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

**THE UNDERCOVER POLICING INQUIRY**

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# (1) APPLICATION ON BEHALF OF N15, N16, N123, N26, N519, N58 AND N81 FOR RESTRICTION ORDERS
# (2) OPEN NOTE ON LEGAL TEST TO BE APPLIED

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## Summary of the Application

1. Core Participants N15, N16, N123, N26, N519, N58 and N81, ('the applicants') apply to the Chairman to the Inquiry for restriction orders sufficient to protect their identities from disclosure. For reasons which are set out in this document and the 'closed' supporting material, the applicants' applications are for (i) orders that their evidence be given in closed session and (ii) anonymity orders.

2. As will be apparent from this document and the 'closed' supporting material, anonymity orders alone, if granted, would not suffice to protect the applicants' identities from entering the public domain. Accordingly, the applicants invite the Chairman to the Inquiry to grant orders restricting the access of the public, other Core Participants and the press to those parts of the hearing at which the applicants give their evidence. As a necessary adjunct to this Application, the applicants' also seek a restriction order prohibiting disclosure of the 'closed' supporting material that accompanies it.

3. Additionally, the applicants seek anonymity orders protecting their identity by such means as the Chairman considers are required, including: (i) restricting disclosure of the identity of the applicants by the use of ciphers in open evidence, including documentary evidence; (ii) the redaction of any personal or other information that could lead to the identification of the applicants from all open evidence and

documents considered by the Inquiry; and (iii) restricting the disclosure of any image or any other information that could lead to the identification of the applicants.

4. The applications are made under section 19(3)(a) and 19(3)(b) of the Inquiries Act 2005 [cf. Counsel to the Inquiry's Note on the Legal Tests Applicable to Applications for Restriction Orders, ¶ 8].

5. In their applications under section 19(3)(a) of the 2005 Act, the applicants submit that the terms of the restriction orders they seek are required by common law principles of fairness that in appropriate circumstances, operate so as to protect the identities of witnesses or participants in legal proceedings.

6. Additionally, the applicants' submit that the Inquiry is required by section 19(3)(a) to give effect to the applicants' ECHR rights. In particular, the applicants contend, on the basis of the material contained in their individual 'closed' applications, that there is a real and immediate risk that they would suffer ill-treatment contrary to Article 3 were the restriction orders sought not granted. Further, the applicants contend that there would be an unjustified and disproportionate interference in their Article 8 rights were the restriction orders sought not granted.

7. In their applications under section 19(3)(b) of the 2005 Act, the applicants submit that the terms of the restriction orders they seek are conducive to the inquiry fulfilling its terms of reference, and are necessary in the public interest, having regard in particular to (i) the risk of harm to the applicants that could be avoided by granting the restriction applied for; (ii) the assurances given to the applicants by the Metropolitan Police Service ('MPS') prior to their deployment as undercover officers that their identities would never be revealed; (iii) the hindrance that might otherwise be caused to the Inquiry were the applications to be refused.

**Structure of the Application**

8. The applications are in two parts: this document is submitted to the Inquiry in 'open' form. There is nothing in the document which is capable of identifying the applicants.

9. In contrast, there are seven individual applications with supporting material that are submitted in 'closed' form. The seven individual 'closed' applications contain personal information about the applicants and their respective deployments which would, if disclosed, be likely to lead to their identification. It follows that to disclose or disseminate the seven 'closed' applications would be in breach of the Chairman to the Inquiry's order of 21 October 2015 granting provisional anonymity to the applicants and defeat the purpose of this Application.

10. This document sets out a brief summary of the features common to all seven closed applications which engage the requirement to make orders protecting the identity of the applicants pursuant to section 19 of the 2005 Act.

11. The document continues by providing a generic overview of the relevant legal test to be applied by the Chairman to the Inquiry. With one possible exception, it does not differ in substance from the position as set out in the Counsel to the Inquiry's Note. This document is not intended to stand as the applicants' skeleton argument, as such a document has not yet been requested by the Chairman to the Inquiry. Instead, it poses a number of questions arising from relevant authority, in numbered paragraphs. The closed applications respond to those questions utilising the information contained in those applications to advance the application on behalf of each applicant.

12. This document follows broadly the structure of the Counsel to the Inquiry's Note. Whilst it will be apparent from the summary of the application above that the applicants do not submit that at the time of making this application there is sufficient evidence, information or intelligence of a 'real and immediate' threat to their lives were their identities to be disclosed, nonetheless a summary of the relevant legal test to be applied should circumstances change is contained in this document.

13. The closed applications contain two documents which are relevant to all seven applications for restriction orders: (i) a "Risk Assessment Briefing Note" prepared by the MPS 'Commissioner's Public Inquiry Team'; (ii) a document entitled "The 'Mosaic Effect' and the potential risk to officers" prepared by the MPS 'Commissioner's Public Inquiry Team'.

14. The closed applications also contain a 'closed application for a restriction order' for each of the applicants, which sets out the grounds of the applications with reference to the open application document, together with a 'risk assessment' for each of the applicants also prepared by the MPS, and a witness statement from the applicant.

**Features Common to all seven applicants**

15. There are a number of features of each applicants' personal circumstances and individual deployments the details of which are contained in the closed applications and supporting material that are relevant to their applications for restriction orders. These common features are relevant to both the open and closed parts of the application, and are set out here in order that the general approach of the applicants to some of the issues that arise in this Application can be understood.

    (1) All seven applicants were or are serving police officers.

    (2) All seven applicants were attached to the Special Demonstration Squad ('SDS') which was at the time, a unit within Special Branch, or the National Public Order Intelligence Unit ('NPOIU').

    (3) All seven applicants were given explicit assurances by a supervising officer(s) prior to their deployment that their identities would not be revealed to anyone. Accordingly all seven applicants agreed to their deployment believing that their identities would not be revealed in any circumstances.

    (4) All seven applicants were deployed as undercover officers in a variety of groups who were regarded as legitimate targets for intelligence gathering activities.

16. In giving evidence, it is reasonable to anticipate that the applicants might be obliged to disclose in public (among other things): (i) the time and place of their deployment; (ii) the identity of the group infiltrated by them; (iii) their undercover identity and 'legend'; (iv) those within in the group that they developed relationships with and provided intelligence on; (v) the activities that they engaged in whilst undercover; (vi) when they left the group and the cover story used by them to justify their departure.

17. That the applicants give such evidence in open session, albeit anonymously, would not preclude those within groups infiltrated by the applicants from identifying that an individual formerly known to them in that group was, in fact, an undercover police officer. Many of the groups infiltrated by the applicants were organised by a relatively small number of individuals. Given that the task of SDS and NPOIU officers was to obtain intelligence on the organisers of such groups, it is likely that the applicants will be readily identifiable.

18. The fact or circumstances of an undercover officer's deployment is highly relevant to the process of piecing together disparate sources of information in an attempt to discover and disclose that officer's identity. Several undercover research groups, readily identified by their websites and known to the Inquiry, plainly regard it as their primary purpose to try and identify former undercover police officers.

19. Notwithstanding the penal notices that would no doubt be attached to any anonymity orders made by the Chairman, it is a reality of the 'internet age' that once information is in the public domain, it is virtually impossible to remove it. The prospect of proceedings for contempt will no doubt provide a reasonable safeguard for all but the most committed individual, but cannot guarantee that the exercise of assembling publicly available information about the deployment of a hitherto unknown undercover officer in order to reveal his or her true identity will not take place.

20. It is for these reasons, as developed in the closed applications, that the applicants submit that their evidence should be given in closed session.

**Legal principles underpinning the Application**

21. For clarity, the term 'restriction' used here is a broad term referring to a number of measures that this Inquiry could impose, including restricting public access during a particular witness' evidence, prohibiting publication of certain information, implementing measures to grant anonymity to a witness or allowing a witness to give evidence from behind a screen. The word 'anonymity' is a narrower term, referring to a combination of measures put in place to ensure the identity of a witness is protected; usually this involves the withholding of the witness' name and other identifying

details from all except nominated individuals, the use of a pseudonym, the use of screening and a prohibition on asking questions that may identify the witness.

22. An order granting anonymity is a form of restriction order. The Inquiry has the power to grant restriction orders under section 19(2)(b) Inquiries Act 2005.

23. As a public body, in exercising that power, the Inquiry must not act in a way that is incompatible with any right of the European Convention for the Protection of Human Rights and Fundamental Freedoms 1950 ('ECHR') (as per section 6 Human Rights Act 1998). Further, the Inquiry is bound to have regard to the common law duty of fairness.

24. Lord Carswell's judgment in *In re Officer L* [2007] 1 WLR 2135, arising from the Robert Hamill Inquiry, provides a largely comprehensive account of the principles to be applied to the question of anonymity and affords much of the basis for the legal analysis contained in this document.

**Applicable principles to an application under section 19(3)(a)**

25. At the broadest level, there are two grounds upon which a restriction order that grants anonymity is required by law:

    (1) In order to give effect to an individual's rights under the ECHR; and

    (2) Where it is required by the common law duty of fairness.

26. Applications under the ECHR are usually founded upon Articles 2, 3 or 8:

    (1) An order may be necessary under Articles 2 or 3 because the applicant would face a 'real and immediate' risk to life, or a risk of serious injury, if they were to give evidence without the benefit of anonymity; and

    (2) An order may be necessary under Article 8 because the decision to require the witness to give evidence without the benefit of anonymity or the use of

screens would be an unjustifiable or disproportionate interference with their personal life.

27. Applications considered under the common law duty of fairness require the Inquiry to conduct a balancing exercise of the factors tending both for and against anonymity.

28. These submissions will take each of these grounds in turn, beginning with Articles 2 and 3, before addressing arguments under Article 8 and concluding with a discussion of the factors relevant to the common law duty.

**Article 2**

29. Article 2 of the ECHR provides that:

> *(1) Everyone's right to life shall be protected by law. No one shall be deprived of his life intentionally save in the execution of a sentence of a court following his conviction of a crime for which this penalty is provided by law...*

30. Article 2 should be the Inquiry's starting point. If giving evidence absent the protection of anonymity would pose a risk to a witness' life such that Article 2 is engaged, the grounds for anonymity will be made out and that will conclude the exercise (*In re Officer L* at ¶ 29). Only if this ground is not made out must the Inquiry turn to examine the application for restriction orders under other ECHR protections and the common law.

31. It is well established that Article 2 encompasses a positive obligation upon the state to protect the right to life:

> The court notes that the first sentence of article 2(1) enjoins the state not only to refrain from the intentional and unlawful taking of life, but also to take appropriate steps to safeguard the lives of those within its jurisdiction... It is thus accepted by those appearing before the court that article 2 of the Convention may also imply in certain well-defined circumstances a positive obligation on the authorities to take preventive operational measures to protect an individual whose life is at risk from the criminal acts of another individual.

*Osman v United Kingdom* (2000) 29 EHHR 245, at ¶ 115

32. This duty is not all-encompassing; there are two notable constraints. First, to engage the state's duty, the risk to life must be "real and immediate" (*Osman* at ¶ 116; *In re Officer L* at ¶ 20). This is a high threshold to reach (*In re Officer L* at ¶ 20). As Weatherup J in *In re W's Application* [2004] NIQB 67 at ¶ 17 explained:

> A real risk is one that is objectively verified and an immediate risk is one that is present and continuing.

33. The risk to life considered in relation to Article 2 must therefore be assessed in light of objective evidence and is not based on the subjective fears of the witness. However, a subjective fear is "not evidentially irrelevant as it may be a pointer towards a real and immediate risk" (*In re Officer L* at ¶ 20).

34. The second constraint upon the state's duty under Article 2 is the restricted scope of the obligation placed upon public bodies. State authorities need only take 'reasonable steps' to protect life:

> ...there is a reflection of the principle of proportionality, striking a fair balance between the general rights of the community and the personal rights of the individual, to be found in the degree of stringency imposed upon the state authorities in the level of precautions which they have to take to avoid being in breach of article 2. As the European Court of Human Rights stated in Osman v United Kingdom 29 EHRR 245, para 116, the applicant has to show that the authorities failed to do all that was reasonably to be expected of them to avoid the risk to life. The standard accordingly is based on reasonableness, which brings in consideration of the circumstances of the case, the ease or difficulty of taking precautions and the resources available.

*In re Officer L* at ¶ 21

35. In light of these constraints, applying Article 2 to the question of granting anonymity, Lord Carswell in *In re Officer L* at ¶ 24 and ¶ 25 laid out a two stage enquiry:

(1) Assessed objectively, if the applicant were to give evidence in the usual way, without the benefit of anonymity, would the applicant face a materially increased risk to their life?

(2) If so, would that increased risk amount to a real and immediate risk to life?

36. If both of these questions are answered in the affirmative, the Inquiry must ask whether there are any reasonable steps that can be taken to discharge the state's duty under Article 2. Any measure that reasonably seeks to protect a witness' Article 2 rights should be granted.

37. In these circumstances, the Inquiry "would ordinarily have little difficulty in determining that it would be reasonable in all the circumstances to give the witness a degree of anonymity" (*In re Officer L* at ¶ 29]). The fact that the right to freedom of expression would be infringed is not a ground for deeming an action unreasonable for the purposes of Article 2 (*Re Guardian News and Media Ltd* [2010] UKSC 1, at ¶ 27).

38. As is apparent from this document, at the time of making this application, the applicants do not argue that on the basis of the most recent risk assessments that there is a real and immediate risk to their life were they to give evidence to the Inquiry in the usual way. Accordingly the applicants do not argue that a restriction order under section 19(3)(a) is required by reason of a threat to their right to life in accordance with Article 2 of the ECHR.

**Article 3**

39. Article 3 of the ECHR provides that:

> *No one shall be subjected to torture or to inhuman or degrading treatment or punishment.*

40. Article 3 may afford a ground for granting anonymity in much the same way as Article 2. The same tests and considerations apply; the court must simply substitute considerations of risk to the applicant's life for risk of ill-treatment to the applicant.

41. Ill-treatment in this context means treatment that has reached a minimum level of severity taking all relevant circumstances into account, including the nature and

context of the treatment or punishment, the manner and method of its execution, its physical and mental effects and the age sex and state of health of the victim.

In summary, under this ground, the Inquiry must consider whether:

(1) Assessed objectively, if the applicant were to give evidence in the usual way without the benefit of the restrictions sought, would the applicant face a materially increased risk of ill-treatment?

(2) If so, would that increased risk amount to a real and immediate risk of ill-treatment?

42. If both of these questions are answered in the affirmative, the Inquiry must ask whether there are any reasonable steps that can be taken to discharge the state's duty under Article 3. Any measure that reasonably seeks to protect a witness' Article 3 rights should be granted.

43. For the reasons developed in the closed applications, three of the seven applicants submit that there is an objective basis for concluding that there would be a real and immediate risk of ill-treatment to them were their identities to be revealed at the Inquiry.

**Article 8**

44. Article 8 of the ECHR provides that:

> *(1) Everyone has the right to respect for his private and family life, his home and his correspondence.*
>
> *(2) There shall be no interference by a public authority with the exercise of this right except such as is in accordance with the law and is necessary in a democratic society in the interests of national security, public safety or the economic wellbeing of the country, for the prevention of disorder or crime, for the protection of health or morals, or for the protection of the rights and freedoms of others.*

45. The Inquiry must not act in such a way that would amount to a breach of Article 8. Further, there is a positive obligation on the Inquiry under Article 8 to ensure that other individuals, such as the press, respect an individual's private and family life:

> The Court reiterates that although the object of article 8 is essentially that of protecting the individual against arbitrary interference by the public authorities, it does not merely compel the State to abstain from such interference: in addition to this primarily negative undertaking, there may be positive obligations inherent in an effective respect for private or family life. These obligations may involve the adoption of measures designed to secure respect for private life even in the sphere of the relations of individuals between themselves...
>
> *Von Hannover v Germany* (2005) 40 EHRR 1 at 57

46. Within the broad scope of Article 8, an applicant requesting anonymity or other protective measures may express concerns that his private life would be impacted in a number of respects.

47. Article 8 clearly encompasses an individual's private and family life. Additionally, concerns relating to an individual's professional life may well come within the scope of Article 8:

> There appears, furthermore, to be no reason of principle why this understanding of the notion of 'private life' should be taken to exclude activities of a professional or business nature since it is, after all, in the course of their working lives that the majority of people have a significant, if not the greatest, opportunity of developing relationships with the outside world. This view is supported by the fact that, as was rightly pointed out by the Commission, it is not always possible to distinguish clearly which of an individual's activities form part of his professional or business life and which do not. Thus, especially in the case of a person exercising a liberal profession, his work in that context may form part and parcel of his life to such a degree that it becomes impossible to know in what capacity he is acting at a given moment of time.
>
> *Niemietz v Germany* (1993) 16 EHRR 97 at ¶ 29

48. A person's reputation may also fall within the scope of Article 8 rights:

> The Court considers that a person's reputation, even if that person is criticised in the context of a public debate, forms part of his or her personal

> identity and psychological integrity and therefore also falls within the scope of his or her "private life". Article 8 therefore applies.
>
> *Pfeifer v Austria* (2009) 48 EHRR 8 at ¶ 35

49. Lord Hope in *R (L) v Commissioner of Police in the Metropolis (Secretary of State for the Home Department and another intervening)* [2009] UKSC 3 at ¶ 24 summarised the scope of Article 8 as follows:

> ... it is sufficient to note that it has been recognised that respect for private life comprises, to a certain degree, the right to establish and develop relationships with other human beings: X v Iceland (1976) 5 DR 86; *Niemietz v Germany (1992) 16 EHRR 97*, para 29. Excluding a person from employment in her chosen field is liable to affect her ability to develop relationships with others, and the problems that this creates as regards the possibility of earning a living can have serious repercussions on the enjoyment of her private life: see Sidabras v Lithuania (2004) 42 EHRR 104, para 48. She is entitled also to have her good name and reputation protected: see Turek v Slovakia (2006) 44 EHRR 861, para 109. As Baroness Hale said in R (Wright) v Secretary of State for Health [2009] AC 739, para 36, the fact that a person has been excluded from employment is likely to get about and, if it does, the stigma will be considerable.

50. The applicants respectfully differ in their view from that expressed by Counsel to the Inquiry in their Note at ¶ 71. While the application of Article 8 might lead to the same outcome as would result from the application of the common law principles of fairness, the Inquiry should consider the impact of Article 8. In short, the applicants' would submit that Article 8 is 'applicable' or 'capable of being engaged' (see *L v Commissioner,* per Lord Hope at ¶ 23) by reason of the consequences that would follow their identities being made public, including but not limited to: (i) a disproportionate public intrusion into their private lives; (ii) disruption and harassment by activists; (iii) loss of reputation; (iv) loss of business or employment (both present and future).

51. The protections afforded by Article 8 extend to the applicants' families, including their partners, children and potentially more distant family members, many of whom will be equally affected should the restrictions sought not be granted and the applicants' identities enter the public domain.

52. If the giving of evidence by a witness without the restrictions sought would serve to interfere with that individual's Article 8 rights, either from the direct actions of the Inquiry itself or from third parties, that interference must be justifiable and proportionate in order to be permissible. If it is not justifiable or is disproportionate, the Inquiry must take steps to prevent interference with the individuals Article 8 rights.

53. In determining whether Article 8 affords a ground for granting anonymity, the Inquiry should therefore conduct the following three stage enquiry:

    (1) Would the refusal of anonymity and/or other restrictions and the subsequent disclosure of the applicant's identity result in an interference with the applicant's rights under Article 8?

    (2) If so, can that interference be justified as being necessary in a democratic society in the interests of the rights and freedoms of others?

    (3) If so, is the interference a proportionate measure in pursuit of that justification?

54. In this context, it is suggested that some of the relevant considerations in establishing whether there would be an interference in the applicant's Article 8 right are:

    (1) How does the applicant believe their private and/or family life, professional life and reputation would be impacted if their identity were to be revealed?

    (2) Upon what basis does the applicant have such fears? Is there any objective evidence to support their concerns?

    (3) Does the applicant's family and/or employer share the applicant's concerns?

    (4) In all of the circumstances, how great an impact would the described interference be upon the applicant's personal life and professional life?

55. For reasons that are set out at length in the closed applications, the applicants submit that the refusal of the restriction orders sought and the consequent disclosure of an applicant's identity would result in a disproportionate and unjustified interference with an applicant's rights under Article 8.

**The Common Law**

56. The common law of duty of fairness, including fairness to witnesses, can justify the granting of a restriction order, including the imposition of anonymity. The applicants agree with Counsel to the Inquiry (at ¶ 74 of the Note) that there is likely to be little difference in substance between the common law duty of fairness and the statutory duty expressed in section 17 of the 2005 Act.

57. In deciding whether fairness is best achieved in granting or refusing the applications for restriction orders sought, the Inquiry must embark on an extensive balancing exercise, weighing multiple competing factors for and against.

58. In the broadest sense, the Inquiry is asked to compare whether the greater unfairness results from identifying the witness publicly or restricting the openness of proceedings and the publication of the witness' identity.

59. This balancing exercise will entail different considerations to those of Article 2 and the other Convention rights (*In re Officer L* at ¶ 22). However, a claim that refusal of the protective measures sought would create or increase a risk to the life of the applicants is, of course, one factor that the court would need to consider carefully when examining the fairness of proceeding without granting anonymity (*R (on the application of A) v Lord Saville of Newdigate (Bloody Sunday Inquiry)* [2001] EWCA Civ 2048 at ¶ 8).

60. A significant factor to be considered under the common law test that is not considered under the analysis of Convention rights is the subjective fear of the witness as to the risk to their life or of serious harm to them. Subjective fears, even if not well founded, can be considered (*R v Saville of Newdigate, ex p A* [2000] 1 WLR 1855 at ¶ 31; *In re*

*Officer L* at ¶ 22 and ¶ 29). The justification behind the consideration of subjective fears is explained by Lord Carswell in *In re Officer L* at ¶ 22:

> It is unfair and wrong that witnesses should be avoidably subjected to fears arising from giving evidence, the more so if that has an adverse impact on their health.

61. The reasonableness of these subjective fears (*Application by A and Others (Nelson Witnesses)* [2009] NICA 6, at ¶ 41) and the extent to which the subjective fears are supported by objective evidence (*R v Saville of Newdigate, ex p A* [2000] at ¶ 31) can affect the weight to be attached to the applicant's subjective fears.

62. In considering the applicant's subjective fears, the following questions should be addressed (set out in *In re Officer L* at ¶ 14, citing the decision of the Inquiry that was subject to appeal, which was duly approved at ¶ 26 of Lord Carswell's judgment):

    (1) How serious is the applicant's fear?

    (2) What is the reason for the applicant's fear?

    (3) What impact would the granting of anonymity and/or other measures sought have in reducing the applicant's fear?

63. In light of Lord Carswell's concern for the health of the applicant, it is also relevant to consider what, if any, impact the applicant's subjective fears have had upon the applicant.

64. The actual or subjective fear of risk to life or of injury is just one of several factors to be weighed in the balance as part of the common law test. The Inquiry may also wish to consider the likely effect of granting or refusing the application on the following:

    (1) The Inquiry's ability to arrive at the truth (mentioned *In re Officer L* at ¶ 14), which would include the Inquiry's ability to hear full and frank evidence from the applicants;

(2) The ability of the public to follow and understand the evidence (mentioned *In re Officer L* at ¶ 14); and

(3) Public confidence in the Inquiry (*Application by A and Others (Nelson Witnesses)* at ¶ 41) and, by extension, in the institutions subject to the Inquiry.

65. The nature of the proceedings should also be borne in mind:

> It is likely to be more difficult for there to be such restrictions imposed in a criminal trial, where, for example, an accused's lawyers may or will need as much information as they can about a witness in order to be able to challenge credibility, than in an inquest or inquiry where, as here, the coroner in any event knew the identity of the witnesses.
>
> *R v Bedfordshire Coroner ex parte Local Sunday Newspapers Ltd*
> (2000) 164 JP 283

66. For the reasons developed in the closed applications, all seven applicants submit that there is both an objective and subjective basis for fearing a wide range of adverse consequences should their true identities enter the public domain, including but not limited to (i) reprisals including physical assault and criminal damage to property; (ii) public vilification and online abuse; (iii) the exposure of former employers, colleagues and friends who assisted in providing cover; and (iv) disruption to and interference with their private lives and the lives of their families.

67. Additionally, for reasons which are set out in the closed applications, there are both objective and subjective grounds for concluding that public exposure of the applicants' true identities would result in serious psychological harm to five of the seven applicants.

68. In their closed applications the applicants place particular emphasis on the assurance of confidentiality that they were given by supervising officers. It is apparent from the closed material that those assurances were (i) given by the MPS, a public body, to individual officers to ensure the performance of a public duty by the applicants; (ii) were relied on by the applicants; (iii) in certain instances, were relied on by the applicants' partners, to whom the assurances of confidentiality were also given; and (iv) the assurances have been respected by the MPS for many years.

69. It is plainly relevant to the Chairman's assessment of fairness that the applicants have a legitimate expectation that their true identities would not be revealed to any person outside of Special Branch: see the relevant passages from *R v Lord Saville of Newdigate and others sitting as the Bloody Sunday Inquiry, ex parte B, O, U and V* (unreported, 30 March 1999, CA) reproduced at ¶86 to ¶89 of Counsel to the Inquiry's Note.

70. To state the point shortly, the applicants were granted anonymity by a public authority in pursuance of a public duty. Unlike the police officers or soldiers whose cases have been the subject of the decisions cited in Counsel to the Inquiry's Note (Bloody Sunday, Al Sweady, Baha Moussa, Billy Wright, Azelle Rodney) the applicants did not perform their public duties openly, only requiring the protection of anonymity when giving evidence. The applicants in this case performed their public duties using an entirely fictitious identity. Indeed, they undertook their public duties on the basis that they would enjoy the protection of anonymity for the rest of their natural lives. In this sense, the applicants invite the Chairman of the Inquiry not to deprive them of this protection that they have been afforded for, in some instances, decades.

**Applicable principles to an application under section 19(3)(b)**

71. Some authorities treat applications for anonymity or other restriction orders made on the grounds of public interest as a separate ground to those set out thus far. Certainly section 19(3) Inquiries Act 2005 allows for restriction orders under two headings:

> (a) as are required by any statutory provision, enforceable [EU] obligation or rule of law, or
>
> (b) as the Minister or chairman considers to be conducive to the inquiry fulfilling its terms of reference or to be necessary in the public interest, having regard in particular to the matters mentioned in subsection (4).

72. Therefore, considerations under the Articles of the ECHR and the common law test afford grounds for a restriction order under section 19(3)(a) and the public interest to be considered separately.

73. Other authorities treat the public interest considerations at issue as part of the balancing exercise conducted under the common law test.

74. Either way, the following factors may fall to be considered as part of an analysis of whether the public interest lies for or against the granting of an application for anonymity:

(1) Any risk of harm or damage that could be avoided or reduced by any such restriction, as per section 19(4)(b). The applicants rely on those matters raised under the 'common law' heading of this document above insofar as they relate to the risk of physical and psychological harm that is likely to result were the restriction orders not made in the terms sought.

(2) Any conditions as to confidentiality subject to which a person acquired information that he is to give to the inquiry, as per section 19(4)(c). The applicants rely on those matters raised under the 'common law' heading of this document above insofar as they relate to the assurances given to the MPS that their anonymity would be protected.

(3) The extent to which not imposing any particular restriction would be likely to cause delay or to impair the efficiency or effectiveness of the inquiry, as per section 19(4)(d)(i). The applicants might regard the prospect of giving evidence having had a lifelong assurance of anonymity removed by the Inquiry (were the applications for restriction orders to be refused) with considerable trepidation, which may inhibit future engagement and cooperation with the Inquiry.

(4) Whether the refusal to order the restriction requested would impair the ability of an applicant to perform their job (*R v Bedfordshire Coroner, ex p Local Sunday Newspapers* at 290-291). Undoubtedly, for the reasons developed in this document under the heading of Article 8 and the closed applications, the refusal of their applications for restriction orders would adversely affect their ability to perform their jobs; and

(5) The general principle that justice should be conducted in public (see generally *Scott v Scott* [1913] AC 417 at 438 and *Attorney-General v Leveller Magazine Ltd* [1979] AC 440 at 450). There is undoubtedly a balancing exercise to be undertaken. The applicants would submit that the public interest and fairness resoundingly favours the grant of their applications for restriction orders.

**Conclusion**

75. The Inquiry has the power to grant an application for restrictions under section 19(2) Inquiries Act 2005, by which the Inquiry can impose any restriction required by any statutory provision, EU obligation or rule of law (section 19(3)(a)), or where the public interest requires it (section 19(3)(b)).

76. In considering an application for restriction orders, the Chairman to the Inquiry must first evaluate whether the restriction order should be granted pursuant to Article 2 of the ECHR, before going on to consider whether grounds exist to impose restrictions under Article 3, Article 8, the duties and rights under the common law and/or the public interest.

77. The applicants respectfully submit that there is a compelling case under both limbs of section 19(3) for requiring the orders sought by this Application.

**SLATER & GORDON LLP**

19th February 2016