

Request to Film - Lady Smith's Decision

DECISION BY THE CHAIR ON THE APPLICATION BY THE BBC TO FILM THE EVIDENCE OF TWO WITNESSES IN THE DAUGHTERS OF CHARITY CASE STUDY

This Inquiry's first public hearing took place almost a year ago. Since then, in addition to the preliminary hearing, there have been 41 days of evidence. Many witnesses have given evidence about their memories of life at certain institutions run by the Daughters of Charity; pseudonyms have been used where requested, as have screens where appropriate. Recording devices have not been allowed to be used during evidential hearings and none of the hearings have been filmed by the media for broadcasting purposes. This state of affairs has become the established norm. It seems to be working well.

A departure from that norm is now sought. By email dated 10 January 2018, the Social Affairs Correspondent of the BBC sought permission to film the oral evidence of two witnesses: Sister Eileen Glancy and Sister Ellen Flynn. All those with leave to appear at the Daughters of Charity case study were advised of the request and invited to make any submissions in relation to the request by close of business on 17 January. Submissions on behalf of the Daughters of Charity, the Lord Advocate, the Scottish Ministers, and the Bishop's Conference were tendered. These submissions were all helpful, responsible and balanced in their individual analyses all of which raised relevant points. Police Scotland tendered written advice regarding the additional steps they would require to take to ensure community safety if the BBC's request is granted.

I have a discretion in this matter and I have decided to refuse the request.

In doing so, I recognise that there are a number of significant factors which support it being granted:

- This is a public inquiry which aims to establish the truth and restore public confidence on a matter of great public importance namely the protection of children in care from abuse.
- The secrecy that may be thought to have traditionally surrounded the abuse of such children could be said to strengthen the need for transparency and demonstrable openness.
- The BBC's request is limited to those members of the order who are currently in positions of leadership within it; they did not work at any of the children's homes referred to in evidence and will not be facing allegations that they themselves abused children.

- There is a strong public interest in hearing what might be the responses of these witnesses to the evidence given by applicants about being abused and what explanations, if any, they might offer in their evidence.
- A number of those who have come forward as survivors are likely to find it difficult to attend hearings to hear and see the witnesses due to age, infirmity and/or the distance between home and Edinburgh.
- A number of those survivors have difficulty with reading so access to the transcript via the website may not provide them with an adequate means of informing themselves about the evidence.
- The Inquiry's redaction responsibilities mean that there can, in any event, be a delay between a witness completing their evidence and the relevant transcript being available on the website.
- Broadcasts of these witnesses' evidence may encourage participation in the Inquiry by relevant witnesses who have not yet come forward.

There are, however, also a number of significant factors which weigh against the request being granted:

- Whilst section 18 of the Inquiries Act 2005 might be said to promote the principle of open justice, it does not require me to facilitate the broadcasting of evidence. The provisions of sec 18(1)(a) are limited to requiring me to take reasonable steps to enable the public to attend inquiry hearings or to see and hear a simultaneous transmission of proceedings within the Inquiry premises.
- The Inquiry's hearing space is situated very close to a transport hub. It is easy to find and there is plenty of public seating. The press attend on most days and the Inquiry's hearings are being reported via many news outlets (online and hard copy) on an almost daily basis. There are also quite frequent television and radio news items. Media coverage is, accordingly, already widespread.
- The witnesses do not consent to being filmed by the BBC during their evidence. They are alarmed at the prospect. If permitted, it could impede their ability to give evidence.
- The anxiety that these two witnesses have about the prospect of being filmed is exacerbated because of the BBC having breached one of my restriction orders in a radio broadcast in December 2017, by naming an individual nun who was entitled to anonymity. Any permitted filming would be subject to conditions imposed, for instance, to provide appropriate protections for the witnesses and it is understandable that they may, in the circumstances, be more anxious about the risk of such conditions being breached.

- There is a very real risk that if I were to permit the filming of only these two witnesses it would seem that they were being unfairly targeted. No evidence given by applicants – a number of whom waived their right to anonymity – has been filmed during their evidence. Nor will any other witnesses from the Order – some of whom have also waived anonymity and not all of whom are facing allegations - have been filmed during their evidence.
- Individuals who have relevant evidence to give may be dissuaded from contacting the Inquiry or from further engaging with the Inquiry on account of an assumption that if this evidence is filmed then that may happen to them if they give evidence in the future. That would be an erroneous assumption but the risk of it being made is obvious.
- Identities which are protected by restriction orders may be disclosed in the course of oral evidence; where that happens, there are standing instructions from me that they cannot be disclosed outside the hearing room. Whilst I imagine that it would not be impossible to take steps to redact any such disclosure from the recording, the process for doing so would not be controlled by the Inquiry, it would be an added complication and it would increase the risk of the restriction order being breached.
- I am advised that the current feeling is that there is a serious and respectful atmosphere within the hearing room. That is right and proper. It is of critical importance that that be maintained. Were I to permit media filming, that atmosphere could easily be jeopardised.
- If the BBC's application is granted, the potential impact on community safety would be such as to require Police Scotland to carry out a rapid assessment of the nature of any increased risks and formulate specific safety plans to provide appropriate protection for the two witnesses; this has resourcing implications which they would require to accommodate at short notice.

Having carefully considered all these factors, I have concluded that the weight to be given to this second set of factors clearly outweighs those which can be relied on in support of the application. It is for these reasons that I have decided not to accede to the BBC's request.

The Rt Hon Lady Smith

Last updated 19 January 2018