IN THE UNDERCOVER POLICING INQUIRY

DISCLOSURE OF THE USE OF DECEASED CHILDREN'S IDENTITIES
HEARING 22 JUNE 2016 10:30

SKELETON ARGUMENT ON BEHALF OF
BARBARA SHAW, GORDON PETERS AND RDCA

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1. This skeleton supplements the submissions made on behalf of Barbara Shaw, Gordon Peters and RDCA dated 1 June 2016 and responds to Counsel to the Inquiry (CTI)'s further note dated 10 June 2016 by reference to the seven questions posed. We also address the submissions of the Metropolitan Police Service dated 27 May 2016. We do not have any separate observations to make arising from the submissions of the Secretary of State for the Home Department, the NPCC and/or NCA dated 1 June 2016.

2. We welcome CTI's acceptance of the existence of a qualified positive duty under Article 8 to inform close relatives, who wish to receive the information, whether a deceased child's identity was used in the construction of the legend of an undercover officer. We also welcome CTI's adoption of our proposals: (i) to advertise to enable family members who want to know the answer to this question to make themselves known to the Inquiry and (ii) in relation to the means of breaking the news to relatives that their deceased child's identity was used. Accordingly, we do not repeat our earlier submissions on those topics. Our remarks below are offered to assist the Inquiry regarding the nature of the Article 8 duty to inform and the operation of the *"fair balance*" test; the inter-relationship between the Article 8 duty and the process of determining restriction order applications; and the practical implications for how the Inquiry should respond to families in our clients' position. We also take the opportunity to provide clarification where there appears to have been some uncertainty about the position we took in our earlier submissions.

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

3. With reference to paragraph 10 of CTI's further note and for the avoidance of any doubt, we do not submit that disclosure can or should be made independently of the determination of section 19 applications for restriction orders. On the contrary, we accept that decisions on disclosure are subject to and will occur in this context, specifically:

i) At paragraph 4(2) of our earlier submissions, we acknowledged that where an application for a restriction order is made, disclosure will be dealt with by the Inquiry through the restriction order process; and

ii) At paragraph 60 we explained that the factors bearing on the existence of a free standing duty under Article 8[1] and in relation to determining the "fair balance" between relevant interests in that context[2], were matters that also fell to be considered in the context of achieving an appropriate balance between competing public interests for the purposes of deciding a restriction order application. We did, however, contend that the existence of a duty to inform under Article 8 and the strength of factors militating in favour of disclosure within the Article 8 context were weighty factors to be taken into account when determining where the public interest lies for the purposes of resolving such restriction order applications[3].

4. Thus it is our submission that the Article 8 evaluation informs and influences the outcome of any relevant restriction order application, but we do not contend that the obligations under Article 8 supplant the statutory scheme.

5. As we acknowledged in our earlier submissions there may be factors militating against disclosure of officers' cover identities[4] but as we are here primarily concerned with undercover policing of non-violent political and protest organisations, particular caution is necessary to ensure that only risks that are real and substantive are weighed in the balance, consistent with the Chairman's Restriction Orders Ruling[5].

6. There is one further point we wish to make in responding to CTI's observations on Question 1; this is in relation to the observation in parenthesis at the end of their paragraph 10. Whilst we appreciate that each instance will be fact specific and we are cognisant of the Chairman's earlier consideration of the Article 8 rights of undercover officers and his conclusion that the concept of "harm" in section 19(4)(b) is wide enough to embrace

[1] See our submissions at [55]
[2] Ibid at [57]
[3] Ibid at [58] – [62]
[4] Ibid at [57]
[5] In this regard, we understand that the example of a risk to life given by CTI at [8] of their further note is provided in order to illustrate one end of the possible scale of competing considerations that might weight in the balancing of public interests (the other end being where no adverse consequences at all are suggested in relation to disclosure of the cover identity).

interference with an undercover officer's Article 8 rights[6], it does not follow that there is or is likely to be an equivalency between the potential engagement of the Article 8 rights of officers and the direct victim status of close family relatives who fear that the identity of a deceased child and related family details have been taken without their knowledge or consent and manipulated by the State[7]. It is important to bear in mind that the primary objective of Article 8 is to protect the individual against arbitrary interference by public authorities.[8] A further consideration that may arise where disclosure of the cover identity to the family of the deceased child is under consideration, is that the weight to be given to protection of an officer's Article 8 rights may be reduced in circumstances where he chose to build his legend from the deceased child's identity, as opposed to selecting a fictional name and characteristics.

7. Thus we submit that the Inquiry's responsibility to address the free standing positive duty under Article 8 owed to close family members who seek information, entails distinct considerations to those that arise when contemplating the necessity of potential interference with an undercover officer's Article 8 rights. We submit that the correct approach is to consider first, the responsibilities to concerned relatives, to determine if the Article 8 duty applies in relation to them and secondly, the public interest test in relation to restriction order applications, informed by that consideration.

Question 2 – Does the Human Rights Act, read with Article 8, impose upon the Inquiry, where it knows the answer, 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?

8. As foreshadowed above at paragraph 2, we welcome CTI's acceptance of a free standing duty under Article 8 to provide information to the close family members of deceased children in the circumstances identified in this question.

9. For the avoidance of doubt and in light of CTI's observation that this "falls short" of stating that Article 8 gives rise to an investigative obligation, we emphasise that our submissions were based squarely in the context of the distinct positive obligation to disclose information sought by an applicant in certain circumstances engaging Article 8; we made no observations on whether a separate investigative duty existed.

[6] Chairman's Restriction Orders: Legal Principles and Approach Ruling at [154]

[7] See [55] and [57] of our earlier submissions in particular.

[8] See by way of examples of the ECtHR reiteration of this well-established principle, *Elberte v Latvia* (No. 61243/08) at [103] and *Odievre v France* (2004) 38 EHRR at [40].

10. Subject to that one point, we agree with everything that CTI say in paragraphs 11 and 12 and in the first sentence of paragraph 13 of their further note.

11. Whilst we have acknowledged that each of the factors bearing on the existence of the Article 8 duty and the operation of the *"fair balance"* test[9] are relevant factors to weigh in the public interest balance to be struck when determining a restriction order application, such that there is a degree of alignment between the two exercises, we respectfully do not agree that the inevitable practical consequence is that the public interest test under section 19 would yield the same answer, whether or not an Article 8 duty to disclose exists. In our submission, framing the question in the context of the freestanding Article 8 obligation in the first instance brings an appropriate focus to bear on the centrality and significance of the interference with close family members' rights, the degree of the same, the features that give rise to that duty and the Inquiry's obligations in this context[10].

12. We welcome the proposal to advertise for any further individuals in a similar position to our clients, Gordon Peters and RDCA and offer additional comments on the practicalities at paragraph 34 below. We agree with the identified imperative of avoiding the raising of false expectations[11].

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?

13. We welcome the acknowledgement that where the Inquiry finds evidence that a deceased child's identity has been used, it is anticipated that this evidence will be relevant and necessary to the work of the Inquiry and that it is highly likely that prima facie evidence of such use will necessitate the receipt of evidence in each instance. We also welcome the proposal that the Inquiry should prioritise its investigative resources, in the event that such a prioritisation proves necessary, to achieving a resolution of the factual circumstances, in the event that a close family member communicates a desire to be informed.

[9] See above at paragraph 3
[10] See further our submissions at [57] – [62]
[11] CTI's Further Note at [14.2]

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?

14. For the avoidance of doubt and in light of paragraph 19 of CTI's further note, we confirm that we did not and do not invite the Inquiry to draw a general inference that any close family member of a deceased child, whose identity has been used as a legend by an undercover officer, would want to know this.

15. At paragraphs 64 – 66 of our earlier submissions we addressed the question of whether a presumption should be made as to the views of families who have potentially been affected. We endorsed CTI's view that in circumstances where there had been an indication of a desire to know, that wish should be taken into account in the course of the balancing exercise[12]. However, we did not suggest that a presumption that families would want to know should apply in other circumstances, rather we proposed that in relation to families who had been affected or believed they may have been affected but who had not indicated their preference in this regard, steps should be taken to invite their views[13] and we set out our proposals as to how that might be achieved by way of advertisement/announcement[14].

16. We are therefore in agreement with CTI's current proposals in relation to this topic.

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

17. We agree that the imperative of ensuring that any close family member has an opportunity to be heard in favour of a restriction order may be conveniently achieved through the MPS proposal (the making of a provisional order[15]) or through CTI's proposal (an opportunity being given for a separate application to be made before the name is put in the public domain[16]). On balance we favour CTI's proposal.

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?

18. We also welcome the proposal at paragraph 21 of CTI's further note, for the necessary information to be communicated by a trained counsellor, in particular in instances where

[12] Our submissions at [64]
[13] Ibid at [65]
[14] Ibid at [73-75]
[15] MPS submissions at [7]
[16] CTI's original note at 71[e]

families do not have legal representation. So far as those whom we represent are concerned, it would be their preference for communication to be through their solicitor, Mr Jules Cary in the first instance.

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 officer, and the answer to that question is no, can the Inquiry simply inform them of that fact?

19. At paragraph 23 of their further note, CTI express uncertainty as to whether we contend that all close family members of deceased children who express a desire to be informed can simply be told if their child's identity was used. That is not our position and we do recognise and acknowledge the difficulties that arise in this area. Our submissions expressly recognised that a weighing of the relevant interests will be required both in relation to the operation of the "fair balance" test under Article 8 and through the section 19(3)(b) exercise arising from a restriction order application[17]. Accordingly, it follows that there may be situations where the balance of the relevant considerations point in favour of non-disclosure, albeit we have suggested with supporting reasons that there are likely to be very limited circumstances where this will be the case in relation to disclosure of cover identities of undercover officers taken from deceased children[18].

20. As regards the three categories of families who wish to know whether their deceased child's identity was used that CTI discuss from their paragraph 25 onwards:

(i) We agree that where a close family member wishes to know whether their deceased child's identity was used by an undercover police officer, the answer is "yes" and a restriction order is not made in relation to that cover identity ("category one families"); then the family should be informed as soon as it has been decided not to make the restriction order and the time limit for challenging that decision has expired;

(ii) We agree that in the second scenario postulated, where a restriction order is made in relation to the cover identity of an undercover officer that was taken from a deceased child ("category two families"), the family in question cannot be told that the answer is "yes" for so long as the restriction order remains in force and nor should they be given an untrue negative answer. However, for the reasons

[17] Our submissions at [57] – [58]

[18] Our submissions at [55]

identified in our earlier submissions[19], we submit that this category of families is likely to be relatively small;

(iii) Where the answer to the question is "no" ("category three families"), we do not agree that the problem that arises is as acute as CTI describe; nor do we accept that *Re: Freddie Scappaticci's Application* [2003] NIQB 56 posed a problem "*of the same kind*"[20] (save in the general sense that it also concerned NCND) or that the Court's decision in that case necessarily provides the answer to how this situation should be addressed; we also wish to put forward an alternative solution to that canvassed by CTI. We go on to develop all of these points below.

21. We submit that it is important not to frame the resolution of the potential problem within the NCND policy itself but rather with this as a factor to be taken into account in applying the *"fair balance*" test in considering the existence / extent of the Article 8 duty to inform in this kind of situation[21].

22. We are conscious that the Chairman is already familiar with the *Scappaticci* case, having addressed it in detail in his Restriction Orders Ruling[22]. However, it is worth reflecting on the particular features that arose in that case.

23. The main challenge to the Minister's decision not to respond substantively to the request to clarify that Mr Scappaticci was not an undercover Government agent was on the ground that her decision violated the positive obligation to protect life arising under Article 2 ECHR, due to the existence of a real and present danger to his life stemming from the perception that he had so acted. The Minister's conclusion was reached on the basis that to take the action sought would "*have very serious consequences in the field of intelligence gathering for combating terrorist crime*", factors which the Court held it was legitimate for her to take into account[23].

24. Further, three specific factors were relied upon by the respondent as supporting the legitimacy of the Minister's decision in that instance, namely:

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[19] See the preceding paragraph of this document

[20] CTI's further note at [25]

[21] As we noted in our earlier submissions, at [4(3)] the restrictions order regime will not apply here; as the child's name was not used to create a legend it will not be the subject of an application for such an order.

[22] At [116] – [121]

[23] At [12]

(i) A statement by the Minister denying the applicant was an agent would have little effect upon those who threatened his life;

(ii) To depart from NCND policy in this situation would create a serious risk to the lives of other agents and imperil the continued receipt of intelligence from agents;

(iii) The decision was one involving national security and the court should be slow to question ministerial decisions in that field[24].

25. As regards the first of these reasons, Carswell LCJ (as he then was) acknowledged that "*there may very well be a good deal of substance*"[25] in it. As regards the second reason, he accepted that the supply of intelligence vital to the war against terrorism could be gravely reduced and that to depart from a strict adherence to NCND in this context could place agents in immediate danger from terrorist organisations[26]. Having accepted these points, Carswell LCJ did not find it necessary to resolve the third point; he was satisfied that in light of these features the Minister's decision did not constitute a breach of the Article 2 positive obligation placed upon her[27].

26. The case thus concerned the legality of the Secretary of State's conclusion on the particular and extreme facts and in circumstances in which she had considered *"relevant background material, the correspondence which had been received from the applicant's solicitor, the NCND policy … and information in the form of an assessment of risk in respect of the applicant's circumstances"*[28]. The very particular context of the State's obligations to British agents who had infiltrated terrorist operations in Northern Ireland, is at a considerable distance from the one with which we are here concerned

27. Thus the Court's decision in *Scappaticci* is an example of an evaluation of where the public interest lay in that particular instance where the State asserted reliance upon NCND. We submit that it does not directly inform or provide a precedent for how the balance is to be struck between an assertion of NCND in this context, the Article 8 rights of category 3 families who seek reassurance, that could be provided, that their child's identity was not used in undercover officers' legends and the related public interest considerations. Of the

[24] At [13]
[25] At [14]
[26] At [15] and [20]
[27] At [19]
[28] Ibid at [6(5)]

two key features that informed the Minister's and the Court's decision in *Scappaticci* (as identified at paragraphs 24 – 25 above), the first is wholly irrelevant to the present situation, where, by contrast provision of the information sought would provide exactly and entirely the intended benefit. As regards the second feature, whilst restriction order applications have yet to be considered by the Inquiry, so far as we are aware there is no evidence at this stage of feared adverse consequences that are of the extent or analogous to the grave threats that the Court accepted arose in that case. Furthermore there are compelling features pointing in favour of disclosure, as we listed in our earlier submissions[29].

28. Additionally *Scappaticci* was decided on the basis that there was a powerful public interest in maintaining a strict NCND policy, which admitted of only very exceptional departures[30]. There have been a number of significant authorities since that decision which have clarified, as the Chairman summarised at paragraph 145 of his Restrictions Orders Ruling that "*the application of the policy is considered in the its particular circumstances and within the legal context of the case. It is applied if it serves a public interest that outweighs the countervailing public interest in disclosure*"[31].

29. Indeed the Chairman himself in his ruling characterised the *Scappaticci* case as offering an example of the "*surprisingly long*" reach of NCND[32] and concluded that examples where the assertion of NCND had not succeed, were not exceptions to it, but the application of the policy in light of the public interests that arose in the particular situations[33]. Thus, in the words of the Chairman, "*the policy does not have a life of its own.*"[34] The Chairman also identified examples where, notwithstanding the crystallisation of a risk arising from the denial to one and not to others, disclosure has nevertheless followed[35].

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[29] At [55] and [57]

[30] At [10] and [15]

[31] Including: DIL & Ors v Commissioner of Police of the Metropolis [2014] EWHC (QB); *Mohamed v Secretary of State for the Home Department* [2014] EWCA Civ 559; *Belhadj v Security Service* [2015] UKIPTrib 13 132H; *Al-Fawwaz v Secretary of State for the Home Department* [2015] EWHC 166 (Admin) (all of which are cited and considered in the Restrictions Orders Ruling), along with the examples of disclosures made by the Security Service or the Secret Intelligence Service at [128].

[32] At [117]

[33] Ibid at [124] – [127] and [145] – [152]

[34] Ibid at [116]

[35] See in particular *Baker v Secretary of State for the Home Department* [2001] UKHRR 1275 and *Belhadj and others v Security Services and others* (above) discussed at [125] and [130] – [136] of the Chairman's Ruling respectively.

30. Accordingly, we are in respectful disagreement with the suggestion that the problem which arises for the Inquiry in relation to category three families is "*of the same kind*" as that in *Scappaticci*[36] and we are uneasy over the characterisation of this issue as "the *Scappaticci* question"[37], when the considerations for the Inquiry to weigh are so different. Our submission in this area remains that category three families should be informed that the answer is "no" as soon as is reasonably possible; that NCND is at best a factor to be taken into account in determining if and when disclosure should be given and that there is no warrant for giving any greater role to NCND considerations in this context than the Chairman has identified in his Restriction Orders Ruling[38].

31. In addition to our emphasis upon the features that tell in favour of disclosure to category three families, we submit that the concern which grounds CTI's approach (namely that if these families are told the answer is "no" "*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*" thereby undermining the restriction order that has been made[39]), is not as significant as has been suggested.

32. The concern is based on the proposition that category two families will or at least are likely to draw the inference referred to in the preceding paragraph. We do not believe that will be the case. CTI accept and propose that information will be provided to category one families. We have already observed that category two is likely to be small, consisting only of those close relatives who have communicated a desire to know and in respect of whom their child relative's identity has been made the subject of a restriction order. Equally, we note that on the basis of the Chairman's Restrictions Order Rulings, parents in category one (where information will be provided) is likely to be significantly larger, either because an application for a restriction order is declined[40] or no application is made. Further, we respectfully suggest, as we go on to detail below, that there are practical means by which the process can

[36] CTI's further note at [25]

[37] CTI's further note at [31]

[38] [67] – [70] of our earlier submissions

[39] CTI's further note at [25.3]

[40] As recorded in the summary of the Chairman's findings at [A.11]: "The starting point is that no restriction order will be made, in the public interest of openness in the Inquiry and its proceedings, unless it is necessary in the countervailing public interest of the protection of individuals from harm and/or effective policing".

be undertaken and category three families informed, so as to minimise the risk of any such inference being drawn by those within category two.

33. Before addressing the practicalities, we emphasise that not only should the guiding principle be one of openness and transparency to the fullest possible extent; but the procedure adopted should seek to minimise delay wherever possible; and it would be undesirable for families who have contacted the Inquiry to be left to speculate on whether their relative's identity has been used, potentially drawing the wrong conclusion, when in fact a clear answer "no" could be provided.

34. We envisage that the Inquiry's engagement with concerned relatives will involve the following stages:

i) Advertisement

In advertising so that close relatives might make themselves known, the Inquiry can make clear that it will not always be possible for the Inquiry to offer reassurance one way or another, without being too specific as to why this might arise. We suggest that the advertisement could say that the reasons why this may prove to be the case include because it may not be capable of being established (given the passage of time and the potential that full records have not been maintained) and because it may be contrary to an important public interest in some circumstances to disclose the information. The advertisement would, we anticipate, be accompanied by a direct and similar communication from the Inquiry to those who have already expressed a desire to know and we endorse the suggestion that a request for information pursuant to rule 9 should be communicated to the MPS and all other relevant agencies[41];

ii) Notification by relatives

Upon receipt of a notification of a desire to be informed, the Inquiry will be in a position to communicate with the applicants and to set out the procedure, including a reiteration of its limitations. We anticipate that family members would be invited at that juncture to inform the Inquiry of any particular issues that they would wish to have born in mind regarding the application of the "*fair balance*" and public interest tests. We suggest that in addition, those who seek information be advised that the inquiry is progressing through its work in tranches and that it is hoped that the majority of those who seek an

[41] See MPS submissions at [6]

answer will be informed at an early stage but that it is not possible to be more specific than that and there may be additional, later tranches of disclosure.

iii) The provision of information to relatives

We suggest that the provision of information to the majority of applicants could take place in a first tranche of disclosure immediately following the first wave of restriction order determinations; in a final tranche of disclosure at a time when the Inquiry is reasonably confident that the overall factual position has been established; and probably at an interim stage in addition.

35. We respectfully suggest that by this method the Inquiry could provide reassurance to category three families at a much earlier stage than would be achieved through a one off process occurring after the overall factual positon has been established and thus spare them the uncertainty and anxiety associated with awaiting a later determination. As has been acknowledged, those relatives' Article 8 rights will be engaged throughout and will likely be further infringed whilst the resolution of their question remains extant.

36. Furthermore, we consider that undertaking a single consideration of whether category three families should be informed after all the relevant evidence has been received by the Inquiry, as CTI propose, is more likely to magnify, rather than reduce the concerns that have been identified. The prospect of category two families drawing an inference that their child's identity was used, may be said to be greater if all the category three families were to be informed that the answer was "no" at one particular juncture of the Inquiry. In turn, this would increase the prospects of the Inquiry in fact deciding at that stage, having weighed the countervailing interests, that the answer should be not to give disclosure to category three families. Accordingly, if CTI's current proposal is adopted by the Inquiry, not only will category three families face unnecessary delay, but the prospects of them receiving a substantive answer at all will be reduced. We believe that undesirable outcome can be avoided by taking the approach we have summarised above.

37. We endorse the sensible additional proposal set out at paragraph 29 of CTI's further note to offer prompt reassurance by reference to criteria such as gender and/or dates of birth as appropriate, where this is feasible.

The MPS submissions

38. We acknowledge the acceptance of a need to inquire into the motives behind the use of the tactic and in relation to the anticipated errors and omissions as to oversight.[42] We concur that the scrutiny that must now be brought to bear will inevitably cause additional turmoil and emotional distress.

39. We also acknowledge the work that is currently being undertaken by the MPS to establish the identity and contact details of affected parents or other next-of-kin. For the avoidance of doubt we would be grateful for confirmation that this exercise will seek to identity close relatives including step parents, birth and adoptive parents, and siblings irrespective of whether a parent and/or other next-of-kin has been traced.[43]

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17 June 2016

[42] Ibid at [1]

[43] At [78] of our earlier submissions