Neutral Citation Number: [2021] EWHC 3274 (Admin)

Case No: CO/3631/2021

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

Manchester Civil Justice Centre

Date: 07/12/2021

Before:

THE HONOURABLE MR JUSTICE SWEENEY

- -

Between:

SIR JOHN SAUNDERS

CHAIRMAN OF THE MANCHESTER ARENA INQUIRY

And

BEN ROMDHAN

(Previously known as ISMALE ABEDI)

- -

Mr Paul Greaney QC and **Mr Nicholas de la Poer QC** for the **Applicant**

Miss Rebecca Filletti (Instructed by Levins Solicitors) for the **Respondent**

Hearing date: Friday 26 November 2021

Approved Judgment

Covid-19 Protocol: This judgment was handed down remotely by circulation to the parties' representatives by email, release to BAILII, (if appropriate), and/or publication on the Courts and Tribunals Judiciary website.

The date and time of hand-down was deemed to be

14:00 on **Tuesday 7 December 2021** .

The Hon. Mr Justice Sweeney:

Introduction

1.
The Manchester Arena Inquiry was established by the Home Secretary on 29 October 2019. It is an investigation into the circumstances in which Salman Abedi detonated an improvised explosive device in the City Room within the Victoria Exchange Complex in Manchester on 22 May 2017, murdering 22 people and injuring hundreds more.

2.
The Inquiry's Terms of Reference require the investigation, among other things, of the radicalisation of Salman Abedi and the circumstances in which the bomb was prepared and assembled.

3.
Salman Abedi did not act alone. In March 2020 his brother, Hashem Abedi, was convicted of the murders and of numerous attempted murders. He was later sentenced to life imprisonment with a minimum term of 55 years.

4.
On 22 July 2021, acting under the provisions of section 21(1)(a) of the Inquiries Act 2005 ("the Act"), and against the background of numerous communications between the Inquiry and the Respondent over the preceding 14 months, the Chairman of the Inquiry, Sir John Saunders, issued a Notice to the Respondent, who is the older brother of Salman and Hashem Abedi, requiring him to attend the Inquiry on 21 October 2021, in order to give evidence.

5.
On 29 August 2021 the Respondent left the jurisdiction, did not return, and thus failed to attend the Inquiry as required.

6.
In the result, on 26 October 2021, the Chairman, acting under the provisions of section 36(1)(a) of the Act, certified that the Respondent had failed to comply with the Section 21 Notice issued on 22 July 2021, and applied to this Court for a bench warrant directing the arrest of the Respondent. The warrant ultimately sought had two particular features:

(1)
It was returnable to the Inquiry Hearing Room.

(2)
It would expire on the date that, in accordance with section 14 of the Act, the Inquiry ended.

7.
The application for a bench warrant was supported by a witness statement, dated 26 October 2021, made by Mr Timothy Suter, the Solicitor to the Inquiry. I append a copy of his statement to this judgment.

8.
I heard the application on 26 November 2021. The Respondent who, it is believed, remains abroad, was represented. He did not dispute the legality of the issue of the Section 21 Notice, nor the fact that he was in breach of it. Equally, he accepted that enforcement of a Section 21 Notice is by means of certification of the matter by a Chairman under section 36 of the Act, and that the powers of the High Court include, potentially at least, the power to issue a bench warrant.

9.

Nevertheless, the Respondent opposed the application on three grounds, namely that:

(1)
It was unnecessary and disproportionate.

(2)
It defeated the purpose of the Act, because it was contrary to the purpose of section 36.

(3)
Any order would be unenforceable because the Respondent was out of the jurisdiction.

10.
Having heard submissions on behalf of both parties, I granted the application and issued a warrant in the terms sought. These are my reasons (which I reserved) for doing so.

Outline Legal Framework

11.
Section 17 (3) of the Act provides that, when making any decision as to the procedure or conduct of an Inquiry, the Chairman must act with fairness and also with regard to the need to avoid unnecessary costs.

12.
In relation to certification and warrants my attention was drawn to a number of authorities, in particular the following (all at first instance):

Paisley, Re Section 36 of the Inquiries Act 2005 [2008] NIQB 158; Re Ian Paisley Junior [2009] NIQB 40; Hanson v Carlino [2019] EWHC 136; Moore-Bick v Mills [2020] EWHC 618 (Admin); Saunders v Taghdi [2021] EWHC 2785 (Admin); Saunders v Taghdi [2021] EWHC 2878.

13.
It was common ground that those cases variously decided that:

(1)
Whilst the decision of the Chairman must carry weight, or considerable weight, this Court must give due and proper consideration as to whether or not it is appropriate to make an enforcement order.

(2)
Section 36 is remedial in nature and calculated to secure compliance - with the focus being on obtaining the relevant information rather than punishment.

(3)
Issuing a bench warrant is an extreme remedy, and must only be done when it is “necessary” – with the test being one of necessity and proportionality, which involves the weighing up of the competing interests.

Factual Background

14.
The factual background is set out in detail in Mr Suter’s witness statement. It suffices to highlight the following:

(1)

On 28 May 2020 Mr Suter wrote to the Respondent requiring that, by 22 June 2020, he provide a witness statement to the Inquiry, dealing with the 39 topic areas specified by Mr Suter. There was no response.

(2)
On 7 July 2020 Mr Suter wrote again asking the Respondent to provide a witness statement by 21 July 2020.

(3)
On 20 July 2020 the Respondent replied saying that he was not able to provide a witness statement, and asserting that that was because he was concerned about the risk of self-incrimination - as he had been arrested in the aftermath of the bombing and had been questioned for 14 days.

(4)
On 23 July 2020 the Respondent was served with a Notice, under the provisions of section 21(2)(a) of the Act, which required him to attend the Inquiry for interview in the week of 24 August 2020.

(5)
On 12 August 2020 the Respondent's solicitor provided an unsigned statement from the Respondent, dated that day, in which the Respondent acknowledged service of the Section 21 Notice, but said that he did not wish to answer the questions asked of him in the letter of 28 May 2020, as he wished to claim the privilege against self-incrimination. He further asserted that his participation in the Inquiry might put members of his family at risk.

(6)
On 21 August 2020, which was the day after Hashem Abedi had been sentenced, Sky News published the content of a telephone interview with the Respondent.

(7)
Also on 21 August 2020, Mr Suter wrote to the Respondent's solicitor in relation to the Respondent's claim of privilege against self-incrimination, referring to section 14 of the Civil Evidence Act 1968 and to a small number of authorities, and indicating that the Chairman considered that the reasons given by the Respondent were not sufficient to discharge the Section 21 Notice.

(8)
On 4 September 2020 the Respondent's solicitor replied, maintaining the Respondent's position in relation to the privilege against self-incrimination and inviting the Inquiry to reconsider its position and to withdraw the Notice.

(9)
On 9 September 2020 Mr Suter replied, underlining the fact of the Respondent's Sky interview, and pointing out that it was not for the Chairman to establish that privilege did not apply – rather, and in relation to each question asked of him, it was for the Respondent to establish that privilege did apply. Mr Suter thus asked the Respondent to provide a written statement to the Inquiry by 18 September 2020.

(10)
On 13 September 2020 the Respondent's solicitor replied, stating that the Respondent would not be making a further statement, but that a signed version of the statement supplied on 12 August 2020 would be provided.

(11)
Mr Suter replied on 16 September 2020 - indicating that, in view of the Respondent's non-compliance, it was anticipated that he would be summoned to appear before the Chairman to give evidence in person.

(12)
On 16 October 2020, following the broadcast of an attempt to interview the Respondent by the BBC, Mr Suter wrote again to the Respondent's solicitor asking for the Respondent's help. There was no substantive reply.

(13)
On 9 April 2021 Mr Suter emailed the Respondent's solicitor pointing out that the Inquiry had recently interviewed Hashem Abedi (who had confirmed his participation in the planning and preparation of the bombing), and that the Inquiry was in possession of an expert report (in relation to radicalisation) which explained the relevance to the Inquiry of the background and family ties of Salman and Hashem Abedi - in relation to which the Chairman would be assisted by comments from the Respondent. Mr Suter emphasised that the Inquiry was a search for the truth, that the Respondent was in a unique position to assist with the investigation, and that the Chairman could require the Respondent's attendance.

(14)
On 20 April 2021, the Respondent's solicitor replied, saying that the Respondent continued to invoke the privilege against self-incrimination, and asserted that the Sky interview had been made up by the relevant journalist. Finally, the Respondent's solicitor raised the possibility of the Chairman applying to the Attorney General for an undertaking that any evidence given to the Inquiry by the Respondent would not be used in any prosecution. Nevertheless, the solicitor continued: " I cannot promise that such an undertaking would address all Mr Ben R o mdhan's concerns, but it would radically alter the picture ".

(15)
Mr Suter responded on 22 April 2021, setting out in considerable detail the law, and the principal authorities, in relation to claims of privilege against self-incrimination. He also made clear that, if it was the Respondent's position that he would answer questions if a formal undertaking from the Attorney General was in place, the Respondent should provide a formal written indication of that fact.

(16)
On 10 May 2021 the Respondent's solicitor lodged an application for an undertaking to be sought by the Chairman from the Attorney General.

(17)
Having heard oral submissions on 19 May 2021, the Chairman refused the application in a written ruling dated 10 June 2021. In the course of the ruling the Chairman variously opined, in relation to the now the Respondent, that;

(a)
There was no doubt that he may be able to provide answers on a wide range of topics that were relevant to the Inquiry's Terms of Reference.

(b)

It was possible that if there was an undertaking from the Attorney General the Respondent would still refuse to answer questions on some topics, and that it might be that any answers that he gave would be designed not to help, but rather to hinder, the work of the Inquiry.

(c)
The Respondent's responses to the Inquiry thus far appeared to have been designed to hinder the work of the Inquiry and not to assist it, and he had no confidence that, if granted an undertaking, the Respondent would do his best to assist the work of the Inquiry. There would need to be a significant shift in his attitude were he to do so.

(d)
The potential adverse effects on the administration of justice in granting immunity considerably outweighed the potential benefits of allowing the Respondent to give evidence with immunity.

(e)
He (the Chairman) was under a duty to act fairly and would do so and looked forward to the cooperation of the Respondent to assist the Inquiry, which he did not need the protection of an undertaking to do.

(18)
As touched on above, on 22 July 2021 a Notice under section 21(1)(a) of the Act was issued. It required the Respondent to give evidence to the Inquiry in person on 21 October 2021. The Notice was served on the Respondent's solicitor on 23 July 2021. No application was made to set the Notice aside.

(19)
On 28 August 2021, the Respondent was stopped prior to boarding a flight from Manchester to Istanbul. In the result, the Respondent missed the flight. However, as already indicated, he flew out the next day and it appears that he remains out of the jurisdiction.

(20)
On 20 October 2021, in response to an enquiry from Mr Suter, the Respondent's solicitor indicated that the Respondent was unwilling to give evidence and would not be attending the Inquiry the following day. The solicitor re-iterated the Respondent's concerns as to his own safety and the safety of his family.

(21)
As indicated above, the Respondent failed to attend the Inquiry, as required, on 21 October 2021. Mr Suter wrote to him later that day asking him to reschedule his evidence and pointing out that it was anticipated that enforcement proceedings would be commenced. No reply was received.

Submissions

15.
Against the background of the Statement of Matter Certified (dated 26 October 2021), and of the Applicant's Skeleton Argument (dated 18 November 2021), Mr Paul Greaney QC, for the Chairman, in the combination of his written and oral submissions, explained that the Chairman's approach was as follows:

(1)

To maintain, in the instant proceedings, the application for a bench warrant with the warrant having, as indicated above, two particular features – i.e. that it would be returnable to the Inquiry Hearing Room, and that it would expire on the day that, in accordance with section 14 of the Act, the Inquiry ends.

(2)
Shortly before the Inquiry comes to an end (and potentially subject to the bench warrant not having been executed) to institute proceedings against the Respondent, under section 35(1) & (5) of the Act, for breach of the Section 21 Notice issued on 22 July 2021.

(3)
As a result to secure the Respondent's evidence separately from any appropriate punishment for his misconduct to date - with (if necessary) the DPP taking over any prosecution in that regard (with arrangements in principle having been made in relation to that eventuality).

(4)
To invite the inclusion in this Court's Order of a requirement for a Directions Hearing in the High Court on 22 April 2022, to enable the Court then to take stock of the situation.

16.
Mr Greaney further submitted, among other things, that the Chairman had rightly concluded that the Respondent had relevant evidence to give, in particular in relation to Term of Reference para 1(ii) [which requires the Chairman to investigate Salman Abedi's radicalisation in the context of his relevant associates, including family members], and Term of Reference para 2(ii) [which requires the Chairman to investigate the storage of the bomb].

17.
As to the Chairman's conclusion in relation to para 1(ii), Mr Greaney underlined that the Respondent was the older brother of Salman Abedi and is the older brother of Hashem Abedi and that, in the Chairman's judgment, the Respondent was thus very well placed to provide relevant evidence in relation to Salman Abedi's radicalisation – particularly in light of the following:

(1)
The Inquiry's expert on radicalisation had identified the family structure around Salman Abedi as a potentially crucial part of his path to radicalisation.

(2)
The Intelligence and Security Committee of Parliament, in its report into the terrorist attacks of 2017, identified that it was likely that the Respondent's father, Ramadan Abedi, had played a significant role in radicalising Salman Abedi.

(3)
Ramadan Abedi is outside the jurisdiction and has refused to engage with the Inquiry.

(4)
Very recent evidence to the Inquiry from a convicted terrorist, Abdal Raouf Abdallah, to the effect that he had fought in Libya for an Islamist Militia called the 17 th February Martyrs Brigade, and that in 2011 / 2012 Ramadan Abedi was part of that group. The 17 th February Martyrs Brigade subsequently went to Syria to fight. He had also seen Salman Abedi in Libya. Other evidence recently given to the Inquiry was to the effect that Ramadan Abedi was also associated with the Libyan Islamic Fighting Group (which was known to have, or to have had, links with Al-Qaeda).

(5)
Abdallah had also said in his evidence to the Inquiry that in 2015 / 2016, whilst living in Manchester and associating with Salman Abedi, he had noticed a change of attitude in Salman Abedi – who had become more religious, had taken to wearing Libyan dress, had stopped taking drugs and had stopped partying.

(6)
The fact that the Respondent had been stopped under Schedule 7 of the Terrorism Act 2000 in September 2015 (i.e. at around the time that Salman Abedi changed), and that a device in his possession had been found to contain a substantial quantity of Islamic extremist material

18.
As to the Chairman's conclusion in relation to para 2(ii) of the Terms of Reference, Mr Greaney underlined that the Respondent's DNA had been found on a hammer inside the Nissan Micra in which his brothers had stored the component parts of the improvised explosive device.

19.
Therefore, Mr Greaney submitted, there were compelling reasons [albeit stronger in relation to para 1(ii) then para 2(ii)] to conclude that the Respondent had relevant evidence to give to the Inquiry, and that such a conclusion provided a compelling basis for requiring him to attend to give that evidence. As did the fact that other witnesses, including Abdal Raouf Abdallah, who had initially failed to comply with Section 21 Notices, had (when ultimately brought before the Inquiry) given evidence in full.

20.
Mr Greaney continued that the Respondent's approach to the Inquiry to date, including his wilful refusal to reply to the lawful requirement on him to attend a statutory public Inquiry which was investigating the deaths of 22 innocent people at the hands of his terrorist brothers, meant that it was necessary and proportionate for the warrant to be granted in order to ensure that, so far as possible, the Respondent gives evidence in what is a full and fearless investigation, as mandated by the Home Secretary.

21.
Against the background that there remained a good deal more evidence to be heard, should the Respondent return to the UK prior to the Chairman discharging his function, it was imperative, Mr Greaney submitted, that a mechanism be put in place to bring the Respondent before the Inquiry in order to give his relevant evidence. Equally, given that the Respondent had shown himself to be determined not to comply with the lawful requirements on him to attend, a bench warrant was necessary and proportionate, with the warrant being returnable to the Inquiry Room - in similar terms to those granted in Saunders v Taghdi [2021] EWHC 2878 (Admin).

22.
As to the first ground of objection, Miss Filletti, on behalf of the Respondent, conceded that, in principle, it was self- evident that the Respondent was in a position to speak to Salman Abedi's background and radicalisation, but submitted that it was less self-evident that he could speak to para 2 of the Terms of Reference – given that the object connected to him that was found in the Nissan Micra was a hammer – i.e. a movable object which could have been used in unrelated endeavours. Equally, she underlined, DNA is transferrable.

23.

However, Miss Filletti submitted that whilst, again in principle, it might be that the Respondent could speak to at least some matters covered by para 2 of the Terms of Reference, the reality was somewhat different given the observation of the Chairman, when giving his judgement in relation to the proposed seeking of an undertaking from the Attorney General, namely,

" I have no confidence that if granted an undertaking the Applicant will do his best to assist the work of the Inquiry ."

24.
Miss Filletti argued that that comment severely undermined the contention that the Respondent's attendance before the Inquiry would provide relevant evidence, and also undermined the assertion that in all the circumstances it was necessary and proportionate for a bench warrant to be issued – the more so since very little of evidential value had resulted from either the Respondent's arrest and interview in 2017, or from his detention at the airport on 28 August this year.

25.
Nor, Miss Filletti submitted, was it a negligible feature that the Respondent was lawfully justified in not answering questions, the answers to which would tend to incriminate him.

26.
As to the second ground of objection, Miss Filletti relied upon passages in the judgments of Gillen J (as he then was) in the Paisley cases (above) - each underlining that section 36 of the Act is remedial in nature and a step toward securing compliance with a Section 21 Notice - with the focus being on obtaining information rather than punishment. Against that background, Miss Filletti submitted that the issue of a warrant would serve only to discourage the Respondent from returning to the jurisdiction during the period of the Inquiry, which defeated the purpose of section 36 and undermined the very intention of Parliament.

27.
As to the third ground, which she accepted overlapped with the other grounds, Miss Filletti underlined that the Respondent was outside the jurisdiction and that his whereabouts were unknown, and submitted that the grant of a warrant would dissuade the Respondent from returning to the UK, that it could not be enforced outside the UK, and that therefore, despite a warrant having the veneer of enforceability, it would not have any actual capacity for enforcement and so should be refused.

Reasons

28.
I gave due and proper consideration as to whether or not it was appropriate to make an enforcement order. No article 2 arguments were advanced.

29.
In my view Miss Filletti's reliance on the Chairman's observation (quoted in para 23 above) was misconceived, given that the observation was clearly made in the course of balancing worst case scenarios when deciding whether or not to apply to the Attorney General for an undertaking, In my view the reality is demonstrated by what the Chairman said at the end of the judgment, namely:

" I am under an obligation to act fairly, and I will…….I look forward to the co- operation of the Applicant to assist my Inquiry. He does not need the protection of an undertaking to do so."

30.

Like the Inquiry, it is the experience of this Court that intransigent witnesses will often give evidence once they have been compelled to attend and, in my view, the Chairman was fully entitled to proceed upon the basis that that is what will happen in the Respondent's case. The more so as the proceedings will be conducted fairly and there is a well-established and fair process (as summarised in Mr Suter's letter of 22 April 20) for dealing with claims of privilege against self-incrimination.

31.
The remainder of Miss Filletti's submissions came close to the proposition that the harder a person has tried to avoid providing evidence the less appropriate it is for a warrant to be granted in relation to them. I saw no merit in that approach.

32.
Against that background, taking the view that there are indeed compelling reasons to conclude that the Respondent has relevant evidence to give to the Inquiry, and having borne in mind that section 36 is remedial in nature and calculated to secure compliance, and that the issue of a warrant is an extreme remedy, I weighed up the competing interests of necessity and proportionality, and concluded that the issue of a warrant was plainly necessary.