

IN THE MATTER OF THE INQUIRIES ACT 2005
AND IN THE MATTER OF THE INQUIRY RULES 2006

THE UNDERCOVER POLICING INQUIRY

**OPEN APPLICATION ON BEHALF OF N123 FOR
RESTRICTION ORDERS**

Introduction

1. N123 was an undercover police officer attached to the MPS SDS. N123 applies to the Inquiry Chairman for restriction orders in the terms set out in the attached draft order.
2. In support of *his/her* closed application is (i) an objective risk assessment prepared by DI X of the MPS, [REDACTED] [REDACTED] ('the risk assessment'); and (ii) a short statement prepared by N58 setting out relevant personal information, including N58's 'subjective' fears should *his/her* identity be disclosed. Both documents are *gisted* and attached in support of this individual open application.
3. This individual open application organises the information contained in both the above documents so as to fit the rubric of the generic open application, and makes limited submissions on the basis of that information, applying the relevant legal test. It is not intended as a skeleton argument.

Background

4. The history of N123's deployment is set out at ¶ 1 to ¶ 4 of the risk assessment.¹ N123 was tasked to infiltrate various groups [REDACTED]
[REDACTED]
[REDACTED]
[REDACTED]

¹ The paragraph references in this document are to the paragraph numbers in the supporting material attached to the closed application.

[REDACTED]

5. [REDACTED]

6. N123 has neither self-disclosed, nor been officially confirmed by the MPS or any other relevant body or court as being an undercover police officer.

7. N123 submits that the restriction orders *s/he* applies for are required for the reasons set out in the open and closed applications.

8. To state *his/her* position shortly, N123 has never volunteered information about either *his/her* identity or deployment to anyone outside of Special Branch, or to a person authorised to receive such information by *his/her* supervising officers.

9. [REDACTED]

10. To deny N123 the continued protection of anonymity *s/he* has been afforded for [REDACTED] years would [REDACTED] increase the very real risk to *his/her* safety and the safety of *his/her* family and others identified in this document and the supporting material. It would compromise the measures already taken by N123 individually and by the MPS to mitigate that risk [¶ 8.1 of the individual risk assessment].

[REDACTED] Moreover, to give evidence in open session would increase the risk that information that is currently not in the public domain would be revealed which might in turn increase the risks to others, including those who provided cover or support to N123 and

conceivably, other undercover officers [REDACTED]
[REDACTED]

[REDACTED]
[REDACTED]
[REDACTED]
[REDACTED]
[REDACTED]
[REDACTED]
[REDACTED]
[REDACTED]

N123's application for restriction orders under section 19(3)(a) of the 2005 Act

Convention Rights

13. N123 relies on those parts of the generic open application that set out the basis upon which this closed application is made. In short, N123 submits that the Chairman to the Inquiry is required by section 19(3)(a) of the 2005 Act to give effect to N123's ECHR rights.

Article 2

14. As set out in the generic open application at ¶ 12 and ¶ 38, N123 does not submit that at the time of making this application there is a sufficient, objectively justified basis for finding that there is a real and immediate risk to *his/her* life so as to engage Article 2. Nonetheless, given what is described in the risk assessment (at ¶ 6.7), namely a medium risk of physical assault to N123 by former members or associates [REDACTED]
[REDACTED], it is respectfully submitted that this issue should be kept under careful review. It will be noted from both the individual risk assessment ¶ 6.4 and N123's own statement at page 1 ¶ 2, the links that exist [REDACTED]
[REDACTED]

Article 3

15. N123 submits that on the basis of the risk assessment, there is an objectively well-founded basis for concluding that there is a real and immediate risk to N123 and *his/her* family of physical harm. The existence of that risk is demonstrated by the following factors:

- (1) [REDACTED]
[REDACTED]
[REDACTED]. Evidence of the physical risk to N123 from named individuals is set out in the risk assessment [¶ 6.9].
- (2) N123's own 'subjective' concerns stem from the lack of restraint in committing acts of violence that was demonstrated by the groups *s/he* infiltrated. Subjective concerns are not wholly irrelevant to the exercise of deciding whether a real and immediate risk is present [¶ 33 of the generic open application].
- (3) This information is confirmed by the risk assessment at ¶ 6.2 to 6.9.

Article 8

16. There cannot realistically be any doubt that Article 8 is engaged in N123's case. Refusal of the restriction orders and the subsequent disclosure of N123's identity would result in an interference with *his/her* Article 8 rights [¶ 53(1) of the open application].
17. The risk of action being directed against N123 likely to interfere with private and family life is assessed in the individual risk assessment as high. [REDACTED]
[REDACTED].
18. Public and official confirmation of N123's deployment and role in the event that *his/her* application for restriction orders is refused is likely to lead to the kind of intrusion suffered by Bob Lambert, one of the two SDS officers whose identity was confirmed in the *DIL* litigation [see ¶ 6.12 of the individual risk assessment].

19. The risk assessment identifies the risk to N123 of suffering psychological harm as high ¶ 6.13 and 8.4. N123's subjective concerns are set out in *his/her* statement at page 3 ¶2.
20. Although properly a matter for legal submission in due course, N123 would submit that there is no necessity for the serious and inevitable interference in *his/her* private life – in other words, it is not necessary for N123 to give *his/her* evidence in open session, or for *his/her* identity be disclosed [cf. ¶ 53(2) of the open application]. The “requisite necessity” is not established for the purposes of Article 8.2 in inquisitorial as opposed to adversarial proceedings where the Article 6 rights of others are at issue: see Counsel's Note to the Inquiry ¶ 68 quoting from the judgment of Lord Justice Girvan in *Re A and others' Application for Judicial Review (Nelson Witnesses)* [2009] NICA 6 at ¶ 33]. N123 would submit that the interference would not be proportionate in circumstances where *his/her* evidence could be given in full in closed session to the Chairman of the Inquiry who can record, report and make recommendation on N123's evidence in a manner that is consistent with his public duty and the Inquiry's terms of reference.

Common law/section 17 of the 2005 Act

21. Additionally, N123 contends that the common law principles of fairness require the Chairman to the Inquiry to grant the application for restriction orders made, in accordance with section 17 and 19(3)(a) of the 2005 Act.
22. To avoid repetition, N123 relies on those parts of the closed application as set out above, and in the generic open application at ¶ 66 to 70 that are relevant to the Chairman's assessment of whether, as N123 submits, fairness requires that *s/he* give evidence in closed session and continues to be afforded the protection of anonymity. In particular, N123 relies on the MPS risk assessment and *his/her* own statement which *s/he* submits establish an objectively well-founded basis that there would be an medium risk of physical retribution should *his/her* identity be disclosed, together with evidence of *his/her* own subjective fears, which are based on objectively established information [cf. ¶ 63 of the generic open application].

23. Additionally, N123 relies on the assurances *s/he* was given by supervising officers that *his/her* anonymity would be protected. The MPS Risk Assessment Briefing Note refers to the nature of these assurances at ¶ 1.5 and ¶ 1.7; the individual risk assessment for N123 refers to the assurances given to N123 and other SDS officers at ¶ 4.4-4.5. N123 sets this out at page 2 ¶ 2 of *his/her* statement.
24. The circumstances of N123's case, in common with other SDS officers, are capable of being distinguished from other public servants, police officers and soldiers, who do not conduct their public duties using an assumed, fictitious identity. They are not routinely afforded the protection of anonymity as a necessary precondition of their employment in a particular role. They are not given assurances that their anonymity will be maintained for their lifetimes, nor that they must not reveal their status or identity to anyone whilst engaged in their performance of those public duties.
25. It is on the basis of such assurances of confidence that N123 (and other SDS undercover officers) carried out their challenging, and on occasion, hazardous duties, an example of which can be found in N123's individual risk assessment at ¶ 4.7. It is also the basis upon which they organised their private and family lives. N123 legitimately expects that *his/her* anonymity will continue to be protected and relies on those passages of Counsel to the Inquiry's Note where relevant authority is cited in support of this proposition [¶ 89]. As counsel for the MPS put it in their open submissions on restriction orders: "it is therefore entirely accurate to characterise the decision of the Inquiry as not whether to grant protection, but whether to take it away" [¶ IV.2]
26. N123 respectfully submits that the assurances given are a compelling feature of *his/her* case, which should be afforded appropriate recognition in the exercise in deciding where the balance of fairness lies.

N123's application for restriction orders under section 19(3)(b) of the 2005 Act

Risk of harm or damage

27. In support of this head of application, N123 pleads and relies on those matters and supporting material set out at ¶ 15 and ¶ 23 of this document.

Conditions of confidentiality

28. In support of this head of application, N123 pleads and relies on those matters and supporting material set out at ¶ 24 to ¶ 27 of this document.

29. Additionally, N123 adopts the submissions made by the MPS in their submissions to the Inquiry on restriction orders set out at ¶ V.32 to ¶ V.39.

Conclusion

30. N123 respectfully submits that should the restriction orders *s/he* applies for be refused there will arise a real and immediate risk of harm to *him/her* and *his/her* family; that there will be an unjustified and disproportionate interference with *his/her* private life and the private life of *his/her* family. Further, the balance of fairness demands that *s/he* be afforded the protections asked for.

SLATER & GORDON LLP

14 March 2016