COUNSEL TO THE INQUIRY'S FURTHER NOTE ON THE PRINCIPLES APPLICABLE TO DISCLOSURE OF DECEASED CHILDREN'S IDENTITIES

Introduction

1. In this Further Note we primarily respond to the issues raised in the detailed and thought provoking written submissions made by Ms Williams QC and Ms Murphy on behalf of Ms Shaw, Mr Peters and RDCA. We refer to these below as 'the Relatives' submissions'. We seek to identify areas of agreement and disagreement ahead of the oral hearing fixed for 22 June 2016.

2. We also consider the suggestion made at paragraph 7 of the written submissions made by Mr Hall QC and Ms Le Fevre on behalf of the Metropolitan Police Service. We do not need to deal with any of the other written submissions filed on this issue because they were in agreement with the analysis which we set out in our Note of 17 May 2016.

3. We should make clear at the outset that we recognise the public interest in informing close family members who wish to know whether their deceased's child's identity was used to build the legend of an undercover police officer of the answer to that question if possible. We also recognise the public interest in doing so without unnecessary delay. However, there are competing interests which the Inquiry is obliged to take into account and which may, in some cases, prevent the answer from being provided. For reasons which we shall explain they also mean that delay is unfortunately necessary in some cases.

4. We note that the Relatives agree that Article 8 of the European Convention for the Protection of Human Rights and Fundamental Freedoms (*'Article 8'*) does not itself oblige the Inquiry proactively to investigate or seek out the close family members of a deceased child in order to inform them that the child's identity was used to build the legend of an undercover police officer[1].

5. However, the Relatives' submissions raise a separate issue under Article 8 which we did not address in our original Note. They examine the position where a family member of a deceased child is actively seeking from the Inquiry the answer to that question: i.e. whether their deceased child's name was used to build the legend of an undercover police officer. We agree that in the event of such a request Article 8 may be engaged. We discuss the scope and content of the obligation to react to such a request further below at paragraphs 11-13.

[1] This does not mean that the Inquiry will not be investigating the practice of using of deceased children's identities to build the legends of undercover police officers. It should do so in order to discharge its terms of reference. The point is simply that it is the terms of reference rather than Article 8 which gives rise to the requirement to investigate. As set out in our previous note dated 17 May 2016 it may be that in investigating the practice the Inquiry does identify every instance in which an identity was used, but the terms of reference do not oblige it to do so.

6. The issues raised in the written submissions to which we are responding give rise, in practice, to the following questions, each of which we discuss further below.

   6.1. Is the Inquiry obliged to disclose a deceased child's identity without first considering whether to make a restriction order?

   6.2. Does the Human Rights Act 1998, read with Article 8, impose upon the Inquiry, where it knows the answer, and where it receives a request from a close family member, to disclose to that close family member whether or not the identity of the deceased child to whom he or she is related was used by an undercover police officer?

   6.3. When is the Inquiry likely to conclude that prima facie evidence that a deceased child's identity was used to build the legend of an undercover police officer is both relevant and necessary to the Inquiry's work?

   6.4. Can a generalised assumption safely be made, when considering whether to make a restriction order, as to whether close family members would wish to be informed that their deceased child's identity had been used to build the legend of an undercover police officer?

   6.5. Should any decision on a restriction order be provisional pending notification of close family members?

   6.6. Where the information does not have to be restricted, who should inform close family members that their deceased child's identity was used to build the legend of an undercover police officer?

   6.7. Where a close family member of a deceased child wishes to know whether or not that deceased child's identity was used by an undercover police officer, and the answer to that question is no, can the Inquiry simply inform them of that fact?

Question 1 - Is the Inquiry obliged to disclose a deceased child's identity without first considering whether to make a restriction order?

7. It is important to be clear about what the close family of a deceased child is seeking when asking to be informed whether the child's identity was used by an undercover police officer for the purposes of building a legend. What is sought is disclosure of the undercover police officer's cover name.

8. The consequences of such a disclosure for the undercover police officer, and possibly other people, are likely to vary considerably according to the facts of the particular case. At one end of the scale there may be no consequences at all (which might arise if the officer has since passed away). At the other there may be a risk to life or of serious physical harm (e.g. an undercover officer who has infiltrated a violent group of drug dealers or a terrorist organisation). There may also be detrimental consequences for effective policing in the future. For example disclosure of a cover name may lead to a course of inquiry which would

inevitably reveal legitimate but secret tactics, techniques or procedures thereby enabling legitimate targets of undercover policing to guard against them in the future. We are not here referring to the use of a deceased child's identity but to other tactics, techniques or procedures which may have been used by the undercover police officer and which public disclosure of the cover name would inevitably have the effect of revealing.[2]

9. Section 19 of the Inquiries Act 2005 provides the mechanism for considering whether the cover name should be disclosed by the Inquiry. It will be necessary to consider, in every case where disclosure of a cover name which was taken from a deceased child is being sought, whether or not a restriction order should be made. This is necessary because to publish such a name without considering whether or not to restrict publication would contravene the Inquiries Act 2005, and would risk further acting unlawfully whether because disclosure was contrary to domestic law or because it was contrary to the undercover police officer's rights under the European Convention on Human Rights.

10. If and insofar as the Relatives' submissions suggest that any disclosure could be made without determination of any section 19 application, we disagree with this analysis. That is not to ignore Article 8, but rather to recognise that any decision under section 19 of the Inquiries Act 2005 must not violate Article 8 (either in respect of the close family of the child or of the undercover police officer concerned).

Question 2 - Does the Human Rights Act 1998, read with Article 8, impose upon the Inquiry, where it knows the answer, and where it receives a request from a close family member, to disclose to that close family member whether or not the identity of the deceased child to whom he or she is related was used by an undercover police officer?

11. We agree with the Relatives' submissions that where a close family member asks the Inquiry for an answer to the question whether it holds evidence that their deceased child's identity was used by an undercover police officer, Article 8 is engaged. We note that this falls short of stating that Article 8 gives rise to an investigative obligation in these circumstances.

12. We agree with the proposition quoted from *Klass v Germany* (1978) 2 EHRR 214 *(*see paragraph 31 of the Relatives' submissions and paragraph 33 of the judgment): the parameters of those who have standing for Article 8 purposes is fact sensitive and an individual may have victim status even without knowing whether he or she has been affected by intrusive measures.[3] The court said:

> *"The Court therefore accepts that an individual may, under certain conditions, claim to be a victim of a violation occasioned by the mere existence of secret measures or of legislation permitting secret measures, without having to allege that such measures were*

[2] We do not prejudge whether the significance of any such concern would be sufficient to prevent disclosure upon consideration of the overall public interest; we only observe that these are factors which may arise for consideration.
[3] In *Klass* itself, the German authorities informed the Strasbourg court that the Applicants had not in fact been affected by the measure complained of: see paragraph 13.

in fact applied to him. The relevant conditions are to be determined in each case according to the Convention right or rights alleged to have been infringed, the secret character of the measures objected to, and the connection between the applicant and those measure."

We agree that the nature of this issue is such that a positive obligation to provide information can apply. We further agree with the suggestion that parents (including all those represented by Ms Williams and Ms Murphy) could all reasonably be considered sufficiently closely connected so as to have victim status sufficient to trigger this obligation.[4]

13. We also agree that the test for disclosure under Article 8 is fair balance. Article 8 is a qualified right and the Relatives' submissions rightly accept that factors tending against disclosure must be taken into account. Consequently, we do not consider that where Article 8 is engaged (i.e. in request cases), this will in practice make any difference to the answer which is yielded by the application of the public interest test under s.19 Inquiries Act 2005. All the same considerations, including the views expressed by the family, would be considered under that test, in a like case, even if Article 8 was not relied upon. As we stated in our Note of 17 May 2016, where the family's wishes are known they should be taken into account.

14. Although, for the reasons stated above, we do not consider that the existence of a qualified obligation under Article 8 in request cases will make a difference to the outcome of decisions under s.19 Inquiries Act 2005, we do acknowledge that the point focuses attention on the need to ensure that the Inquiry has a mechanism in place to enable close family members of deceased children to make known to the Inquiry that, if it is possible, they would like to be informed whether their deceased child's identity was used by an undercover police officer. We therefore agree in principle with the Relatives' submission that the Inquiry should advertise for any further individuals in a similar position to their own. We make two practical observations.

    14.1. First, we are less sanguine about the Inquiry's ability accurately to give date parameters at this stage than the Relatives are in their submissions. The Inquiry is at an early stage. The Herne report on the issue was focused on the Special Demonstration Squad (in its various incarnations). It did not systematically examine the extent to which dead children's identities were used by the National Public Order Intelligence Unit but it did state that there was some such use within that unit. The question also arises as to whether deceased children's identities were used more widely by undercover police officers either in the Metropolitan Police Service or regional forces. The Herne report describes that as "highly possible". The statement in the Herne report that it is unlikely that the real identity of a child born at any time in the last forty years had been used cannot have been based on any knowledge as to

[4] While we described the test as "subject to the particular facts of any given case" in our original Note, we consider that for practical purposes parents may be considered sufficiently closely connected by default, and that any question of fact-specific consideration may be reserved for those who otherwise regard themselves as close family members.

the position in other forces. It seems to us that the Inquiry must keep an open mind at this stage.

14.2. Second, any invitation to close family members of deceased children to express their desire to know whether the Inquiry has uncovered evidence that a child's identity was used by an undercover police officer, should not raise false expectations. For the reasons discussed further below at paragraphs 23-29 the Inquiry cannot guarantee that a substantive answer to the request will ever be given.

Question 3 - When is the Inquiry likely to conclude that prima facie evidence that a deceased child's identity was used to build the legend of an undercover police officer is both relevant and necessary to the Inquiry's work?

15. We anticipate that the importance of the practice of using deceased children's identities to the work of the Inquiry (which importance arises in large part from the impact which that practice has on close family members when revealed) is such that where the Inquiry finds evidence of such use it will be relevant and necessary.

16. The cautious terms in which we expressed ourselves on this issue in our Note of 17 May 2016 were to accommodate the possibility that the Inquiry discovers that the practice was so endemic, nationally, that very large numbers of such cases emerge. In these circumstances it might not be practicable or desirable to receive evidence about every instance. We have no indications to date that this scenario is likely to eventuate.

17. There is in any event a difference between a case in which close family members have come forward wishing to know whether a child's identity has been used and those in which that is not the case. The starting position is that we anticipate that it is very likely that every use of a deceased child's identity of which the Inquiry receives evidence will in practice be considered relevant and necessary. However even if this does not prove possible, we suggest that the Inquiry could consider confirming that it will consider such evidence to be both relevant and necessary at least all cases in which there is a concerned close family member wishing to know.

Question 4 - Can a generalised assumption safely be made, when considering whether to make a restriction order, as to whether close family members would wish to be informed that their deceased child's identity had been used to build the legend of an undercover police officer?

18. We discussed at paragraphs 58-60 of our original Note whether it would be permissible, when considering whether to make a restriction order, to make a general inference that any close family member of a deceased child, whose identity had been used as a legend by an undercover police officer, would wish to be informed. We provisionally concluded that it would not be appropriate to make such a presumption. We remain of that view. It is not a self-evident fact that any such family member would want to know. Evidence would be

required sufficient to support such an inference. If there is evidence it should be considered, but in a typical case no such evidence could be sought before the family was told. We would add that it would be unfortunate to presume that a close family member wished to know only to find out that in fact the contrary was the true position.

19. Although our conclusion in this regard leaves us in disagreement with the Relatives' submissions on the issue of presumption, it may be noted that this disagreement does add force to the advertising issue raised in the same submissions, with which we agree.

Question 5 - Should any decision on a restriction order be provisional pending notification of close family members?

20. Paragraph 7 of the Metropolitan Police Service's submissions raises the question whether a decision to refuse a restriction order, in circumstances in which the consequences of so doing will lead to the publication of the name of a deceased child whose identity was used to build the legend of an undercover police officer, that decision should be expressed as provisional. The purpose of so doing would be to enable any close family members, once traced and informed, to make submissions in support of a restriction order, if they so wished. We do not consider that in practice there is any real difference between this suggested approach and the alternative: permitting a separate application for a restriction order to be made by the family before the name is put into the public domain. Although it would be a separate application this would of course involve consideration of the cumulative effect of all factors including any previously raised in an unsuccessful application as well as any new matters raised by the family.

Question 6 - Where the information does not have to be restricted, who should inform close family members that their deceased child's identity was used to build the legend of an undercover police officer?

21. We acknowledge the helpful and informative views expressed in the Relatives' submissions in response to paragraph 12 of our Note. The view of the Relatives that they would prefer not to be informed by the police is itself a relevant factual matter to be considered in relation to this issue. Accordingly, if and when the situation arises in which close family of a deceased child have been traced and the news is to be broken to them that their child's identity was used to build the legend of an undercover police officer then we are inclined to agree that a trained counsellor who is not a police officer may be the most appropriate person to break the news. [5]

22. On the related question of apologies, we agree with the Relatives' submissions that they are important and require proper consideration. Any apology will, of course, be a matter between the police force and family in question.

[5] The position may be different if the situation arises in respect of a relative who is already legally represented.

Question 7 - Where a close family member of a deceased child wishes to know whether or not that deceased child's identity was used by an undercover police officer, and the answer to that question is no, can the Inquiry simply inform them of that fact?

23. Insofar as the Relatives' submissions suggest, at paragraphs 67-70, that all close family members of deceased children, who express concern to the Inquiry, can simply be told if their child's identity was not in fact used, we disagree.

24. The situation in *Re: Freddie Scappaticci's Application* [2003] NIQB 56 was described as follows in the evidence in that case:

> *"3. The Government has a long established policy in respect of the identification of agents....The policy involves the principle that the identity of agents is neither confirmed nor denied....as...*
>
> - *to confirm that a person is an agent would place that person in immediate and obvious danger;*
> - *to deny that a person is an agent may place another person in immediate and obvious danger; and*
> - *to comment either way in one case raises a clear inference [if] the Government refuses to comment in another case that it has something to hide in that [other] case, i.e. the inference will be that the individual in that [other] case is an agent, and he may be subject to reprisals (and his life may be at risk) as a result. It is only by maintaining the NCND policy so far as possible across the whole range of cases that this risk can be avoided." [Square bracketed words added]*

The Inquiry Chairman's ruling dated 3 May 2016 has concluded that 'neither confirm nor deny' does not have a life of its own (see paragraph 116) but is simply a statement of refusal to make disclosure one way or the other on public interest grounds.

25. In the circumstances now under consideration, there is a real problem of the same kind as led the court in *Scappaticci* to conclude that it was not in the public interest for Mr Scappaticci's deceptively simple question to be answered. Where a close family member wishes to know whether their deceased child's identity was used by an undercover police officer, there are three possible scenarios summarised below.

    25.1. First, the answer is yes and a decision is taken not to make an order restricting publication of the cover identity of the undercover police officer. In this eventuality we agree that the family should be informed as soon as it has been decided not to make an order restricting publication and the time limit for challenging that decision has expired.

    25.2. Second, the answer is yes but a decision is taken to restrict publication of the cover identity of the undercover police officer (e.g. to protect the officer from the risk of

death or serious physical harm). In this eventuality, the close family member who has asked to be informed cannot be informed that the answer is yes for so long as the restriction order remains in force. The close family member cannot be given a negative answer either because that would be untrue.

25.3. Third, the answer is no. The problem which arises is that if the Inquiry adopts the suggested policy of informing concerned close family in this category, it will be known that if the answer falls into either the first or third category, then the concerned family will receive an answer. It will then be obvious that the close family member who asks the Inquiry for an answer but is told that one cannot be given, will be able to infer that that must mean that their case falls into the second category. That would undermine the restriction order because it would have, in practice, the effect of confirming to those in the second category that the answer was yes notwithstanding that to do so had already been found to be contrary to the public interest, e.g. to protect the officer from serious harm.

26. Is there a way around this problem? We consider that there might be. However, it remains our position, as we submitted at paragraphs 66-68 of our Note, that the public interest balancing test in respect of this issue should not be considered until the overall factual position has been established.

27. The ability to draw an inference where a practice is followed over a period of time will not arise if the Inquiry makes a once only decision. To put this another way, before a decision is made to release any information, the consequences of doing so will be fully known and there will be no need to consider the possible impact on future disclosures (because there will be no such future disclosures). For this reason we submit that the Inquiry should approach the public interest balance on a single occasion.

28. It is important that this single consideration of the public interest test, if and insofar as it results in the Inquiry being able to confirm to some concerned families that their deceased child's identity was not in fact used, yields accurate information. For this reason, the exercise should be undertaken only once all the evidence on the issue has been received by the Inquiry. At this point the Inquiry will know, with as much certainty as it can establish, which close family members fall within the first category referred to at paragraph 25 above. It will be able to establish which family members who have expressed an interest in knowing the answer fall within the second and third categories. Those in the first category will, by then, already have been informed because they will have been informed after the section 19 applications relating to the relevant cover names have been determined. Those in the second category cannot be told because in their cases a section 19 order will be in force. Consideration can be given, on the most fully informed basis possible, as to where the public interest / fair balance lies, in relation to informing those in the third category. In other words, the Chairman can decide whether:

28.1. the overall public interest / fair balance comes down in favour of telling all of the close family members in this category (e.g. if there was not in fact anyone in the second category by this stage and therefore no risk of harm); or

28.2. if not, there is a way of informing at least some of those close family members in the third category without giving rise to the risk of inference being drawn which would undermine an existing restriction order.

29. In relation to paragraph 28.2 above, we have in mind that it might be possible to give assurance to those asking who fell into objectively defined categories of a kind which would not permit inferences of a kind which would undermine an extant restriction order. For example, that none of those who had asked about a deceased child born after a certain date, or of a certain gender, had any grounds for concern. It follows that while some of those who were not informed would be right about their concerns and others would be wrong, the pool of individuals not provided with information would be diminished and there would at least be some families given information. Other possibilities may arise, but the effect of them can only be considered by the Inquiry once the factual position is known.

Conclusion

30. We agree with the Relatives' submissions that, where a request to know whether a deceased child's identity has been used by an undercover police officer is made by a close family member, a qualified positive duty to disclose the answer arises under Article 8. However, because the duty is qualified and the fair balance test can be expected to yield the same result as the public interest test, no difference in result is likely to arise in practice.

31. We disagree with the Relatives' submissions on the *Scappaticci* question. The issue cannot be dismissed. There is a problem. A well intentioned policy of reassuring all close family of deceased children who have asked to know whether their child's identity was used, in cases where the answer is no, could, through a process of inference, undermine a restriction order made on sound public interest grounds. That could potentially expose a former undercover police officer to a risk of serious harm. We have sought to recommend an approach to this question which maximises the extent to which the Inquiry may be able to overcome this obstacle to informing concerned close family. That approach is for the Chairman to consider making a single, once and for all decision as to where the balance between competing public interests lies towards the end of the Inquiry (or fair balance for Article 8 purposes). The Chairman can only realistically decide whether they can receive a substantive answer and, if so, in what terms, once all of the relevant evidence is available.

32. We agree that the Inquiry should advertise so that those close family members of deceased children who might be affected by the tactic of using deceased children's identities who wish to know whether their deceased child's identity was used, can make that request to the Inquiry. However, the invitation to make such a request would have to be the subject of a caveat: the Inquiry is not in a position to guarantee that an answer can be given.

33. Having had the benefit of the views expressed in the Relatives' submissions we also agree that in cases where a family is to be informed that their deceased child's identity was used by an undercover police officer, then the news is best broken by someone other than a unformed police officer using a marked car. We are also inclined to agree that the news may best be broken in the first instance by a trained counsellor independent of the police.

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