COUNSEL TO THE INQUIRY'S SUPPLEMENTARY NOTE ON THE LEGAL TESTS APPLICABLE TO APPLICATIONS FOR RESTRICTION ORDERS

Introduction

1. Since circulating our Note on the Legal Tests Applicable to Applications for Restriction Orders dated 29 January 2016, we have had the benefit of sight of the legal submissions made on behalf of various core participants and on behalf of a number of media organisations. There are a number of issues raised in those submissions which we now explore further. Before doing so we observe that the differences between the core participants as to the correct legal tests under section 19 of the Inquiries Act 2005 are much narrower than the differences between them as to the results which they contend should flow from the application of those tests.

Applications for restriction orders under s.19(3)(a) based on rights conferred by the European Convention of Human Rights read with the Human Rights Act

Article 2 of the Convention

2. We noted at paragraph 53 of our January Note that in *Re Officer L* the House of Lords left open the question whether, in the event of there being a real and immediate risk to life, the interests of openness could be taken into account when deciding what measures the Inquiry would reasonably be required to take in order to protect the right to life. Lord Carswell did, however, refer to the case of *In Re Donaghy's Application* [2002] NICA 25, which we also discussed in our January Note which affords support for the proposition that the interests of openness can be taken into account (see our Note at paragraphs 82 – 84).

3. Further support for this proposition can be found, albeit in a very different context, in the case of *Rabone v Pennine Care NHS Foundation Trust* [2012] 2 AC 72. The case concerned the duty owed by medical professionals to a vulnerable adult who was at risk of suicide. At paragraph 104, Lady Hale stated:

"*104. The cross reference to Osman indicates that the operational duties under both article 2 and article 3 are similar if not identical. The State does have a positive obligation to protect children and vulnerable adults from the real and immediate risk of serious abuse or threats to their lives of which the authorities are or ought to be aware and which it is within their power to prevent. Whether they are in breach of this obligation will depend upon the nature and degree of the risk and what, in the light of the many relevant considerations, the authorities might reasonably have been expected to do to prevent it. This is not only a question of not expecting too much of hard-pressed authorities with many other demands upon their resources. It is also a question of proportionality and respecting the rights of others, including the rights of those who require to be protected. The court acknowledged in Keenan that restraints would inevitably be placed upon the preventive measures available in the context of police activity by the guarantees in article 5 and 8 and also that "the prison authorities, similarly must discharge their duties in a manner compatible with the rights and freedoms of the individual concerned" (para 91)."* (Emphasis added)

Article 8 of the Convention

4. A number of the submissions raise the need to consider making restriction orders in order to prevent breaches of privacy. These include the submission that when considering documents the Inquiry should afford persons referred to in the document the opportunity to view the document and make submissions on it before it is circulated: see the submissions on behalf of the non-state, non-police core participants at paragraph 82. We accept that there will be some instances in which that will be appropriate and a mechanism to achieve this end has been written into paragraph 15 of the Draft Redaction Protocol. However, it is not envisaged that every reference to a third party in a document will give rise to the need to consult the third party affected. In many cases it will be obvious either that the reference is relevant and that it will be proportionate to leave it unredacted or that it must be redacted as a disproportionate interference with the subject's privacy. Whether to refer a document to a third party for submissions will be a matter of judgment for the Inquiry. Referring all documents which refer to a third party for that third party's submissions on privacy redactions would be administratively unworkable. It would become in itself a reason to consider restricted disclosure of documents and private hearings for the reasons articulated in s.19(4)(d) of the 2005 Act (delay, efficiency, effectiveness and cost). We wish to avoid such an outcome and will strive to do so.

Common law duty of fairness

5. We note that all those who have made written submissions appear to accept that *Re Officer L* correctly states the common law duty of fairness and a permissible approach to dealing with cases in which both Article 2 of the Convention and the common law duty of fairness fall to be considered.

Public Interest

6. A number of issues arise in connection with the balancing of the public interest, whether in the context of an application for a restriction order under s.19(3)(a) of the 2005 Act, relying upon the privilege against self incrimination, or an application made under the public interest limb of s.19(3)(b).

Relevant Public Interest Factors

7. We append to this Note a provisional list of the public interest factors which are likely to arise in relation to public interest applications. We deliberately describe the list as provisional because we consider that it will be only when considering a specific application that all of the factors applicable to a particular application will be capable of conclusive identification. We must also emphasise that it is the weight to be attached to the relevant factors and not the number of public interest factors for or against a particular restriction which will be decisive.

8. The factors are shortly stated in our list. Ms Kaufmann QC and Ms Brander in their submissions have already carefully analysed the public interest in openness. To this we would add reference to the discussion in the cases of *R (Wagstaff) v Secretary of State for Health* [2001] 1 WLR 292 and *R (Persey) v Environment Secretary* [2003] QB 794 as to the benefits of open evidence. Factors stated in *Wagstaff* to favour an open inquiry included (at 319) (i) the fact that it has often been considered appropriate to do so where a major disaster has occurred; (ii) that there are positive known advantages to be gained from taking evidence in public, namely that witnesses are less likely to exaggerate or attempt to pass on responsibility; that information becomes available as a result of others reading or hearing what witnesses have said; that there is a perception of open dealing which helps to restore confidence; and that there is no significant risk of leaks leading to distorted reporting; (iii) factors relating to the wishes and expectations of relatives and friends of the deceased; (iv) *"what really amounts to a presumption that [a public inquiry] will proceed in public unless there are persuasive reasons for taking some other course"*; (v)

the fact that any report following public hearings would command greater public confidence.

9. In setting out the factors in favour of a private inquiry in *Persey* (essentially the less confrontational, shorter, cheaper and more constructive process that would result), Simon Brown LJ added:

> *"That, of course, is not to say that the benefits are all one way and that there are no advantages to be gained from holding an inquiry in public. Manifestly there are. Most obviously perhaps in satisfying the sceptical that lessons really have been learnt. Each process has its advantages and disadvantages and in any particular case a judgment has to be made as to where the balance of advantage lies."*

10. Other factors cited, referring particularly to comments in the Report of the Public Inquiry into children's heart surgery at the Bristol Royal Infirmary (Cm 5207(I)) (see paragraph 29) included *"communal catharsis"*, an *"opportunity for those in authority to be held to account"*, a *"public venting of anger, distress and frustration"*, and a *"public stage"*.

11. Mr Squires QC and Mr Stoates in their written submission emphasise the gravity of the allegations which relate to the elected representative core participants and which the Inquiry will be investigating. Those allegations are indeed grave. We respectfully agree with them that it is important to investigate those issues as publicly as possible. It is also important to recognise that theirs are not the only matters of fundamental importance which the Inquiry will be investigating. There are many others. Investigating the impact of undercover policing on protest movements calls into question whether basic democratic freedoms have been undermined. Investigating the impact of undercover policing on people from ethnic minorities gives rise, once again, in a public inquiry, to profoundly important questions of racial equality. The particular adverse impact of undercover policing on women who were the subject of deceitful relationships means that attitudes towards women in the context of undercover policing also fall to be examined. In all of these cases the more publicly police conduct is examined the better.

12. A specific issue which arises from the written submission of the Metropolitan Police Service is the weight which should be accorded in principle to assessments of harm or damage put forward in support of applications for restriction orders on public interest grounds. In the context of ministerial public interest immunity certificates and especially in the context of national security it is right that the courts have made clear that they will be slow to reject the

assessment of the Secretary of State. That is because the executive is much better placed to make the assessment. However, the courts have also made clear that nevertheless the ultimate decision remains that of the Court. See, for example, *Foreign Secretary v Assistant Deputy Coroner for Inner North London* [2013] EWHC 3724 (Admin), citing at paragraphs 29 - 36 *R(Binyam Mohammed) v Secretary of State for Foreign and Commonwealth Affairs* [2011] QB 218 at paragraph 132 and *Conway v Rimmer* [1968] AC 910 at page 943.

13. We submit that evidence such as the Cabinet Office statement outlining the development of the neither confirm nor deny policy, which is referred to by Mr Hall QC in his written submissions on this issue (see VII.5 – VII.13 of his submissions), is not analogous to a personal damage assessment made by the Secretary of State in relation to specific information which is arrived at in the course of making a public interest immunity certificate. In the latter case the Secretary of State personally assesses the material in question and has the benefit of both legal advice and advice from subject matter experts.

14. Appropriate weight will need to be given in due course to damage assessments advanced by those seeking restriction orders on public interest immunity grounds. Regard should be had to the quality of the evidence based, amongst other things, on the expertise of the source and the thoroughness of the assessment.

15. We agree with Mr O'Connor's submission to the effect that Parliament has deliberately legislated in the 2005 Act to provide the option of closed hearings. There are circumstances where it may be better to have a closed hearing than not to be able to hear the evidence at all. This was the benefit which converting the Litvinenko Inquest into a statutory public inquiry delivered. However, we remain of the view that the scheme of the 2005 Act gives rise to a presumption of openness. We note that the statutory presumption of openness is consistent with the conclusion of the majority of the Supreme Court Justices in *Kennedy* who held that there is at common law a presumption of openness in public inquiries: Lord Mance at paragraph 47 and Lord Toulson at paragraphs 124 – 125 and 128, Lords Neuberger, Clarke and Sumption agreeing.

Investigative Obligations under Articles 3 and/or 8 of the European Convention on Human Rights

16. It has long been recognised that Article 3 of the Convention includes an investigative obligation. The investigative obligation arises where there has been a violation or arguable violation of Article 3.

17. The purpose of an investigation under Article 3 is to *"be capable of leading to the identification and punishment of those responsible. If this were not the case, the general legal prohibition of torture and inhuman and degrading treatment and punishment, despite its fundamental importance, would be ineffective in practice and it would be possible in some cases for agents of the State to abuse the rights of those within their control with virtual impunity."* (see, inter alia, *Assenov v Bulgaria* (1999) 28 EHRR 652 at [102].)

18. The purposes of the analogous duty to investigate under Article 2 in the context of an inquest were described by the court in *R(Amin) v Secretary of State for the Home Department* [2004] 1 AC 653 at paragraph 31 as being:

> *"...to ensure so far as possible that the full facts are brought to light; that culpable and discreditable conduct is exposed and brought to public notice; that suspicion of deliberate wrongdoing (if unjustified) is allayed; that dangerous practices and procedures are rectified; and that those who have lost their relative may at least have the satisfaction of knowing that lessons learned from his death may save the lives of others."*

19. The requirements of an Article 3 investigation have been explored in numerous cases, including *Assenov v Bulgaria* (cited above), *Milanović v Serbia (2010) 58 EHRR 33, Banks v United Kingdom* (2007) 45 EHRR SE2, *El-Masri v Former Yugoslav Republic of Macedonia* (2013) 57 EHRR 25 and *D v Commissioner of Police for the Metropolis* [2016] QB 161.

20. The degree of participation which must be afforded to victims of a violation of Article 3 is the extent necessary to safeguard their legitimate interests. The European Court of Human Rights said in *Anguelova v Bulgaria* (2004) 38 EHRR 31 at [140]:

> *"There must be a sufficient element of public scrutiny of the investigation or its results to secure accountability in practice as well as in theory, maintain public confidence in the authorities' adherence to the rule of law and prevent any appearance of collusion in or tolerance of unlawful acts. The degree of public scrutiny required may well vary from case to case. In all cases, however, the next- of- kin of the victim must be involved in the procedure to the extent necessary to safeguard his or her legitimate interests"*

21. This passage was cited with approval in *In the matter of an application by Officers C, D, H & R for Leave to Apply for Judicial Review* [2012] NICA 47 at [15], following which the court added (at the same paragraph):

"Issues of anonymity and screening can of course be material to whether this obligation is fulfilled but they are not decisive. In order to determine whether the Anguelova test is fulfilled, it is necessary to review all aspects of the preparation for the hearing, the mechanisms employed during the hearing to satisfy the obligation and the steps taken after the hearing if necessary. The manner in which the Coroner disseminates information during this inquisitorial process is but a part of the material to be considered."

22. The requirements of an Article 3 investigation operate on a 'sliding scale' (see *D v Commissioner of Police for the Metropolis* [2016] QB 161 at paragraph 45). At their highest they are very similar if not the same as the requirements of an Article 2 investigation. *Amin* (cited above) established that this includes the requirement that it be independent, effective, and must involve a sufficient element of public scrutiny.

23. In practice there are many examples of Article 2 and/or Article 3 compliant inquiries in which anonymity has been granted to witnesses. These include 2005 Act inquiries. For example the Baha Mousa Inquiry which was both an Article 2 and an Article 3 investigation.

24. Strasbourg case law expressly accepts that there may be cases in which the victims and the public cannot see all of the investigator's evidence: *Chahal v United Kingdom* (1996) 23 EHRR 413; *McCann and others v United Kingdom* (1996) 21 EHRR 97.

25. It is well settled that Article 8 of the Convention includes positive as well as negative duties. The positive duty under Article 8 can extend to a requirement to investigate a violation of Article 8: *Craxi v Italy* (2004) 38 EHRR 47 (breach occasioned by failure adequately to investigate the disclosure of personal information).

26. The positive duty under Article 8 can also involve a requirement to provide information: *Guerra v Italy* (1998) 26 EHRR 357 (breach occasioned by failure adequately to inform residents affected by environmental pollution of the risks which they faced).

27. The Chairman will need to ensure that his decisions on restriction orders comply with the obligations imposed by the Convention. However, we consider that in practice the investigative obligation is unlikely to make any difference to the substantive outcome of an application determined either under the duties of fairness, or as a result of balancing the competing public interests. After all,

striking a fair balance between competing interests also lies at the heart of the Convention.

Article 10 of the Convention and the Interests of the Media

28. Conflicting submissions are being advanced by core participants as to the circumstances in which Article 10 of the Convention (freedom of expression) will be engaged. We do not think that the position is straightforward or that the authorities are easily reconciled. Ultimately, we consider that whether Article 10 is engaged in relation to a particular application for a restriction order will be fact sensitive.

29. *Persey* is authority for the proposition that where an inquiry is held in private, Article 10 is not engaged. That case concerned the non-statutory inquiries which followed the 2001 outbreak of Foot and Mouth disease. The court dismissed a challenge to the lawfulness of the decision to hold those inquiries in private (in circumstances very different to those which apply to the Undercover Policing Inquiry). *R(Howard) v Secretary of State for Health* [2003] QB 830, referred to in the judgment of Scott Baker J and handed down on the same day, related to the decision to hold private inquiries into serious misconduct allegations against doctors, and is to the same effect.

30. The reasoning for the decision on Article 10 in *Persey* is consistent with the reasoning in a line of decisions of the European Court of Human Rights on the applicability of Article 10: *Leander v Sweden* (1987) 9 EHRR 433; *Gaskin v United Kingdom* (1989) 12 EHRR 36; *Guerra v Italy* (1998) 26 EHRR 357 and *Roche v United Kingdom* (2005) 42 EHRR 599, of which all but *Gaskin* were decisions of the Grand Chamber. It is also consistent with the analysis of the scope of Article 10 to which the majority of the Supreme Court Justices who considered it in *Kennedy v Charity Commissioner* [2015] AC 455 subscribed (Lord Mance, with whom Lord Neuberger, Lord Clarke, Lord Toulson and Lord Sumption agreed, Lord Wilson and Lord Carnwath dissenting).

31. Whilst these passages are obiter dicta they are clearly of the highest persuasive authority. Put shortly, Article 10 is engaged where one person wishes to communicate with another and that other wishes to receive the information. However, it does not confer a free standing right to information from a public authority which does not wish to communicate the information in question.

32. Although *A v Independent News & Media* [2010] 1 WLR 2262 to which Mr Millar QC refers was not expressly overruled by *Kennedy* the comments in it upon

which Mr Millar relies are not consistent with the reasoning in *Kennedy* and are themselves obiter dicta (see paragraph 22 and 31 – 45). Moreover, *Kennedy* is supported by dicta in the earlier Supreme Court case of *Sugar v BBC* [2012] 1 WLR 439 per Lord Brown (at 94) with whom Lord Mance agreed (at 113).

33. We cannot reconcile the apparent acceptance by the Administrative Court in *R (Associated Newspapers Ltd) v Leveson* [2012] ACD 23; [2012] EWHC 57 that Article 10 applied with the reasoning in *Kennedy*. However, we note that the reference to Article 10 in the Leveson case was addressed (see paragraph 36) simply to point out that it made no difference to the outcome of the case which turned on whether the decision challenged complied with the statutory duty of fairness.

34. Applying the principles enunciated by the Grand Chambers of the European Court of Human Rights to two straightforward examples. First, if the Chairman decides not to publish evidence at all, then Article 10 is not engaged. However, if he chooses to make evidence public but then restricts its reporting, Article 10 will be engaged because the wish to communicate what has been made public to a wider audience will be interfered with by the restricted reporting order.

35. Article 10 is a qualified right. Even where it is engaged interference with the right may be justified. All restriction orders will need to be justified in any event, whether or not Article 10 is engaged. In an Inquiry in which there is clearly a need to hear as much evidence as possible openly, we doubt whether in practice Article 10 is likely to make a difference to the outcome of applications for restriction orders. Competing interests will be balanced in any event. In this regard we note that in both *R (Associated Newspapers Ltd) v Leveson* and in *In the matter of an application by Officers C, D, H & R for Leave to Apply for Judicial Review* (cited above) consideration of Article 10 made no difference to the outcome.

36. None of the above is intended in any way to diminish the importance of the ability of the press to report the evidence heard by the Inquiry. Press scrutiny is undoubtedly an important element of public accountability.

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