Neutral Citation Number: [2020] EWHC 2053 (Admin)

Case No: CO/1984/2020

IN THE HIGH COURT OF JUSTICE
QUEEN'S BENCH DIVISION
DIVISIONAL COURT

Royal Courts of Justice
Strand, London, WC2A 2LL

Date: 29/07/2020

Before:

THE PRESIDENT OF THE QUEEN'S BENCH DIVISION

and

MR JUSTICE GARNHAM

- -

Between:

THE QUEEN ON THE APPLICATION OF EA (BY HER LITIGATION FRIEND MA) AND BT	**Claimant**
- and -	
THE CHAIRMAN OF THE MANCHESTER ARENA INQUIRY	**Defendant**

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- -

Brenda Campbell QC and Jennifer MacLeod (instructed by **Irwin Mitchell**) for the **Claimant**
Paul Greaney QC and Jesse Nicholls (instructed by Tim Suter, the Solicitor to the Manchester Arena Inquiry of **Fieldfisher LLP**) for the **Defendant**

Hearing dates: 7th to 9th July 2020

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Approved Judgment

Covid-19 Protocol: This judgment was handed down remotely by circulation to the parties' representatives by email, release to BAILII and others, and publication on the Courts and Tribunals Judiciary website. The date and time for hand-down is deemed to be 09:30am on 29 July 2020.

Dame Victoria Sharp P.:

Introduction

1. By these proceedings, EA and BT (the claimants) seek permission to challenge by way of judicial review, a decision of the Chairman of the Manchester Arena Inquiry (the Inquiry), Sir John Saunders (the Chairman) refusing them core participant status in the Inquiry. The claimants seek an order quashing that decision and designating the claimants as core participants. Choudhury J ordered that this should be a rolled-up hearing to be heard by a Divisional Court, with the application for permission heard first and the full judicial review to follow, if permission was granted. He also made interim orders anonymising EA and BT and their respective litigation friends pending the determination of this claim. Following the exchange of skeleton arguments for this hearing, on 21 June 2020, LL applied by her litigation friend TK, for permission to be joined to the claim under the Civil Procedure Rules (CPR) rule 19 and for an order of anonymity.

2. We heard argument on 7 and 8 July 2020. The core issues for determination were as follows:

   (i) Was the application for judicial review made out of time?

   (ii) If so, should time be extended pursuant to section 38(1) of the Inquiries Act 2005 (the 2005 Act)?

   (iii) Was the Chairman's decision that article 2 and/or 3 of the European Convention of Human Rights and Freedoms (the Convention) did not mandate the grant of core participant status to the claimants, arguably incorrect?

   (iv) Was the Chairman's decision not to grant the claimants core participant status arguably irrational?

3. On 9 July we indicated to the parties that we had decided that the application for judicial review was made out of time and that we declined to extend time. We also indicated that, in any event, we considered the substantive claim for judicial review was not arguable (that is, there was no properly arguable case that the Chairman's decision was unlawful) and that we would have declined to give leave. We have further determined to refuse LL's application for permission to join these proceedings. In accordance with the guidance given by the Court of Appeal, in *McDonald v Rose and ors* [2019] EWCA Civ 4, the hearing was adjourned, so that the decision of the Court could formally be made on the date of the hand down of this judgment.

4. This is the judgment of the Court to which we have both contributed, giving our decision and our reasons.

The History

5. On 22 May 2017 Salman Abedi detonated a bomb filled with shrapnel at Manchester Arena, when a music concert given by Ariana Grande, and attended by many thousands of children and young people, was coming to an end. In what was the deadliest terrorist attack in the United Kingdom since the 7/7 bombing in 2005, 22 innocent people were

killed in the explosion, as well as the bomber himself, and dozens were seriously injured. This is not the place to describe the full horror of the bombing of the Manchester Arena. It was an unspeakable crime which has caused loss, heartbreak and devastating injury to many. It is impossible to read the papers in this case without feeling the most profound sympathy for the bereaved, for the injured survivors and for their families. Amongst those seriously injured survivors were EA, then aged twelve, BT, then aged seventeen and LL then aged fourteen. They sustained profound and life changing injuries.

6. In the aftermath of the attack, a police investigation was launched by the North West Counter-Terrorism Police, and inquest proceedings (the inquests) were opened into the deaths of the 22 people who had been killed. The focus of the criminal investigation was Salman Abedi's brother and accomplice, Hashem Abedi, then in Libya. Hashem Abedi was detained by Libyan authorities on 23 May 2017; he was subsequently extradited to the United Kingdom in July 2019 and his criminal trial commenced at the Central Criminal Court earlier this year. On 17 March 2020, he was convicted of 22 counts of murder, one count of attempted murder, in relation to all those who were injured, and one count of conspiracy to cause an explosion. He awaits sentencing. The inquests, and later the Inquiry, were delayed due to the criminal investigation, extradition proceedings and trial of Hashem Abedi.

7. In the months that followed, a number of further investigations were conducted into the Arena attack including by Lord Kerslake, Lord Anderson QC and Parliament's Intelligence and Security Committee (the committee of Parliament with statutory responsibility for oversight of the United Kingdom Intelligence Community).

8. Prior to his appointment as Chairman, in the autumn of 2018, Sir John Saunders was appointed as the nominated judge to sit as the Coroner on the inquests into the 22 people who were killed in the Arena attack. Following a pre-inquest review hearing held on 29 July 2019, the Chairman ruled that article 2 of the Convention was engaged for the purposes of the inquests. The Chairman held that substantive obligations under article 2 may have been violated. He said that agents of the British State, and or systemic defects in the security system of the United Kingdom, might be, in some way, implicated. On 27 September 2019, Sir John formally invited the Secretary of State for the Home Department to establish a public inquiry pursuant to section 1 of the 2005 Act. He did so because it appeared to him that there was sensitive material available which was of central relevance to matters within the scope of the Inquest which could not be considered in the course of an inquest within the Coronial framework.

9. On 22 October 2019, the Secretary of State for the Home Department established the Inquiry. In doing so she made the following announcement:

> "It is vital that those who survived or lost loved ones in the Manchester Arena attack get the answers that they need and that we learn the lessons, whatever they may be. This process is an important step for those affected as they look to move on from the attack and I know that they want answers as quickly as possible. I am determined to make this happen, while ensuring the proper processes are followed. Now that the coroner has decided that an inquest cannot properly investigate the deaths, I

> have agreed to establish an inquiry to consider all the information so that he can make appropriate recommendations."

10. The Terms of Reference (sometimes referred to as the ToR) for the Inquiry begin with a statement of the Inquiry's purpose. It is:

> "To investigate how, and in what circumstances, 22 people came to lose their lives in the attack at the Manchester Arena on 22 May 2017 and to make any such recommendations as may seem appropriate."

11. The scope of the Inquiry was set out in the Terms of Reference. The Inquiry's investigations will include consideration of the following matters: whether the attack of Salman Abedi could have been prevented by the authorities; the build up to the attack; the attack itself; the security arrangements within and outside the Arena; the emergency response to the bombing; the experiences of each person who died and the immediate cause and mechanics of each death.

12. Soon after its establishment, the Inquiry invited applications for core participant status, pursuant to rule 5 of The Inquiry Rules 2005 (the Inquiry Rules), indicating that such applications were to be made by 20 November 2019. The first preliminary hearing of the Inquiry took place on 22 November 2019. On 24 February 2020, some three months after the deadline, an application for core participant status on behalf of 29 survivors, including BT and LL, was lodged with the Inquiry by the claimants' solicitors, Irwin Mitchell. On 31 March 2020 Irwin Mitchell lodged further submissions for core participant status on behalf of an additional 27 survivors, including EA. Between 17 March and 3 April 2020, further written submissions were lodged by the claimants' solicitors; and by existing core participants and counsel to the Inquiry in response. The application for core participant status, now made by 56 survivors, was considered at an oral hearing on 7 April 2020 and the Chairman gave his ruling, refusing that application, on 21 April 2020.

13. By letter dated 15 May 2020, the claimants invited the Chairman to re-visit his decision. By letter dated 18 May 2020, the Chairman declined to do so. These proceedings were then issued on 29 May 2020.

The Relevant Statutory Provisions

14. Section 38(1) of the 2005 Act provides that:

> "An application for judicial review of a decision made…must be brought within 14 days after the day on which the applicant became aware of the decision, unless that time limit is extended by the court."

15. Rule 5 of the Inquiry Rules provides as follows:

> 1) The chairman may designate a person as a core participant at any time during the course of the inquiry, provided that person consents to being so designated.

2) In deciding whether to designate a person as a core participant, the chairman must in particular consider whether:

(a) the person played, or may have played, a direct and significant role in relation to the matters to which the inquiry relates;

(b) the person has a significant interest in an important aspect of the matters to which the inquiry relates; or

(c) the person may be subject to explicit or significant criticism during the inquiry proceedings or in the report, or in any interim report…

Is this claim out of time?

16. The Chairman issued his decision in writing on 21 April 2020. As noted above, 23 days later the claimants invited the Chairman to reconsider that decision, but he declined to do so. Ten days later the claim was issued.

17. On behalf of the claimants, Brenda Campbell QC submitted before us that it was the letter of 18 May 2020 which was the substantive decision; or at least that this letter was part of a composite decision. On that basis she submitted that the 14 days provided for by section 38(1) did not start to run until 18 May 2020 and, accordingly, this claim was brought in time. She argued that this must be so because the 21 April letter failed to make an "individualised assessment" of the claim for core participant status by each survivor and it was this individualised assessment that the claimants asked the Chairman to provide in their letter of 15 May.

18. On behalf of the Chairman, Paul Greaney QC submitted that the only decision capable of challenge in this case was the refusal of the Chairman to grant core participant status to the claimants. That decision was made in the Chairman's ruling of 21 April 2020. He said that it is impossible to avoid the consequences of delay by writing a fresh letter and obtaining a reply, which the claimants then seek to characterise as a fresh decision. He submitted that the 18 May letter was not part of a composite decision nor was it a confirmation decision, because the 21 April ruling was complete in and of itself.

19. We have no hesitation in accepting the Chairman's submissions on this issue, which in our judgment are plainly correct. The 21 April ruling was a careful and comprehensive analysis of the claimants' claims for core participant status.[1] It set out the facts, the statutory test and the competing submissions. It then analysed the issues and set out the Chairman's conclusions. There was no ambiguity. The 21 April ruling constituted the Chairman's final decision on the applications for core participant status. It was circulated to the claimants and other survivor applicants, to other core participants and to the media. It was published on the Inquiry's website. It was a decision capable of challenge in public law proceedings without more.

20. Furthermore, it is clear that the claimants' solicitor, Mr Amin, was aware that the 21 April ruling was the final decision. He describes in his witness statement taking urgent

[1] The ruling is available on the Inquiry's website but for ease of reference we set out a link to it here: https://manchesterarenainquiry.org.uk/2019/wp-content/uploads/2020/04/Ruling-on-application-for-Core-Participant-status-on-behalf-of-56-survivors-of-the-Manchester-Arena-attack.pdf

steps on receipt of that ruling to consider whether to challenge it by judicial review. The fact that his letter of 15 May 2020 sought what was described as a "reconsideration" demonstrates that he knew that the Chairman's decision on the claimants' applications was the 21 April ruling. As Mr Greaney accurately put it "the Claimants were not asking the Chairman to review a provisional decision; they were asking him to reopen a final decision." And they did so moreover in a letter that proceeded to repeat in detail the submissions the claimants had already made, and/or had the opportunity to make in writing and orally during their application for core participant status. Similarly, the pre-action protocol letter intimating the intention to bring these proceedings referred to the 21 April ruling as "the original decision".

21. By comparison, the letter of the solicitor to the Inquiry of 18 May was, on its face, a simple response to correspondence. It was not circulated more generally or published on the website. It made clear that the ruling of 21 April was final and would not be reconsidered.

22. In our judgment, the suggestion that the 18 May letter brings a challenge to the 21 April ruling within time, because of what the claimants characterise as a failure to conduct an "individualised assessment" of all 56 survivor applicants, is without merit. The Chairman instructed the Inquiry team to compile evidence summaries in relation to each survivor applicant, he invited the claimants' solicitors to propose any additional content which was then included in the final document considered by the Chairman. The claimants were therefore able to put the full detail of their experiences before the Chairman, which as his ruling makes plain, he considered when reaching his decision.

23. We have seen a transcript of the 7 April 2020 hearing. It is apparent from what was said that there was agreement between Counsel to the Inquiry and the claimants' counsel that the Chairman would proceed to consider the application on the basis, first, that all the claimants satisfied Rule 5(2)(b) of the Inquiry Rules and were persons with "a significant interest in an important aspect of the matters to which the inquiry relates" and second, that the article 2 rights of all the survivors were engaged On that basis, Ms Campbell indicated that she would not address the Chairman on an applicant-by-applicant basis. She said she stood willing to provide further assistance on the individual circumstances of the survivors' case if required ,but did not seek to make submissions as to the circumstances of individual applicants. It was at its lowest implicit, if not explicit, that she was content for the Chairman to proceed on that basis.

24. In all the circumstances, the Chairman was entitled to deal with the matter as he did and was not obliged to give separate reasons for his decision in respect of each individual survivor. That being so, the fact that he declined to revisit the issue in the light of the 15 May letter, does not entitle the claimants to argue that the decision was not complete on 21 April. We would add that, in any event, we cannot see how his decision would have been any different had he approached his task in the way the claimants now say he should have done.

25. It follows that the decision under challenge in these proceedings can only be the 21 April ruling and, accordingly, the present proceedings were issued substantially out of time.

Should time be extended?

26. As noted above, there is, however, power in the Court to extend time. In considering any such application the Court will have regard to the following principles.

27. First, complying with time limits for commencing judicial review proceedings is always important. "Delay of any kind of proceedings for judicial review is to be avoided, as far as possible." (*R v Kigen v SSHD* [2016] 1 WLR 723 at para 25).

28. Second, it is especially important to avoid delay in a case of challenges to public inquiries. As Supperstone J observed at para 87 in *R (Da Silva) v Sir John Mitting (sitting as Chairman of the Undercover Policing inquiry)* [2019] EWHC 426 (Admin) "The abridged time limit in s.38 of the 2005 Act exists to ensure the efficient conduct of an inquiry, and to allow work to progress." In *R (Associated Newspapers Ltd) v The Rt. Hon. Lord Justice Leveson (As Chairman of the Leveson Inquiry)* [2012] EWHC 57 (Admin), Toulson LJ said (at para 39): "Where there is an issue of principle which requires to be considered by the court, it is generally speaking best done at the earliest opportunity".

29. There is an obvious public interest in avoiding delay to the work of inquiries in general, and to this Inquiry in particular. Delay causes additional distress to those involved. Delay affects the ability of the relevant authorities to learn lessons and act upon them. Delay involves further expense. Delay impacts on the Inquiry's ability to meet the objectives set by its Terms of Reference in a timely manner. Here, as Mr Greaney observes, an extension so as to permit this application to proceed risks having a significant impact on the preparation for the commencement of the Inquiry's oral hearings in September 2020. Indeed, the evidence of the solicitor to the Inquiry is that granting the claimants' application to extend time now presents a real risk to the Inquiry's preparations, start date and conclusion. There is a strong public interest why that risk should be avoided, including the needs of the bereaved families, the stress and anxiety this will cause many if not all of them, and the significant public interest in the Inquiry being able to conclude and report as soon as possible. Witness statements are presently being taken, evidence is being prepared, disclosure is being reviewed and provided to core participants, a courtroom has been built and is now being re-organised to allow for social distance hearings, and preliminary hearings are being organised. The fact that the Inquiry's attention and resources has had to be diverted to deal with this late application to the Court, and would be further diverted if this application proceeds, is an additional factor for us to take into account. In the circumstances, the claimants' argument that the additional delay has made no difference and/or that the same risks would have applied had the claim been brought in time is misconceived and must be rejected.

30. Third, in considering an application to extend time it is relevant to consider the claimants' conduct prior to the events that led to the making of the application. Here, the application to the Inquiry for core participant status was itself substantially out of time. The Chairman accepted that there was good reason for that delay. But in viewing the delay in the present case, we are entitled to take into account the delay that has already occurred in the claimants' application. As was pointed out by Mr Greaney, it is now more than seven months since the application for core participant status was required to be served within the Inquiry process and it is now considerably closer to the Inquiry's start date of 7 September 2020 (delays in the conclusion of the criminal

proceedings led to the Inquiry start date being moved from January 2020 to April 2020 and then to June 2020; and then to 7 September 2020 as a result of the coronavirus pandemic).

31. Managing a public inquiry of this scale is a considerable undertaking, and achieving its objectives in an efficient and timely manner requires both conscientious conduct by those who wish to be involved and the enforcement of strict adherence to procedural requirements.

32. Against that background, Ms Campbell suggested that time should be extended because of difficulties in communication between the claimants and their solicitors, and because of delay in identifying which of many potential claimants would be eligible for legal aid, and then in obtaining legal aid for those so identified. We reject that argument for the following reasons.

33. First, in our view the potential need to challenge the Chairman's decision on core participant status must have been obvious to the claimants' advisors from an early stage. In endeavouring to explain the failure to lodge the application in time, Ms Campbell submitted that the claimants expected the application for core participant status to be successful, and, in effect, that they were entitled to proceed on that assumption. There was however nothing whatever to indicate that the claimants would be certain to obtain core participant status. In particular, as the claimants and their advisors knew, counsel to the Inquiry had advised the Chairman against granting them that status and other core participants, notably a number of the bereaved groups, opposed that grant. The claimants' advisers knew that if that status was refused, the decision could only be challenged if that challenge was lodged very quickly. The claimants ought to have arranged their affairs (including identifying a potential claimant eligible for legal aid and making clear what would be needed to make an application for legal funding) so that they were able to obtain advice and consider the position promptly after the Chairman gave his decision of 21 April. That is precisely what section 38(1) of the 2005 Act requires.

34. Second, it is apparent from the application for core participant status that the claimants already had in place arrangements for giving instructions and receiving advice at the time of the 21 April ruling. The application to the Chairman for core participant status included the following:

> "The survivor group has already begun to form a lead 'core group' of less then 10 applicants who will act as a conduit for all within the group with the aim of assisting the Inquiry and the bereaved families in understanding the wider truth of what happened. The legal team are confident that constructive and sensible working arrangements are in place for this group".

35. It follows that the problem was not in the existence of a conduit between the claimants and their advisers, but its timely deployment.

36. Ms Campbell placed considerable emphasis in her submissions on the difficulties caused to the claimants and their advisors by the coronavirus pandemic. However, the submission referred to at para 34 above was made after the imposition of lockdown measures throughout the United Kingdom (on 23 March 2020). It cannot therefore be the case that the effects of the coronavirus pandemic made it impossible for the

claimants or their advisers so to organise themselves as to enable them to comply with the section 38(1) time limit.

37. Third, delay in obtaining legal aid will only be taken into account in exceptional circumstances. In *Kigen*, Davis LJ made clear that practitioners and parties should not proceed on an expectation that the Court will be sympathetic to a delay in issuing proceedings.

> "On the contrary, they should proceed on the expectation that any explanation based on the proposition that the delay was 'only' for a few days, whether or not coupled with an explanation that a decision from a legal aid agency was awaiting, will not be received with indulgence by the tribunal or court. It is most important that…time limits…are observed".

38. Fourth, in any event, the Legal Aid Agency is able to consider urgent applications within a matter of days. However, the claimants' solicitor only applied for investigative representation funding on 13 May, already well beyond the section 38(1) time limit. It is of note, as Mr Greaney properly points out, that the claimants' solicitors were capable of acting quickly in relation to the 21 April decision. On the very day that ruling was issued, the claimants' solicitor emailed the solicitor to the Inquiry seeking their costs.

39. Fifth, at no time prior to the expiry of the 14-day time limit did the claimants' solicitors indicate to the Chairman that they were considering an application for judicial review, or that they were having difficulties progressing the matter. They simply allowed the time limit to expire. Then ten days later, they wrote to the Inquiry, making no reference to the section 38(1) time limit, and sought to generate a letter from the Inquiry, which they now describe as part of the decision-making process they wish to challenge.

40. In written submissions, the claimants submitted that the extension should be granted because the claim is an important one. We accept without hesitation that the claim is important to the claimants. However, we do not consider this case raises issues of significant or general importance which affect the wider public generally, so as to justify an extension of time notwithstanding the lack of merit such an application to extend time might otherwise have. Rather, it is a case which concerns the application of established legal principles to the facts.

41. For all those reasons, we reject the claimants' application for an extension of time to apply for judicial review.

42. That is sufficient to dispose of this application. However, in deference to the arguments we have heard, we have considered the merits of the application for permission.

Permission

43. The claimants advance two grounds of challenge. First, they assert that the Chairman's decision refusing them core participant status amounted to a breach of articles 2 and 3 of the Convention. Second, they say that the Chairman's decision was irrational.

Articles 2 and 3

(i) The Scope of the Manchester Arena Inquiry

44. As to the first ground, in our judgment, the claimants proceed on a fundamental misunderstanding of the law. This was a proposition we put to Ms Campbell in argument but which she rejected.

45. Accepting for the moment that Ms Campbell is correct about the obligations imposed by articles 2 and 3[2] in respect of persons in the claimants' position, those are obligations imposed on the State Parties to the Convention, that is, in the United Kingdom, on Her Majesty's Government. Section 6 of the Human Rights Act 1998 (the 1998 Act) makes it unlawful for a public authority to act in a way which is incompatible with the Convention rights and we readily accept that the Chairman of the Inquiry, conducting that Inquiry in accordance with his Terms of Reference, is a public authority for these purposes. The Chairman gains his authority and legitimacy from the Terms of Reference. The Terms of Reference define the scope and limits of that authority. It is the starting point for any analysis of how he can, and must, act.

46. We have set out at para 10 above the relevant Terms of Reference. They make it plain that the aim of the Inquiry is to investigate the circumstances of the killing of the 22 who died in this attack. The Terms of Reference make no reference to those who survived the attack. The Chairman is given no authority or entitlement to investigate the circumstances in which the survivors were injured, save by necessary implication where that is incidental to investigating the circumstances of the deaths of the 22. In our view, the Chairman would be acting beyond his powers if he set out to investigate the circumstances in which the survivors were injured.

47. Section 3 of the 1998 Act requires the Court to interpret primary and subordinate legislation, so far as it is possible to do so, in a way which is compatible with Convention rights. But it does not empower either this Court or the Chairman, to recast the Terms of Reference of a public inquiry.

48. It follows that the Inquiry cannot investigate the circumstances in which the survivors were injured beyond what is necessarily incidental to the investigation into the deaths of the 22. The procedural entitlements of those involved in the public inquiry flow from the investigative obligations imposed by the Terms of Reference. Since this Inquiry has no separate investigative obligations as regards the survivors, those survivors have no *entitlement* to core participant status.

49. That outcome is not remotely surprising. This public inquiry was established with the express purpose of enquiring into the circumstances of the death of the 22. In effect, it took over the role and purpose of the previous inquests. It was not designed to cover every aspect of the United Kingdom's Convention obligations arising out of the Manchester Arena bombing. It was not designed as the vehicle by which the United Kingdom might discharge Convention obligations owed to the survivors.

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[2]"Article 2 Right to life 1. Everyone's right to life shall be protected by law... Article 3 Prohibition of torture No one shall be subjected to torture or to inhuman or degrading treatment or punishment."

50. For those reasons, we see no arguable case here under the Convention. The claimants' fundamental error is to treat a public inquiry established to investigate the deaths of the 22 as a public inquiry into all the circumstances of the Manchester bombing, and the Chairman of that Inquiry as the repository of all the United Kingdom's obligations under the Convention arising out of that outrage. Neither of those propositions is accurate.

51. That is sufficient to dispose of the argument based on the 1998 Act. There is, however, a further and discrete reason why the claimants' grounds based on articles 2 or 3 are not properly arguable in any event.

(ii) The Chairman's analysis

52. The Chairman proceeded on the basis that article 2 was engaged in the case of the claimants and proceeded to determine whether the Convention obliged him to accord core participant status to the claimants. He found that it did not.

53. Nonetheless, the Chairman made clear that he wanted survivors to participate in the inquiry. He directed that:

    (i) Those who wished to do so could attend a further interview with the police.

    (ii) They could have access to to previous accounts or witness statements they had given together with any related exhibits'.

    (iii) Funding would be provided for them to instruct solicitors for the purpose of that interview.

    (iv) Survivors might be called as witnesses.

    (v) Survivors would be able to attend live hearings, view live streaming of the Inquiry's hearings and access transcripts of the proceedings.

    (vi) Survivors would be encouraged to raise issues with the Inquiry team, suggest lines of enquiry which needed to be pursued and propose lines of questioning which need to be followed.

54. Ms Campbell submits that that does not go far enough. She says the claimants should have a right to full disclosure of documentation, to legal representation and legal aid, to cross examine witnesses and to make submissions. In other words, she seeks for her clients all the rights that may flow from core participant status.

55. Citing the House of Lords decision in *R (JL) v Secretary of State for Justice* [2009] 1 AC 588 and what was said by Laws LJ in *DSD and NBV v Commissioner of Police for the Metropolis* [2016] QB 161, Ms Campbell acknowledged that where articles 2 and 3 were relevant to an investigation into the death or serious injury of a person, the requirements of that investigation varied according to the circumstances. She accepted that there is a sliding scale of procedural requirements imposed by articles 2 and 3, but submitted that the horrendous nature of this event puts this case close to the very top of that sliding scale. In any event, she said there were "minimum standards" and they were those set out in at paras 106 to 109 in *Jordan v UK* (2003) 37 EHRR 2. In particular, she pointed to the requirement that "the next of kin of the victim must be

involved to the extent necessary to secure accountability." By parity of reasoning, she said, the same must apply to an article 3 case.

56. She referred to the judgment of May J in *MA, BB v Secretary of State for the Home Department* [2019] EWHC 1523 (Admin). She said that if a victim cannot participate in a manner which protects their legitimate interests and accords proper respect to their dignity, there will be a breach of article 2 or 3. Proper participation necessitates, she says, disclosure, legal representation, legal aid to fund that representation and the ability to cross-examine and make submissions. Ms Campbell submitted that the degree of participation offered by the Chairman is, against this standard, inadequate.

57. In our judgment, that contention, that articles 2 or 3 require the grant of core participant status in this case, is wholly unarguable.

58. It is necessary to consider, first, whether the claimants' characterisation of their case is accurate. It is right to say that there are categories of case which give rise to an *automatic* obligation on the state to conduct an effective investigation. These include cases where death is caused by the use of force by a state agent or whilst the deceased is in the custody of the state.

59. In *JL*, Lord Rodger rejected an argument that article 2 did not require an independent investigation to be held unless there was some positive reason to believe that the authorities had indeed been in breach of their obligation to protect a prisoner. The reason that obligation arose automatically, however, was because a prisoner is subject to the control of the state. As Lord Rodger said at para 59:

> Whenever a prisoner kills himself, it is at least *possible* that the prison authorities, who are responsible for the prisoner, have failed, either in their obligation to take general measures to diminish the opportunities for prisoners to harm themselves, or in their operational obligation to try to prevent the particular prisoner from committing suicide. Given the closed nature of the prison world, without an independent investigation you might never know. So there must be an investigation of that kind to find out whether something did indeed go wrong.

60. In *R (Smith) v Oxfordshire Assistant Deputy Coroner* [2010] UKSC 29, Lord Hope said at para 59:

> "The procedural obligation extends to prisoners as a class irrespective of the particular circumstances in which the death occurred. The fact that they are under the care and control of the authorities by whom they are held gives rise to an automatic obligation to investigate the circumstances. The same is true of suicides committed by others subject to compulsory detention by a public authority, such as patients suffering from mental health illness who have been detained under the Mental Health Act…"

61. At para 210, Lord Mance identified five categories of death where the substantive rights contained within article 2 have been held to be potentially engaged *"…with the result that the procedural obligation has been held to exist"*. These categories were: killings by State agents; deaths in custody; conscripts; mental health detainees and "… other situations where the State has a positive substantive obligation to take steps to safeguard life*"*.

62. The reason why there must necessarily be an investigation in such cases is because the death occurred as a direct consequence of State action or as a result of a failure by the State to take steps to protect life where it was under a specific duty to do so. That is not this case. There is no suggestion that the State was directly responsible for the bombing of the arena and the State did not owe particular protective duties to the claimants of the sort that applies in detention cases. It follows that there is here no automatic obligation on the State to establish an inquiry which gives the claimants what they seek.

63. Second, we reject the contention that the claimants' cases were the gravest type of article 2 case, or, as Ms Campbell put it that they fall "at the very top of the article 2 spectrum".

64. Article 2 may be engaged when injuries are near-fatal, but fatal cases are recognised as being of a greater gravity. In *JL* the House of Lords considered the significance of the difference between a suicide and a near suicide. Lord Brown said at para 105: "Calamitous though near-suicide cases may be, death adds a further dimension of gravity".

65. Equally, there is a distinction to be made in assessing the seriousness of an article 2 breach, and the stringency of the resulting obligations, between deaths and injuries that occur in the community, and deaths and injuries that occur in circumstances where the state has assumed responsibility. The degree of responsibility on the State will reflect the measure of control the State was exercising. In *Rabone v Pennine Care NHS Foundation Trust* [2012] 2 AC 72, when considering the incidence of the article 2 operational duty, Lord Dyson said (at para 22) that duty would be held to exist "where there has been an assumption of responsibility by the state for the individual's welfare and safety (including by the exercise of control)".

66. Just as in non-fatal article 2 cases, so in article 3 cases there is a spectrum of severity. In *DSD and NBV*, Laws LJ said at paras 45 to 46:

> "[I]t is important to keep in mind the Article's overall, strategic, safeguarding purpose. One consequence is that it is misleading to regard investigative processes as always "ancillary" or "adjectival" to the "substantive" right guaranteed by Article 3. Language of that kind more or less fits the case where there is a credible allegation of ill-treatment by State agents: then, there is a "substantive" breach by the State, whose investigation may reasonably be regarded as "adjectival". But that model is inapt where there is ill-treatment by non-State agents. In such a case there is no antithesis between what is substantive and what is adjectival: the "substantive" act does not of itself violate the Convention. In such a case Article 3 generally requires a proper investigation, and criminal process if that is where the investigation leads. The idea at the core of the Article is that of safeguarding or protection in all the myriad situations where individuals may be exposed to ill-treatment of the gravity which the Article contemplates.
>
> 45. There is perhaps a sliding scale: from deliberate torture by State officials to the consequences of negligence by non-State agents. The energy required of the State to combat or redress these ills is no doubt variable, but the same protective principle is always at the root of it. The margin of appreciation enjoyed by the State as to the means of compliance with Article 3 widens at the bottom of the scale but

> narrows at the top. At what may, without belittling the victim, be called the lower end of the scale where injury happens through the negligence of non-State agents, the State's provision of a judicial system of civil remedies will often suffice: the individual State's legal traditions will govern the means of compliance in the particular case. Serious violent crime by non-State agents is of a different order: higher up the scale…."

67. In our judgment, in advancing her case as to seriousness of the potential article 2 and article 3 breaches, Ms Campbell fails to distinguish between, on the one hand, the gravity of the incident that led to the deaths of the 22 and the injuries suffered by the survivors and, on the other, the gravity of the potential breach of the State's duties under article 2 or 3. There can be no doubt that the consequences of Salman Abedi's crime were of the most serious kind, but, taking the allegations at their highest, the culpability of the State was toward the bottom end of the spectrum. What is said is that the United Kingdom security services, as they sought to deal with the hundreds of potential threats to the security of the United Kingdom**,** may have failed properly to assess the risk Salman Abedi posed and to take adequate steps to prevent his attack. But this was an attack carried out in the community by a non-State actor. It was not an attack by the State itself, nor was it an attack by an agent of the State, nor was it an attack on persons in the care or custody of the State.

68. Accordingly, this case does not fall into the most serious category of article 2 or 3 cases.

69. Against that background, we consider what the Convention requires of the State on the facts of the claimants' cases, if it is to be the Arena Inquiry which is to meet that obligation.

70. Where the article 2 procedural duty arises, the State is under an obligation to conduct an effective investigation. It is common ground that such an article 2 investigation must satisfy certain standards, including promptness, independence, thoroughness, a sufficient element of public scrutiny, and, in fatal cases, the involvement of the next of kin of the victim to the extent necessary to safeguard his or her legitimate interests. However, as Lord Phillips said at para 31 in JL:

> "The Strasbourg court has emphasised the need for flexibility and the fact that it is for the individual State to decide how to give effect to the positive obligations imposed by article 2."

71. As Mr Greaney submitted, applying *R (Long) v Secretary of State for Defence* [2015] 1 WLR 5006, in assessing effectiveness, the totality of the State's investigations should be considered. Lord Anderson's report into the 2017 attacks in London and Manchester contained an assessment of M15 and Police internal reviews into the atrocities; Lord Kerslake's report reviewed the preparedness for, and emergency response to, the Manchester Arena attack. There was, in addition, the very substantial criminal investigation which resulted in the conviction of Hashem Abedi. On any view, there have already been investigations of real substance.

72. Even in fatal cases where the State has used lethal force resulting in death and where the procedural obligation therefore arises automatically, what is required to satisfy the article 2 standards is flexible. In *Tunc v Turkey* [2016] Inquest LR 1 [GC] the Grand

Chamber considered an alleged breach of the article 2 procedural duty where an army sergeant had been killed by gunfire. The Grand Chamber stated at para 225 that,

> "[T]he nature and degree of scrutiny which satisfy the minimum threshold of the investigation's effectiveness depend on the circumstances of the particular case …compliance with the procedural requirement of Article 2 is assessed on the basis of several essential parameters: the adequacy of the investigative measures, the promptness of the investigation, the involvement of the deceased person's family and the independence of the investigation. These elements are inter-related and each of them, taken separately, does not amount to an end in itself, as is the case in respect of the independence requirement of Article 6. They are criteria which, taken jointly, enable the degree of effectiveness of the investigation to be assessed. It is in relation to this purpose of an effective investigation that any issues, including that of independence, must be assessed."

73. The decision in *Tunc* demonstrates that flexibility applies to the involvement of bereaved families in fatal investigations. Similarly, in *Ramsahai v Netherlands* (2008) 46 EHRR 43, the Grand Chamber found a State's investigation into a fatal case effective for article 2 purposes without the full participation of the bereaved family, despite the fact that the family were not afforded advance disclosure, funded legal representation or the ability to question witnesses (at paras 347 to 348 and 354).

74. Mr Greaney submitted by extension, that the same approach applies to victims in non-fatal cases, albeit that the degree of flexibility in non-fatal cases will be even greater. Certainly, in our view, the requirement for victim involvement in non-fatal cases can be no more stringent than it is in fatal cases.

75. Here, as explained above, there is no automatic obligation under the Convention to establish an inquiry involving the survivors; the triggering event under the Convention was far from the most severe of cases; and there has been a full criminal investigation together with other investigations. It follows, in our judgment, that it cannot properly be argued that the circumstances of this case require the grant of core participant status in order to meet the survivors' rights under articles 2 or 3.

76. Furthermore, the court will accord the person appointed to conduct an article 2 or 3 investigation significant discretion in determining the processes he will adopt. In *JL* Lord Phillips said at para…:

> "Once the independent investigation has been established with the powers and resources it needs, it is very much up to the investigator to decide how to proceed in order to achieve the objectives for which it was set up."

77. In reaching his decision on the application for core participant status, the Chairman accepted that an effective investigation was required; he assessed its effectiveness by reference to the whole of the State's investigation into the attack, including his own inquiry; he addressed the question of the involvement of the claimants as part of that exercise. We are unable to fault his analysis and see no proper ground for challenge under the Convention.

Rationality

78. The fact that the 1998 Act gives the survivors no *entitlement* to core participant status, however, does not necessarily mean that the Chairman ought not grant them that status pursuant to Rule 5 of the Inquiry Rules.

79. We have set out at para 15 above the relevant parts of Rule 5. The question whether he should grant survivors status is a matter for the exercise of the Chairman's discretion within those Rules. The test to be applied by this Court, in considering whether that exercise of discretion is vulnerable to challenge, is the familiar public law question addressed in permission applications, namely, whether the claimants have demonstrated an arguable case that refusing to grant core participant status was not a conclusion properly open to the Chairman.

80. The thrust of the claimants' complaint is that the Chairman erred in focusing on what the participation of the claimants would add to the inquiry rather than what participation would mean to them. They argued, in particular, that the Chairman wrongly elided his response to the articles 2 and 3 claims with his defence to the irrationality challenge. They point to the importance of their articles 2 and 3 rights in the rationality exercise the Chairman must undertake.

81. In our judgment, however, it is the claimants, rather than the Chairman, who have elided the Convention and rationality. For the reasons we have given, the Convention does not necessarily assist the claimants and the Chairman was right to approach the two questions separately.

82. It is plain from the wording of the Rules that the Chairman has a broad discretion under the Rules. The only pre-condition to his designating a person a core participant is that they consent. The Chairman here proceeded on the basis that all the claimants met the Rule 5(2)(b) criteria. In other words, they each had an interest in an important matter to which the Inquiry relates. This was the foundational starting point of the Chairman's consideration of the representations put before him.

83. In reaching his decision, the Chairman was obliged to consider the matters set out in the Rules and everything else he considered relevant. It is the Chairman who is best placed to identify what is relevant in the circumstances of his Inquiry. The weight to be given to the matters the Chairman considers relevant is also a matter for him (See *Da Silva* and *SSHD v KP(1)* [2011] 2 AC 1 at para 12).

84. His conclusions are neatly summarised in Mr. Greaney's written submissions:

> "In Summary (the Chairman ruled against the application) because (having considered the wide range of submissions before him) he considered that the fact that the inquiry had commenced an inquest on the 22 deceased, had ToR on the deceased, the direct overlap of interests and perspective between the survivors and bereaved families (who are CPs and are legally represented), the fact that the survivors could be called as witnesses to assist with the inquiries investigation, the fact the survivors could participate in the inquiry by other means without being designated as CPs, the possible delay in the inquiry caused

> by a decision to designate survivors, and a statutory requirement to avoid unnecessary costs all weighted against granting the application."

85. In our judgment, the Chairman's analysis was plainly one properly open to him. He had regard to all relevant factors and disregarded none. He did not focus on the benefits the claimants might derive from participating in the process as core participants but, in our judgment, he was not obliged to do so. His focus was, as is it had to be, on meeting his terms of reference.

86. The Chairman's decision does not exclude the claimants from the inquiry process, as he has made clear. On the contrary, as we have said, he was at pains to emphasise how they could be involved and how he would welcome their involvement. He was nonetheless plainly entitled to conclude that they should not have core participant status.

87. On a proper analysis, the claimants' case amounts to no more than a disagreement with the Chairman's conclusion on the question which Rule 5(2) provides is his to decide. Their case fundamentally, is an attack on the merits. That provides no basis for a public law challenge.

88. We see no properly arguable claim here and, had we extended time to bring this application, would have refused permission to apply for judicial review.

Anonymity

89. The two claimants in these proceedings are currently anonymised. In ordering a rolled-up hearing Choudhury J noted that anonymity may be reviewed at the hearing. We now do so.

90. Each of the claimants, including the prospective claimant LL, has applied for anonymity. It is submitted on their behalf that, "whether under CPR r39.2(4), s39 of the Children and Young Persons Act 1993 (sic), or the court's inherent jurisdiction, such an order is appropriate".

91. The Chairman is neutral as to this application but has helpfully drawn the court's attention to the relevant principles. He reminds the court of the principle of open justice, and of the need to be satisfied that any interference is lawful, including where the application is unopposed.

92. The starting point is the fundamental principle of common law that justice is administered in public and judicial decisions are pronounced publicly: see *Scott v Scott* [1913] A.C. 417. Derogations from the general principle of open justice can only be justified in exceptional circumstances, when they are strictly necessary as measures to secure the proper administration of justice. What is sought from us is not an interim non-disclosure order but an order permanently preventing the identification of the claimants.

93. Section 39 of the Children and Young Persons Act 1933, as amended (the 1933 Act) provides a power to prohibit publication of the name, address or school of any child or young person concerned in the proceedings, either as being the person by, or against, or

in respect of whom the proceedings are taken, or as being a witness therein; or any particulars calculated to lead to the identification of a child or young person so concerned in the proceedings; or a picture of any child or young person so concerned in the proceedings except in so far (if at all) as may be permitted by the direction of the court.

94. CPR 39.2(1) provides that: "The general rule is that a hearing is to be in public." Rule 39.2(3) provides: "A hearing, or any part of it, may be in private if … (d) a private hearing is necessary to protect the interests of any child or protected party; or … (g) the court considers this to be necessary in the interests of justice." CPR Rule 39.2(4) provides: "The court may order that the identity of any party or witness must not be disclosed if it considers non-disclosure necessary in order to protect the interests of that party or witness."

95. The general approach of the courts to the anonymisation of parties and witnesses in proceedings and to the circumstances in which reporting restrictions can be imposed has been extensively considered in cases such as *Guardian News and Media Ltd* [2010] 2 AC 697 (see in particular para 723), *Khuja v Times Newspapers Ltd and ors* [2017] UKSC 49 and *Norman v Norman* [2017] EWCA Civ 49; [2017] 1 WLR 2523 (the latter case was concerned with the position in the Court of Appeal). See further, *JXMX v Dartford and Gravesham NHS Trust* [2015] EWCA Civ 96 and *MN v OP and ors* [2019] EWCA 679. In *Khuja* Lord Sumption (with whom Lord Neuberger, Lady Hale Lord Clarke and Lord Reed agreed) said this at para 14:

> "The inherent power of the courts extends to making orders for the conduct of the proceedings in a way which will prevent the disclosure in open court of the names of parties or witnesses or of other matters, and it is well established that this may be a preferable alternative to the more drastic course of sitting in private: see R v Socialist Worker Printers and Publishers Ltd, Ex p Attorney General [1975] QB 637, 652; Attorney General v Leveller Magazine Ltd [1979] AC 440, 451-452 (Lord Diplock), 458 (Viscount Dilhorne), 464 (Lord Edmund-Davies). Orders controlling the conduct of proceedings in court in this way remain available in civil proceedings whenever the court "considers non-disclosure necessary in order to protect the interests of that party or witness": CPR rule 39.2(4)."

96. The question in *Khuja* was whether the press could report the name of an adult given in open court. In *JXMX*, the court was invited to anonymise the name of the claimant in relation to an application for approval of a compromise for a claim for damages for personal injury brought by a child. Moore-Bick LJ said:

> 29. Although, as we have indicated, we do not think that approval hearings lie outside the scope of the principle of open justice, we think there is force in the argument that in the pursuit of justice the court should be more willing to recognise a need to protect the interests of claimants who are children and protected parties, including their right and that of their families to respect for their privacy in relation to such proceedings. Such a willingness is reflected both in the Family Procedure Rules and in the Court of Protection Rules. It might be thought that approval hearings, whether involving children or protected parties, are comparable in nature and deserve to be viewed in a similar light, although it has not been suggested that in general such hearings should be held in private. The function which the court discharges at an approval hearing is essentially one of a protective nature, as it was

> when it exercised the function of parens patriae on behalf of the Crown in relation to wards of court and lunatics. The court is concerned not so much with the direct administration of justice as with ensuring that through the offices of those who act on his or her behalf the claimant receives proper compensation for his or her injuries. The public undoubtedly has an interest in knowing how that function is performed and the principle of open justice has an important part to play in ensuring that it is performed properly, but its nature is such that the public interest may usually be served without the need for disclosure of the claimant's identity.

97. In *R (TT) v Registrar General for England and Wales* [2019] EWHC 1823 (Fam) it was held that it was appropriate to lift an anonymity order which had been made in consolidated judicial review and family proceedings to protect the identity of the claimant, a transgender man who had given birth to a child and was seeking to be registered as the father. The claimant had put into the public domain the fact that he was a transgender man who had given birth to a child, and identifying him as the claimant in the proceedings would not result in any intrusion beyond that which would follow from what he had already made public knowledge.

98. EA was twelve at the time of the bombing and is now fifteen. BT was seventeen and is now twenty. LL was fourteen and is now seventeen. The concern that has been identified on their behalf is the need to maintain their privacy and protect them from the publicity and from attention from the media having regard to their particular vulnerability.

99. We can understand the concerns expressed on their behalf. It is, however, apparent that no steps were taken by the applicants or their legal advisors to protect the applicants' identities when the issue of core participant status was being considered by the Inquiry, even when the Inquiry was sitting in public session. As the Chairman points out, there was no suggestion that an anonymity or a restriction order (under section 19 of the 2005 Act) was required in respect of EA when the application for core participant status was made. Moreover, EA was named by Ms Campbell during the public oral hearing of the survivors' application on 7 April 2020.

100. Furthermore, all three applicants have featured in media reports relating to the bombing and it is apparent that they, or their parents, have discussed their circumstances with the media. It is unnecessary to give examples, but there are numerous references (including photographs) to each of them in publicly available material.

101. Ms Campbell accepts that it is correct that the applicants are known publicly as survivors and to some extent publicly identified, but she submits their concerns are genuinely held, in relation to two, they are children, and it is appropriate given the circumstances, that anonymity is granted to them.

102. The Court will more jealously guard the interests of those under 18 in considering applications of this sort. Two of the three applicants are under that age. But the fact that an applicant is a child is not, in circumstances such as the present, necessarily decisive. The applicants here have brought public law proceedings seeking a greater role in a public inquiry in circumstances where their identity was disclosed in the application to the Inquiry challenged in these proceedings, and their association with this tragedy more generally is a matter already in the public domain. This is not a case, like *JXMX,* where the court is discharging an essentially protective function.

103. Nonetheless, each of the claimants is particularly vulnerable; and LL, the prospective claimant, is particularly vulnerable. We have, following the circulation of this judgment in draft, received further information about their situations which has persuaded us that it would be right to make permanent the orders made on an interim basis by Choudhury J to protect the interests of the claimants, and, for the same reason, to extent that protection to LL.

Conclusions

104. In those circumstances, we decline to extend time for EA and BT to apply for judicial review. We make it clear that, even if we had been minded to extend time, we would then have refused permission to apply for judicial review.

105. LL can be in no better position to pursue this case than EA and BT (quite apart from difficulties her application would face because of the terms of the CPR 19.5(2) and (3) and/or CPR 19.2) and we refuse permission to her to be added as a party under CPR rule 19.

106. In order to protect the interests of the claimants and the prospective claimant, we make permanent the anonymity orders in favour of EA and BT, and their Litigation Friends, and grant a similar order to LL and her Litigation Friend.