] from conducting any further hearings, with or without the involvement and participation of the applicants, by way of further inquiry into the Operation Burnham allegations …

[21] The application for interim relief is scheduled for hearing on 30 April 2019. The substantive hearing of the application for review is scheduled for a three day hearing beginning on 22 July.

The application for interrogatories

The original application

[22] The application for interrogatories had its genesis in a written request for information made by the applicants' counsel to the Inquiry on 18 March 2019. The letter of request stated:

> We understand that the Inquiry has commenced the gathering of evidence in closed sessions or interviews, and that two such interviews have occurred to date. We also understand that no further closed sessions or interviews are to take place before 1 May 2019, although we are also aware of recent approaches by the Inquiry to other core participants or witnesses.
>
> To the best of our knowledge, this was not previously public knowledge and we as counsel for the victims of Operation Burnham were not made aware of

> any closed sessions or interviews. We would therefore appreciate if you could confirm whether our understanding as outlined above is correct, and provide further detail as to the nature of the sessions or interviews which have been completed or are planned, including:
>
> • The identity and/or a description of the witness;
>
> • The length and format of the interview or evidence-gathering session;
>
> • The subject of the interview.

[23] The applicants subsequently explained that the three items of information sought:

> … are of central importance to the scope of interim relief sought by the applicants. Further information as to what interviews and/or hearings are planned by the Inquiry is necessary to enable the applicants to specify precisely what actions need to be stopped, and to identify the prejudice they may face.

[24] The request was declined by the Inquiry.

[25] On 1 April the applicants issued the Inquiry with a formal Notice to Answer Interrogatories of the kind contemplated by r 8.34 of the High Court Rules 2016 (the HCR). Those interrogatories sought to have the Inquiry:

> (a) identify the name and/or provide a description (as appropriate, depending on confidentiality concerns) of all witnesses the Inquiry intends to interview or take evidence from;
>
> (b) with respect to each of the above witnesses, provide the intended date or dates, estimated length and proposed format of the interview(s) or evidence-gathering session(s);
>
> (c) with respect to each of the above witnesses, describe the subject of the interview.

[26] As a result of directions made by me at a telephone conference this notice then transmogrified into an interlocutory application, essentially for leave (or "permission" to use the language of s 14(2)(i) of the Judicial Review Procedure Act 2016) to administer interrogatories.[16] The grounds for the application were essentially the same as those to which I have referred at [23] above.

---

[16] The notice procedure contained in the High Court Rules 2016 was considered inappropriate both because interrogation is not available as of right in judicial review proceedings and because the Inquiry has not filed a statement of defence.

Relevant law

[27] Although s 14 itself does not give any indication of the circumstances in which permission should be granted, I proceed on the basis that:

(a) It has always been accepted that judicial review proceedings are not like ordinary civil proceedings and that, like cross-examination, interrogatories are not permitted as of right and, rather, are unusual.[17]

(b) While accepting that an application for judicial review is not to be regarded as ordinary civil proceedings to which the HCR always apply, useful guidance may be obtained from r 8.38, which provides:

> (1) A Judge may at any stage of any proceeding order any party to file and serve on any other party … a statement prepared in answer to interrogatories in accordance with rule 8.39 in answer to interrogatories specified or referred to in the order.
>
> (a) The Interrogatories must relate to matters in question in the proceeding.
>
> (b) The order may require the statement to be verified by affidavit.
>
> (c) The Judge must not make an order under subclause (1) unless satisfied that the order is necessary at the time when it is made.

(c) Also useful is r 8.39, with which a statement in answer to interrogatories must comply and which imposes a duty upon the interrogated party to answer the substance of the interrogatory, without evasion. Rule 8.39 also permits the answering party to object on one or more of the grounds set out in r 8.40(1), namely:

(i) that the interrogatory does not relate to a matter in question between the parties involved in the interrogatories;

---

[17] That is because in most cases, the decision under review will speak for itself; extraneous and/or explanatory material is thought irrelevant and unnecessary. Moreover, interrogation sits uneasily with the fundamental objectives of the judicial review procedure, such as expedition and cost-effectiveness.

(ii) that the interrogatory is vexatious or oppressive;

(iii) that the information sought is privileged; and/or

(iv) that the sole object of the interrogatory is to ascertain the names of witnesses.

[28] In short, I consider that the applicants here must satisfy the Court that:

(a) the information sought is relevant to a matter in issue in the proceedings;

(b) an order is necessary at this time;

(c) an order will not undermine the purpose of judicial review and, in particular, their speedy and untechnical resolution; and

(d) any r 8.40 ground raised by the respondents for objecting to answer is not sufficient.

The amended interrogatories

[29] The application as originally formulated was formally opposed by the Inquiry and the Attorney-General. The Crown Agencies and Mr Stephenson also indicated their opposition less formally.

[30] One of the principal grounds of opposition was that answering the interrogatories would almost inevitably breach or undermine the confidentiality orders made by the Inquiry and which are the focus of the substantive review application. The point was, perhaps, best explained by Mr Stephenson, who filed an affidavit stating:

> This subgroup of my sources all had (and have) significant concerns about the potential consequences for them were their identities to be made public. The particular consequences differ depending on the source but include physical harm (including mistreatment or death), detention, or serious damage to their reputations and careers.

> I am concerned that the interrogatories sought by the applicants, if asked, could result in the disclosure of information which could be used to identify these sources. The interrogatories ask the Inquiry to provide:
>
> (a) names and/or descriptions of all witnesses the Inquiry intends to interview or take evidence from.
>
> (b) intended date(s), length and format of interview(s) or evidence gathering sessions.
>
> (c) the subject of the interview(s).
>
> I understand the applicants' position to be that the application protects the confidentiality interests of the Inquiry's witnesses by stipulating that the Inquiry can provide a "description" of intended witnesses instead of their name. I do not agree.
>
> Information about what happened prior to, during, and after Operations Burnham, Nova and Yamaha was heavily compartmentalised. Often, information is known only to small and select groups of people. There is a real risk that even descriptions of witnesses could give rise to those witnesses being identified as, or suspected of being, my sources. It is important to bear in mind that anyone reading the "description" would also know the time, duration, format and subject-matter of the witness' interview.

[31] The focus of Mr Stephenson's concerns was, of course, the preservation of the confidentiality of his sources as a journalist. Such sources constitute just one category of sensitive witness who will appear in the Inquiry. But similar points were made by the respondents and by the Crown Agencies in relation to all other categories of confidential witness.

[32] In light of these concerns, Mr Harrison QC accepted at the hearing (rightly in my view) that the interrogatories could or should not have the effect of requiring disclosure of information about witnesses which the Inquiry has ruled confidential. He rightly acknowledged that even if only a description of a witness was given, there was a real risk that linking that description with the other information sought would result in the identification of witness concerned. And as I have said, that would undermine the Inquiry's rulings that are the subject of the substantive application for review prior to any determination of the challenge to them.

[33] For those reasons Mr Harrison modified the applicants' position. He based his modification on paragraph 2.3 of the Inquiry's notice of opposition in which five categories of "sensitive" witness had been identified, namely:

(a) members of NZDF involved in the operations under consideration, as well as those involved in planning and reporting on them;

(b) staff of the intelligence and security agencies who hold relevant information;

(c) whistle-blowers, who may also fall within one of more of the previous categories;

(d) Afghan nationals; and

(e) journalists' sources, who may fall within one or more of the previous categories.

[34] Mr Harrison said it was only the first two categories of witness which were of interest to the applicants (in terms of their desire to participate in cross-examination or other testing of their evidence). He explained that if the applicants had information about:

(a) the number of proposed witnesses in those categories (and the number of witnesses in the remaining three); and

(b) when it was that those witnesses were going to be interviewed by or give evidence before the Inquiry;

they (the applicants) would be in a much better position to advance their interim orders application. That, he said, was the principal object of the interrogatories.[18]

[35] More specifically, Mr Harrison submitted that if (for example) the applicants were told that there were 100 witnesses falling within the first two categories and that a good number of them would be giving their evidence before the substantive review hearing in July, then the position sought to be preserved by the interim relief application would be very clear. The potential prejudice to the applicants of *not*

[18] The advancing of the interim relief application has always been the stated focus of the interrogatories.

granting interim relief (ie *not* stopping the Inquiry from hearing from those witnesses in the meantime) would be significant. Conversely, if it transpired that there were 100 witnesses falling within the latter three categories, the applicants would invite the Court to make more limited interim orders in relation to the first two categories. And the Court, he said, would likely be more willing to grant such limited relief because there would be little or no prejudice to the Inquiry in doing so; the Inquiry would have plenty of work to get on with, pending the substantive review hearing. Moreover, if it transpired that the Inquiry was not proposing to hear from any witnesses in the first two categories before July then there might be no need for the interim orders at all.

[36] During the morning tea adjournment, Mr Harrison attempted to draft some interrogatories that reflected the position I have just set out. I confess that the jury is out on the success of that venture; I suspect that it may have been better to rewrite the interrogatories from scratch rather than to attempt to amend the existing ones. Be that as it may, however, the result was modified interrogatories in the following terms:

> (a) Identify the employing organisation or category, in terms of paragraph 2.3 of the First Respondent's notice of opposition, of each witness the Inquiry intends to interview or take evidence from;
>
> (b) With respect to each witness, provide the intended date or dates, estimated length and proposed format of the interview(s) of evidence-gathering session(s);
>
> (c) With respect to each of the witnesses, identify the subject of the interview by reference to one or more of the categories in paragraph 12(i) to (v) of the Inquiry's Minute No 6.[19]

Discussion

[37] The position of the respondents and the interested parties was that, in terms of confidentiality concerns, the modified interrogatories were no better (and arguably worse) than the original iteration. Mr Martin pointed out that if (for example) a "whistle-blower" witness were identified as being employed by NZDF and the subject matter of his or her evidence identified, then NZDF would, almost certainly, be able

---

[19] Namely: (1) The operation in relation to Objective Burnham on 21-22 August 2010, (2) The operation in relation to Objective Nova on 2-3 October 2010, (3) The operation leading to the capture of Qari Miraj and his transfer to the NDS facility on 16 January 2011, (4) The operations in relation to Alawuddin and Qari Musa on 20 and 23 May 2011 respectively and (5) The operation in relation to Abdullah Kalta on 21 November 2012.

to work out the identity of that witness. Providing such information would, again, undermine the confidentiality orders. The chilling effect, in terms of the Inquiry's ability to obtain the co-operation of sensitive witnesses, is obvious.

[38] And even taking a more purposive approach to the interrogatories (by which I mean proceeding on the basis that they could be further amended to better reflect Mr Harrison's argument summarised above) there are problems.

[39] Assuming for now that interrogatories can be sought in relation to an interlocutory application,[20] I remain wholly unpersuaded that the interrogatories are necessary here. The short point is that the applicants have all the information they need to advance their application for interim relief.

[40] The applicants know that the Inquiry proposes to interview or hear evidence from witnesses falling within the first two categories noted at [33] above in private, in accordance with the processes foreshadowed in the Inquiry's Protocol. And in the absence of any more specific information about numbers and timing the Court hearing the application for interim relief will necessarily proceed on the assumption that:

(a) some or even all of those interviews will occur and that some or all of that evidence will be taken before the hearing of the substantive application for review; and

(b) the content of the information/evidence provided during those interviews will be relevant to those parts of the TOR in which the applicants have a particular, and legitimate, interest and will be of a kind that they wish to test.

[41] The challenge for the applicants will be to persuade the Court that their position will have been irreparably prejudiced if they later succeed in their substantive review application and the Inquiry has already undertaken such interviews or heard such evidence. Relevant to that, of course, will be the recently announced extension of the Inquiry's final reporting date to 31 December 2019.

---

[20] A point which was not conceded by the respondents.

[42] The application for leave to administer interrogatories is declined on the grounds that:

(a) requiring the questions as presently (re)drafted to be answered by the Inquiry would give rise to a real risk that confidential and sensitive information would be disclosed in breach of the Inquiry's rulings, in circumstances where the validity of the applicants' challenge to those rulings has yet to be determined; and

(b) even if the questions can be reframed to avoid the difficulty in (a), the information sought is not necessary in order for the applicants to advance their application for interim relief.

[43] I acknowledge that there may be some practical benefit in generalised information about numbers and timing being made available to the applicants in advance of the interim relief hearing. To take the most obvious example, if it were the case that no interviews or evidence of the kind with which they are concerned would take place or be taken prior to the July hearing then the need for interim orders would fall away. But that is a matter for the Inquiry. It is not a reason to compel the Inquiry to provide such information and I decline to do so.

[44] I did not hear from counsel about costs, which I would place in the 2B category. Rule 14.8 of the HCR would appear to apply, at least by analogy. If agreement cannot be reached, memoranda may be filed.

Rebecca Ellis J