UNDERCOVER POLICING INQUIRY

PRELIMINARY HEARING ON DECEASED CHILDREN'S IDENTITIES

I N D E X

Wednesday, 22 June 2016

(10.30 am)

Opening remarks

THE CHAIR: Good morning, everyone.

Can I first refer to the usual housekeeping matters. No cameras and recording equipment in the room, please. There must be no recording of the proceedings except by the Inquiry itself. As you know, a transcript of today's proceedings will be prepared and placed on the Inquiry's website.

Please make sure that any mobile phones in the room are switched off or on 'silent'. Telephone calls from

this room are not allowed except during any breaks.

Finally, text and Twitter are allowed, but no statement made in the hearing can be transmitted from this room until at least 60 seconds has elapsed since the statement was made. As you know, that is to enable anyone who wants to object to the transmission from this room to somewhere else before it is too late to be effective.

That completes housekeeping. Can I next remind you why we are here today.

The Metropolitan Police Service acknowledges that during the period between 1968 and 2008 the identities of some 42 deceased children were used in order to create the cover legend of undercover officers. That means that there are, or were, a number of families who were affected by that process.

The Metropolitan Police Service, in 2013, set up what was called a casualty bureau, which effectively means that telephones were manned to receive enquiries from anyone who was interested in this issue. To date, 23 families have made enquiries of the police.

I can assume that many of them will want to know whether the identity of their deceased loved one was used for this purpose. The issue therefore arises for the Inquiry as to whether the parents of such deceased

children are in any special position with regard to receiving information from the Inquiry. Secondly, what is the Inquiry to do if the true answer to the question is that their child's identity was not used for covert purposes?

As I think Mr Barr is going to tell us, as in the case of other preliminary issues I have been very much assisted by written submissions, and we have probably arrived at a position in which many of these issues are agreed. At the end of the hearing I shall, as usual, consider the position and issue a ruling in writing, both as to the principles involved and my approach to the practical problems, which we are going to discuss this morning.

Mr Barr.

Submissions by Counsel to the Inquiry,

MR BARR

MR BARR: Thank you, Sir.

Can I first of all introduce the advocates who are present today. I am here with Ms Ailes, to my right. To my left are Ms Williams QC and Ms Murphy on behalf of the Relatives. To my right is Mr Hall QC with Mr Payter for the Metropolitan Police Service. To my far right is Mr Brandon on behalf of the separately represented core participant

police officers.

Behind them you will recognise Mr O'Connor QC on behalf of the National Crime Agency and Mr Griffin QC on behalf of the Home Office.

Sir, the written submissions made by counsel acting on behalf of those with an interest in today's issues have indeed been valuable. They have served to identify and narrow the issues between Counsel to the Inquiry and the interested participants. All of their submissions, together with our note and further note, have been posted on the Inquiry's website. I will not repeat them now. Instead, I propose to address those areas where there appears to remain a difference of opinion.

The first of those issues is whether Article 8 of the European Convention on Human Rights imposes any freestanding duty of disclosure on the Inquiry. We understand the Metropolitan Police Service to be submitting that if there is any positive duty under Article 8 to consider a request by a close family member to be told whether his or her deceased child's identity was used by an undercover police officer, then it is satisfied by the obligations imposed upon police forces by the Data Protection Act 1998 and the Freedom of Information Act 2000.

Consequently, it argues that your consideration of

this issue falls to be considered purely having regard to your terms of reference and the Inquiries Act 2005. It argues that you need take no action in relation to any evidence of the use of a deceased child's identity in the event that you find it unnecessary to put such use into evidence.

I can deal with that last scenario first. All current indications are that it is an academic issue. The Inquiry is proposing to treat all instances of the use of a deceased child's identity of which it becomes aware as relevant and necessary to its work.

Turning to the evidence of the use of a deceased child's identity which is being considered for publication by the Inquiry. We remain of the view that the obligation on the Inquiry in relation to information of this kind is to have in place an accessible and effective system for striking a fair balance between competing interests when the close family member of a deceased child asks to know whether or not his or her deceased child's identity has been used by an undercover police officer. Our view remains that section 19 of the Inquiries Act 2005 provides this mechanism in the present context.

The second issue is whether striking a fair balance for the purposes of Article 8 of the European Convention

on Human Rights is achieved through section 19 of the Inquiries Act 2005 or whether separate consideration is required.

We are all now agreed that the question whether to restrict publication of evidence relating to the use of a deceased child's identity by an undercover police officer falls to be considered under section 19 of the Inquiries Act 2005. However, there remain significant differences as to how the test should be approached and applied.

First, counsel for the Relatives 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. I am quoting there from page 3, paragraph 7 of their final submissions.

We disagree. The Inquiry has indicated that it anticipates that it will regard the practice of use of deceased children's identities as relevant and necessary in all cases, for example even in a case where that deceased child had no surviving relatives at all, and not only in those cases where there is a relative with an Article 8 interest in disclosure.

Every factor which would fall to be considered in an analysis of individual rights in considering whether non-disclosure would lead to a violation of a relative's rights under Article 8 will also fall to be considered as an aspect of the public interest, whether it tends for or against disclosure.

This is accepted by counsel for the Relatives at paragraph 11 of their skeleton argument. We submit that it is therefore unnecessary for any separate Article 8 rights-based analysis to take place. The Article 8 obligation is satisfied by the existence of a procedure which strikes a fair balance between competing interests, namely section 19.

Given the presumption of openness in the Inquiry's work, which is relevant to the section 19 balance, there can be no question that separate consideration under Article 8 would result in disclosure where consideration under section 19 would not do so.

Second --

THE CHAIR: Is that because the starting point under section 18 is disclosure?

MR BARR: Yes, essentially. It is because there is a general public interest in being as open as possible, and in section 19 that will be in the balance, together with the individual interest in ascertaining

the information.

The second issue is that the Relatives seek to assert that the Article 8 rights of close family members of deceased children whose identities have been used by undercover police officers are not to be equated to those of undercover police officers. They suggest that the weight to be attached to the rights of an officer may be diminished where he chose to build his legend from a deceased child's identity.

We agree that the rights are not directly equivalent, but for different reasons. The right of the close family member of a deceased child arises where fair balance falls in her or her favour from the positive obligation under Article 8. The right of the undercover police officer arises from the negative obligation. We would add that in many cases the Inquiry will be required to consider not only the Article 8 rights of the undercover police officer but also that of his partner and children. No presumptions can be made at this stage as to the weight to be attached to the relative interests arising under Article 8. They will be fact-sensitive.

Even where an undercover police officer has passed away, he may have surviving relatives whose lives will be affected by public revelation of the deceased

officer's identity. These, too, will fall to be taken into account in the public-interest balancing exercise.

It is convenient here to digress and make clear that throughout our written submissions, and today, we have not sought to quantify the weight to be attached to the various factors that will have to be balanced when considering applications for restriction orders. Weight will fall to be considered when specific applications fall to be determined.

The third issue between the participants is, who is a close family member? For the purpose of the positive obligation with which we are concerned today, namely disclosure to close family members relating to whether or not their deceased child's identity was used by an undercover police officer, who is a close family member?

We have no doubt that a parent should normally be presumed to be sufficiently close. Where the parents of the deceased child have passed away, the next of kin would, in our submission, meet the test. Where the family member's own identity was also adopted as part of the undercover police officer's legend, there is particular reason to include that relative within the scope of the obligation.

However, there is little in the case law to assist with who else in this type of case is sufficiently close

to fall within the ambit of the positive duty. The following observations can be made in the light of the Strasbourg case law.

First, [Klass and others v Germany (1978) 2 EHRR 214] indicates that the connection with the information sought is relevant to whether an applicant has standing. This indicates that the proximity of relationship is a factor.

Second, most of the case law on positive obligations of disclosure concerned a living applicant seeking information about his or her own circumstances, and so do not assist on this question.

Third, the case of Elberte v Latvia [(2015) 61 EHRR 7] concerned a widow, but her standing arose from the fact that consent to remove tissue from her deceased husband should have been sought from her. She did not seek Article 8 standing on the basis of the interference to her husband's rights. The judgment does emphasise that she was the closest relative.

Fourth, generally Strasbourg law has imposed limits in relation to the standing of relatives in cases where the victim is dead. A general interest test is applied, although we have found no cases akin to the instant circumstances.

Finally, the Strasbourg court has generally

approached the imposition of a positive obligation on a fact-sensitive case-by-case basis.

All of the above suggests that the position under Article 8 in the present circumstances is not settled. It is fact-sensitive and probably quite restrictive on this question. However, the Inquiry needs also to consider the position under section 17 of the Inquiries Act 2005, the duty to act fairly. In relation to those who proactively contact the Inquiry wishing to know whether their close family member's identity was used by an undercover police officer, there would appear to us to be good reason to include stepparents, foster parents and siblings as proposed in the Relatives' submissions. Doing so ought not to give rise to any practical difficulty.

The position may be different in relation to those close family members who will have to be traced before the Inquiry can publish the cover name of an undercover police officer who has used a deceased child's identity. We note the practical difficulties in tracing those other than parents to which the Metropolitan Police Service refer in their further submissions dated 17 June 2016.

There may be a case here for concentrating the search on the next of kin and then proceeding from there once the next of kin have been located. Delay spent

tracing more distant relations from the outset, potentially fruitlessly, would work against the general interest in progressing the Inquiry's work as quickly as possible.

THE CHAIR: Can I just ask you to pause for a moment, Mr Barr?

I do understand the focus on the question of who qualifies if not a parent, if a parent is no longer available. But if I am asking the question whether it is in the public interest to make a restriction order or not, I'm not limited by the subparagraphs in [section 19(4) of the Inquiries Act 2005]. In other words, I would not exclude, say, an aunt merely because an aunt is not a parent or a sibling or a foster carer, for example. But if that person were to demonstrate to the Inquiry the nature of his or her interest in the use of the family name, that would nevertheless be something that I could take into account even though, strictly, if that person went to Strasbourg the application might not be admitted?

MR BARR: Absolutely. The whole thrust of my submission here is that there is an interesting and unsettled question so far as the Strasbourg law is concerned, but your powers under the Inquiries Act 2005 are much wider and permit you to go further and you can decide what in fairness is required, and the scenario you have just

posited is precisely an example of that.

THE CHAIR: Okay, thank you.

MR BARR: The fourth issue that we have identified from the written submissions is a question of is there a Scappaticci [1] type problem.

Counsel for the Relatives have pointed to the indisputable factual differences between the Scappaticci case and the cases presently before the Inquiry. However, there is not an answer to the difficulty which confronts the Inquiry. The crucial similarity between the situation in Scappaticci and the dilemma which the Inquiry has to deal with now is that if the Inquiry simply gives a 'no' answer to every concerned relative whose deceased child's identity was not in fact used by an undercover officer, then obviously inferences will be drawn by those to whom the Inquiry cannot give a straight 'yes' or 'no' answer; that is to say those cases where the Inquiry cannot answer because to do so would undermine a restriction order made for good reason.

We remain of the view that the Inquiry does face a Scappaticci-type problem albeit on very different facts. Harmful inferences can be drawn if the Inquiry simply answers the requests of concerned relatives.

Counsel for the Relatives assume that the size of

[1] Re Freddie Scappaticci's Application [2003] NIQB 53

what we have described as category two -- that is to say those cases where a deceased child's identity has been used by an undercover police officer but a restriction order prevents publication of the officer's cover name -- is likely to be small.

That is not an assumption that can safely be made at this stage. It is too early to say. In any event, as long as there is at least one person in this category, the Scappaticci problem arises and cannot be ignored.

We remain of the view that it is not realistic to tell all concerned relatives that they will be given an answer as the Inquiry progresses. For the reasons set out in our further note, we consider that those in category one, those whose deceased child's identity was used and where the Inquiry has decided not to make a restriction order, can and should be told as soon as possible. Those in category two cannot be told whilst the relevant restriction order remains in place.

In relation to those in category three, those whose child's identity was not used, the Inquiry will not know who they are until it has completed its investigations. It is only then that the Inquiry can consider where the balance of public interest lies and what can and cannot be published.

We agree with counsel to the Relatives that, after

investigation, the risk of inferences being drawn remains. It is for that reason that we have made clear that individual answers may not be possible even at that stage.

Those, Sir, are our submissions.

THE CHAIR: Thank you very much, Mr Barr.

Ms Williams.

MS WILLIAMS: Thank you, Sir.

THE CHAIR: Thank you very much for your written submissions which have been very helpful.

MS WILLIAMS: I am heartened to hear that, Sir.

Submissions on behalf of 'the Relatives'(Barbara Shaw, Gordon Peters, and RDCA) by MS WILLIAMS

MS WILLIAMS: As you know, we, myself and Ms Murphy, represent three families, Mrs Shaw's family, Mr Peters' family and another family, who are concerned whether the identities of their deceased children were used in the undercover legends and are most anxious to understand if that occurred and, if so, why. May I just mention that, of the three families, Mr Peters is present today.

Sir, if I may just deal briefly with what we say is the important context before then coming directly to deal with the issues that have been flagged as live issues at that juncture.

In terms of the important context, if I may make six

brief observations.

Firstly, this is an area in which it has been recognised -- it appears by all concerned -- that there are very significant private and public interests involved in informing the parents, if possible, whether their deceased child's identity was used. I say "all concerned" because that is acknowledged, for example in the skeleton of my learned friend Mr Hall at paragraph 2, and of course acknowledged in Counsel to the Inquiry's note.

THE CHAIR: Quite apart from the law, it is everybody's instinct.

MS WILLIAMS: Indeed, and it is in fact often the case, Sir, that one's instinct and the law do go hand in hand, perhaps more often than sometimes might be appreciated.

Sir -- and again, I take these points quickly because I appreciate you are aware of them, but it is important context -- secondly, the Home Secretary has confirmed via paragraph 2 of my learned friend Mr Griffin QC's skeleton that the concern about the use of the deceased children's identities was indeed one of the factors that led to her setting up this Inquiry.

Thirdly, Sir, the examples of our clients -- which I don't go into detail about now, but you have seen at

paragraphs 17 to 23 of our original submissions -- illustrate the devastating stress and trauma and anxiety that these matters have occasioned over a protracted period.

The fourth general observation, we make, Sir, is to stress -- and again this is acknowledged in the submissions on behalf of the Metropolitan Police Service -- that the tactic in question did not involve simply using the name of a deceased child, taken from a birth certificate and death certificate, but it involved the officer in question researching details of the family, where the family lived, where the local schools and shops were, the parents' names, their occupations and so on, and weaving those real details into the fake personas that they created for themselves. And in that way in particular whole families became involved in the creation of these legends.

The fifth general point, Sir, relates to such apologies as have been given so far. I raise this, Sir, because some emphasis is put on this in paragraph 21 of the Metropolitan Police's skeleton argument. The apologies, such as they are thus far, have been couched in very general and limited terms. Sir, we have distributed to my learned friends this morning copies of the relevant letter. I don't know if it would be useful

to hand you copies, Sir.

THE CHAIR: Yes, I will have one. Thank you (handed).

MS WILLIAMS: These relate to Mrs Shaw and Mr Peters, and I read only the relevant paragraphs.

Sir, the letter to Mrs Shaw is dated 16 July 2013. Sir, you will be aware that that was the date upon which Operation Herne published their first report, the one that dealt with deceased children's identities.

Mrs Shaw, who had already made a police complaint about the matter, was written to by a commander in the department of professional standards. The relevant paragraph is at the bottom of page 1.

"On behalf of the Metropolitan Police I would like to sincerely apologise for the shock and offence the use of this tactic has caused, as it is clear you believe your child's identity was used.

I am unable to confirm or deny if the tactic was used in your case."

Sir, I read that to illustrate why, from the family's perspective, such apologies as have been proffered -- and that's the long and the short of it -- is not something which has afforded them any degree of comfort. Indeed, quite the contrary, it has increased the sense of frustration at not being able to understand at all if their child's identity was used or in what

circumstances or why.

Similarly, the letter written to Mr Peters on 18 December 2014, and the letters sent on that date, are referred to in my learned friend Mr Hall's skeleton argument. I will just read the first and last paragraph. This is a letter from Detective Superintendent Craddock:

"Dear Mr Peters

I wrote to you in October 2014 following your enquiry about whether Benjamins' personal details had been utilised by undercover officers. I was unable to provide any meaningful response other than to maintain the Neither Confirm Nor Deny (NCND) stance for the reasons which were detailed in my letter. I appreciate the distress this may have caused you and your family as we could not answer your questions."

Last paragraph:

"I realise the above information ..."

Which I will come back to:

"... may still fall short of providing the definitive answers you require and can only reiterate my previous apology for any hurt or upset caused to you and your family by the historical use of this tactic..."

So again, Sir, that is in very general and indeed qualified terms and not something which has afforded

Mr Peters any comfort at all thus far.

Sir, the sixth and final matter I wanted to deal with by way of context is also covered by this letter. You will recall reference in the Metropolitan Police Service's skeleton argument and the cross-reference at paragraphs 21 and 34 to 36 to some information that was provided under the Freedom of Information Act 2000, relating to the ages of the children who were used to create the legends, or at least in relation to those that had been thus far identified and researched.

The letter says in the second paragraph:

"Earlier this year the Metropolitan Police Service (MPS) received a Freedom of Information Access (FOIA) request by a Member of Parliament on behalf of a constituent. The request asked specifically for details of the ages of children whose identities were used by undercover police officers, in whole years. The [Metropolitan Police Service] maintained the [Neither Confirm Nor Deny] stance and rejected the request. This decision was appealed by the applicant through the [Information Commissioner’s Office] who conducted a detailed review. The [Information Commissioner’s Office] determined that the [Metropolitan Police Service] should provide the details requested."

It goes on to say that, thereafter, disclosure will

be made, and therefore disclosure is given of the ages used between 0 and 17, with the consequence, as Mr Hall says in his skeleton, that ages 2, 3 and 15 were not used.

Sir, that is the long and the short of the extent of the information provided so far; the Metropolitan Police Service initially refusing to do so.

Sir, then I turn to the questions that have been identified for today's purposes. Again, like my learned friend Mr Barr I would simply focus on matters which remain or appear to remain in dispute.

Question 1, which we dealt with at paragraph 3 onwards in our skeleton argument. As we have clarified there, we don't submit that consideration of disclosure pursuant to the Article 8 duty should be dealt with without reference to the restriction order regime. However, we do submit -- and we maintain our submission -- that the existence of an Article 8 duty has a significance, indeed potential importance, in this area. As we put it at paragraph 4, the Article 8 evaluation informs and may influence the outcome of any relevant restriction order application.

We accept -- as indeed we did in our earlier submissions, where we listed the relevant factors that are likely to be relevant to your determinations in this

area, which are paragraphs 55, 57 and 59 of those submissions, Sir, but we do submit that the very fact that, if you so determine, an Article 8 duty to provide information arises is a significant feature in itself which you should weigh in the balance when making your public-interest determinations pursuant to section 19 of the Inquiries Act 2005.

THE CHAIR: Ms Williams, can I ask you to pause at that point, because for my own purposes I paraphrased your submissions as to the existence of the positive obligation in this way, and I would be very grateful if you could help me as to whether it properly reflects your submissions.

You argue that those whom you represent are victims for the purpose of Article 34 [of the European Convention on Human Rights]. They wish to know whether the identities of their deceased children were appropriated, used and stored by the State for covert purposes without their knowledge or consent.

Accordingly, that conduct alleged touches on their Article 8 right of respect for their private life.

Two, the State is in possession of the information they seek.

Three, they are in a current state of uncertainty, anxiety and distress as to whether the identities of the children have been misused in this way. And thus -- and

you will recognise the wording -- the State has a positive obligation to provide them with an effective and accessible procedure enabling them to have access to all relevant and appropriate information -- these are my words not yours -- so that either they can become reconciled with the truth or reassured that no violation of their private life has occurred.

Is that a fair summary of the argument?

MS WILLIAMS: It is a very fair summary, Sir, with the confirmation -- and I am sure this is what you intended, but forgive me for confirming -- that in this context enabling them access to the relevant and appropriate information so that they can be reconciled to the truth and/or reassured means access to whether their deceased child's identity was used in the creation of an undercover legend.

THE CHAIR: Absolutely. However -- and this is what I wanted to discuss with you -- it is not an absolute right, because it depends on the measurement of the interests of the community with the interests of the individual.

It is not going to be productive to enter into an argument as to whether all the decisions in Strasbourg are logically sustainable, but that's the effect of what Strasbourg has said. And only in cases

where there has been, as it were, a flagrant denial of information for which non-disclosure is completely unjustifiable, Strasbourg has said this information should have been disclosed. What it is more interested in is that the individual has a process by which to ask that that balance is reached.

Do I have it right so far?

MS WILLIAMS: As I have already indicated, I am entirely in respectful agreement, Sir, with the way that you characterised the duty in relation to the observations or summary you have made since then. In relation to the first point, that Strasbourg weighs the individual interests in receiving the information as against the interests of the community, yes, indeed, that is exactly what the authorities say. Here, we point out that there is, of course -- unlike in many of the Strasbourg authorities, which simply concerned an individual wanting to know information about their time in foster care or whether it was wanting to know about health procedures that had been carried out in relation to them -- there was not a wider public interest in disclosure of the information as opposed to a public interest or a potential public interest to be weighed in the balance against disclosure.

So in terms of the application of the test, in this

particular instance it is noteworthy that there are particularly strong public-interest features as well to weigh in the balance on the side of disclosure, as well, of course, we readily acknowledge, features, in at least some instances, that may point the other way.

THE CHAIR: Two of them are: the starting point of openness in a statutory inquiry; another is the exposure of misconduct and its effect on the individuals who have suffered it.

MS WILLIAMS: Absolutely, Sir.

THE CHAIR: So we are all agreed that the process which applies in present circumstances, given that the Inquiry has been instituted, is section 19 [of the Inquiries Act 2005]?

MS WILLIAMS: Sir, yes. May I just reply to the other points that you made?

THE CHAIR: Do.

MS WILLIAMS: I'm sorry if it was not clear; I had not quite finished.

You then said, Sir, that Strasbourg had found a violation where there had been a flagrant denial of the information in question.

We would respectfully suggest that it doesn't need to be put in such high terms or at such a high threshold. Strasbourg has simply weighed up the interests generally, as I have said, of the applicant in

receiving the information, as against any countervailing interest, and made a decision in those circumstances whether it should have been provided via a proper process or not provided.

So we would respectfully suggest that to propose that it is only in cases of flagrant denial that a violation is found is to put an unwarranted gloss on the test or the approach.

THE CHAIR: I accept that.

MS WILLIAMS: Thirdly, in relation to your observation about process, I was going to take you briefly -- and I stress briefly -- to a view of the cases, in light of my learned friend Mr Hall's submissions about -- well, he suggests that the Article 8 duty is really about having proper process and this Article 8 duty does not go further than that.

We would respectfully submit that the focus of duty does go further than that, and where Strasbourg considers that the information in question that the applicant is desirous of falls within Article 8, that the fair balance falls on their side, that they have been denied access to that information. It is the non-availability of that information to them that grounds the violation. It is not simple enough that there is a mechanism or a process by which they could

ask for it or did ask for it.

So whilst there is emphasis on process in the authorities, Sir, we respectfully submit that it doesn't just stop at process, that the Article 8 duty goes further, and where the information is information that falls within Article 8, and on the application of the fair balance, the applicant should receive --

THE CHAIR: Well, as I understand it from the letters that you have drawn to my attention, there have been Freedom of Information requests made to the police. Certainly in one of these cases a reference was made to the Information Commissioner for a decision. So that is the process that applied before this Inquiry started its work. That would have been a process which would have been upheld in Strasbourg, wouldn't it?

MS WILLIAMS: Sir, when we look at the authorities we will see, as I respectfully submit, that it is not enough simply that there is a process. In cases where a violation of this form of Article 8 positive obligation has not been found, albeit it is accepted that the information is of a kind that engages Article 8, there has been in existence a process which would provide -- not might, would provide -- the information that the applicant seeks and the applicant has failed to utilise it. Those features are common.

And we will see when we look at the authorities.

Here, we do not have a process outside of this Inquiry by which the applicants can receive the information that they seek when they have sought it, whether it be via a police complaint, in Mrs Shaw's case, or whether it be by a Freedom of Information --

THE CHAIR: But Ms Williams, surely Strasbourg has never decided that information should be given to an individual which it would be against the public interest to permit?

MS WILLIAMS: Of course, Sir, absolutely not, if, weighing the fair balance, the fair balance has come down in favour of the applicant. But, Sir, respectfully, that's a different point to the point you put to me: namely whether the fact that there is a process under which the applicant can ask for the information is sufficient in itself to discharge the Article 8 obligation.

THE CHAIR: Yes. The outcome may not be satisfactory so that the Information Commissioner's decision can be challenged. Ultimately, I suppose, the applicant could go to Strasbourg. Is that right?

MS WILLIAMS: Ultimately that would be one possibility. In light of this Inquiry, one of the first points they would probably be met with is that they have not exhausted their domestic opportunities to obtain the

information. So this is a situation where precisely because -- amongst other concerns -- but because of this concern about the use of deceased children's identities and the family's concern about it, the Home Secretary set up this Inquiry, this is the means by which the State has sought to, we respectfully submit, discharge its obligations, including its Article 8 obligations in this area.

So whatever has or has not happened via the Information Commissioner thus far, where the [Metropolitan Police Service] have insisted upon [Neither Confirm Nor Deny] save for the information about the ages involved, this is now the means by which the State has sought to discharge the Article 8 positive obligation. And therefore, we respectfully submit, it would be no answer, within this Inquiry, for you, Sir, to simply say, well, there is a Freedom of Information Act -- I am not suggesting you would, but --

THE CHAIR: I don't think there is anything between us, Ms Williams. I may not have expressed myself as accurately as I should, but I really do not think there is anything between us.

MS WILLIAMS: I am heartened to hear it. In that case, I will take the authorities as briefly as I can, but --

THE CHAIR: But what you do say is that the existence of

a positive obligation is material to the exercise of the [powers under section 19 of the Inquiries Act 2005]?

MS WILLIAMS: We do, Sir.

THE CHAIR: Right.

MS WILLIAMS: It is probably one of those points that does not improve by repetition or amplification, but it is an area where the European Convention has provided a right. It is a right which bites in these circumstances, and it is something, therefore, of itself, to which weight should be accorded.

THE CHAIR: All right.

MS WILLIAMS: Sir, as you have said in various contexts, including already today and in your restriction order ruling [dated 3 May 2016], the starting point for this Inquiry is transparency and openness. Restriction orders are, by their very name, a restriction on what would otherwise apply. And we respectfully submit that the starting point is to approach the Article 8 positive obligation first, albeit of course we acknowledge there is an overlap in the features to be considered in relation to that and the section 19 duty.

Sir, may I then turn to the case law, insofar as it is relevant at this juncture to the nature of the Article 8 duty. First of all, in relation to the victim status, because that may be relevant, for two

reasons, Sir: firstly as a result of some recent authorities that my learned friend Mr Hall has drawn to your attention in paragraph 8 of his skeleton argument, but also because my learned friend Mr Barr has observed -- and I believe you observed as well, Sir -- it may inform the question of the extent of the duty in terms of family members.

THE CHAIR: Yes. You mean to whom it is owed?

MS WILLIAMS: Indeed.

THE CHAIR: Right.

MS WILLIAMS: Sir, as you will know -- and, for example, to save turning this authority up as well, it sets out conveniently in paragraph 12 of Counsel to the Inquiry's second note a citation from paragraph 33 of the Klass case, wherein the court had said that an individual may, under certain conditions, claim to be a victim of a violation occasioned from the mere existence of secret measures, or legislation permitting secret measures, without having to allege that they in fact applied to him.

Now, my learned friend Mr Hall then referred, in the paragraph which I have just indicated in his skeleton, to recent authority narrowing the test.

We would respectfully suggest it doesn't so much narrow as clarify. If I could just take you to that

very briefly. The case in point is Zakharov v Russia (Application no. 47143/06, 4 December 2015), which is volume 2, tab 24 in your authorities bundle, Sir.

THE CHAIR: 34?

MS WILLIAMS: Sorry, 34, I can't read my own writing. I'm very grateful.

I don't think we need to do other than go straight to the test, but simply by way of introduction it was a case that concerned a secret surveillance system in Russia under which mobile telephone communications could be intercepted without the user of the phone being aware of it or having any process by which to challenge it afterwards if they suspected that they had been so surveilled.

The clarification of the Klass position is expressed specifically in relation, therefore, to surveillance. But we see no reason in principle why it shouldn't apply more generally, and, as we understand it, that's what my learned friend Mr Hall submits as well. So the clarification of the conditions under which an applicant can claim to be a victim of a violation of Article 8, without having to prove that in this instance surveillance actually applied to them, is set out at paragraphs 170 and 171, which is page 41.

The relevant part in particular is paragraph 171,

the fourth line onwards. On the fourth line there is a sentence which starts "Accordingly", and the Grand Chamber says:

"Accordingly, the Court accepts that an applicant can claim to be the victim of a violation occasioned by the mere existence of secret surveillance measures, or legislation permitting secret surveillance measures, if the following conditions are satisfied. Firstly, the Court will take into account the scope of the legislation permitting secret surveillance measures by examining whether the applicant can possibly be affected by it, either because he or she belongs to a group of persons targeted by the contested legislation or because the legislation directly affects all users of communication services by instituting a system where any person can have his or her communications intercepted. Secondly, the Court will take into account the availability of remedies at the national level ..."

Then skipping down a few lines, the court says that in those two circumstances -- so where the applicant can possibly be affected by it and where there is a lack of available remedies at national level:

"In such circumstances the menace of surveillance can be claimed in itself to restrict free communication through the postal and telecommunication services,

thereby constituting for all users or potential users a direct interference with the right guaranteed by Article 8. There is therefore a greater need for scrutiny by the Court and an exception to the rule, which denies individuals the right to challenge a law in abstracto, is justified. In such cases the individual does not need to demonstrate the existence of any risk that secret surveillance measures were applied to him. By contrast ..."

And this is the second category identified, Sir:

"... if the national system provides for effective remedies, a widespread suspicion of abuse is more difficult to justify. In such cases, the individual may claim to be a victim of a violation occasioned by the mere existence of secret measures or of legislation permitting secret measures only if he is able to show that, due to his personal situation, he is potentially at risk of being subjected to such measures."

So if there is a proper domestic system for challenging the measure in question, then the test is that the person has to show that they are potentially at risk, which is not, with respect, a high threshold. Indeed, perhaps I could just give you the reference, without suggesting you need to turn it up now.

In the [Investigatory Powers Tribunal] case [Human

Rights Watch v Secretary of State for the Foreign & Commonwealth Office [2016] UKIPTrib15_165-CH] which is at the next tab, at tab 35, involving Human Rights Watch and various other organisations and individuals who were concerned that GCHQ had illegally obtained information about them, the [Investigatory Powers Tribunal] said at paragraph 46 that that second category, potentially at risk, was a low hurdle. You see that at the end of paragraph 46.

If you look back at paragraph 11, you will see the kind of organisations and persons who had made application to the [Investigatory Powers Tribunal] in this matter on the basis that they feared that GCHQ had been illegally involved in monitoring their communications.

You will see, if you just cast can your eye down paragraph 11, a whole range of people and organisations who, simply by nature of what they did, had a general concern that that might be the case. It was not that they had specific, hard information to believe that GCHQ had taken steps in relation to them.

So, Sir, we draw attention to these authorities to clarify, firstly, as I say, we respectfully submit, that it is not so much that the test has been narrowed but simply that it has been clarified.

Secondly, even if one were to take the view here

that the relatives of deceased children came within the second category -- albeit we would submit they come within the first, given the lack of any effective domestic procedures at the time by which they could know of or challenge this intrusion upon private and family life -- but even if it came within the second category it is enough for them to show they are potentially at risk. And we would respectfully submit, given that it is a low threshold test, in essence any family member who was to contact the Inquiry, to use the example of an aunt, Sir, which you gave, was to say that they were the aunt of a child who died in X year aged Y and as a result they were very concerned and worried that the identity of that child had been used to create an undercover officer's legend, that in itself would be sufficient to meet this test for victim status.

I mention that, Sir, because although you observed, when my learned friend Mr Barr was making submissions, that in any event as a result of the Inquiry's duties you would bear in mind their interests, albeit they might well not qualify as a victim in the eyes of Strasbourg, we respectfully submit they would qualify as a victim in the eyes of Strasbourg under that test, and so therefore that is something to bear in mind.

Sir, before I turn to the other case I was going to

take you to briefly in relation to the content of the Article 8 duty, it may be helpful just to deal with the other points made by my learned friend Mr Barr about the scope of close family members.

From what he said, there is a large measure of agreement between us. He said when he addressed you a few moments ago that he had no doubts that the positive obligation would extend to a parent, and, where the parent had passed away, the next of kin and a family member whose details was involved in the adoption of the false persona by the officer involved. We respectfully agree with all of that, and with his proposition that if contact is made to the Inquiry by stepparents, foster parents, siblings and so on, then they also should have the same entitlements weighed in the balance as parents.

We also respectfully agree with his observation that in relation to category one families who have not contacted the Inquiry but where the details of the use of the deceased child's identity is going to come into evidence because no restriction order has been made -- we entirely accept it that is sensible and reasonable to concentrate in the first instance in seeking to trace the next of kin if the parents are no longer alive.

THE CHAIR: Suppose -- I should preface my question with the observation that surely the nature of the relationship

must have something to do with qualification? For example, the next of kin may have lived in Australia for 40 years and have lost contact with the family. In those circumstances, would there be a sufficient relationship with the family and the deceased child to justify treating that person as a victim?

MS WILLIAMS: Yes, Sir, I understand the point. The level of connection is undoubtedly important. Simply as a means of practicality, it may be easier to, in the first instance, trace the next of kin as a focal point, as it were. It may be that the next of kin is living in Australia, but they may be able to put the Metropolitan Police Service, who may be having practical difficulties in contacting other family members, in contact with a family member -- perhaps a cousin in this country -- who grew up with the deceased child and was close to them and would be absolutely horrified to learn of these matters.

So simply on a practical basis, where the next of kin can be traced they may be the appropriate person in category one cases to contact. But I fully accept, Sir, that the degree of connection is important. And that is equally why we would respectfully submit it is important to be flexible. There may be a sibling or a cousin who was close in age to the deceased child, who would

1 therefore be particularly upset and traumatised if these
2 details were to come out in the public domain without
3 their first being contacted by the Inquiry to be advised
4 of this matter.
5 THE CHAIR: Right.
6 MS WILLIAMS: Sir, beyond that, we would simply encourage
7 that all practical steps are taken to trace close family
8 members. Obviously if there are practical difficulties;
9 we understand that. But the Metropolitan Police Service
10 does have considerable resources at its disposal. And we
11 note in the Metropolitan Police Service's original
12 submissions on this topic on 27 May 2016 that they did say,
13 in either the last or the penultimate paragraph, that
14 fairness dictates that close living relatives should,
15 where possible, be notified in advance, so any approach
16 that restricted notification to the parents, we would
17 respectfully submit, would be unduly prescriptive.
18 Sir, if we may turn to the Article 8 authorities.
19 Of course, I do not want to take up any more time than
20 necessary in circumstances where there is a broad
21 measure of agreement, but, to borrow the words of my
22 learned friend Mr Hall, it is important to get the law
23 right in that area, and we respectfully submit that he
24 has not altogether achieved that and we submit that the
25 Article 8 duty in this context is along the lines that

I indicated to you in our exchanges a few moments ago, Sir.

So if I could just take you to a few of the cases as quickly as possible to make good that proposition, and obviously if I'm being unduly repetitive you will let me know, but I don't intend to take more than a few minutes doing this.

First, Sir, tab 24. A case that may challenge my pronunciation. It is the Polish case [Szulc v Poland (2013) 57 EHRR 5]. We referred to this case in our skeleton. It is in paragraph 43(xiv) of the long list of the various cases we relied upon.

This is a case where the applicant complained under Article 8 about her unsuccessful attempts to obtain access to documents collected on her by the Communist era secret service, and she wanted to dispel suggestions that she had been a collaborator with those services.

This is actually the most recent of the Article 8 cases, Strasbourg cases, we rely on, so we take you to this one because it saves some time because it refers back to the earlier cases.

In considering Article 8 in this area, the Strasbourg court follows a particular sequence of consideration, which is very largely reflected, Sir, in the propositions that you put to me earlier, so I will

take it as briefly as I can.

The court's assessment in relation to Article 8 in this case starts at paragraph 81. The first stage in the court's reasoning is to consider the applicability of Article 8. In other words, does the subject matter that the applicant seeks access to fall within its protections?

It didn't cause any great difficulty in this case, for the reasons set out in paragraphs 81 to 82.

Paragraph 83 then reflects the fact that the applicant had been trying to get hold of the information but had been unsuccessful.

Paragraph 84, which we see time and again in these authorities, then refers to the positive obligations inherent in this effective respect for private life and the fair balance test that we have already canvassed.

Paragraph 85. Here, the court acknowledges the vital interest protected by the Convention of persons receiving information.

THE CHAIR: Why doesn't the Strasbourg court -- and I'm entering into the semantic argument that I said I would not -- identify what the positive obligation is?

MS WILLIAMS: Sir, in our respectful submission it does. But we see that in paragraph 86, we see it identified in general terms, and then we see its application to the

particular circumstances.

THE CHAIR: "Effective and accessible procedure".

MS WILLIAMS: "Enabling".

THE CHAIR: "Relevant and appropriate information" I have interpreted as meaning relative and appropriate once the balance between community and individual interests has been weighed. Is that the right way to look at it?

MS WILLIAMS: Yes, there appears to be some weighing going on in deciding whether there is a positive obligation at all. But equally it appears to come in at that stage. I respectfully agree, Sir.

THE CHAIR: So it may come in twice?

MS WILLIAMS: Yes. Although that is not necessarily acknowledged in the reasoning of the court.

THE CHAIR: Sure. I understand.

MS WILLIAMS: But we do stress, it is not simply an obligation to have an effective and accessible procedure, but it is one that enables the applicant to have access to all relevant and appropriate information. And as you say, Sir, the court then goes on to assess what, in the circumstances, amounts to relevant and appropriate information and whether the applicant has been denied that or not.

One sees that here in paragraph 87, after references to a case that I do not need to take you to. We pick it

up at the end of the third line of 87:

"In respect of a person, like the applicant, who sought full access to her file created by the communist secret services with a view to refuting any allegation of her supposed collaboration with those services, the state should secure an 'effective and accessible procedure' before the authority currently holding those files. It is important to underline that the procedure referred to above should enable an interested party to have access to all relevant and appropriate information which would allow that party to effectively counter any allegations of his or her collaboration with the security services."

Then the court goes one further and specifies what the relevant and appropriate information is in the particular circumstances. That is important, Sir, for reasons that are no doubt evident from the observations I made earlier. It is not enough, as my learned friend Mr Hall says, to satisfy the Article 8 obligation, to say, oh, well, there is a mechanism, there is the Data Protection Act 1998, there is the Freedom of Information Act 2000. The court goes further and looks at what information the person in question is entitled to access under Article 8 and considers whether the procedure provides for that. And if it doesn't, there

is a violation.

So one sees -- I don't need to take you through the details of the features that are considered here -- but the conclusion at 94, over the page:

"Having regard to all the foregoing considerations, the Court finds that the respondent State has not fulfilled its positive obligation to provide an effective and accessible procedure enabling the applicant to have access to all relevant information that would allow her to contest her classification by the security services as their secret informant."

So the violation is characterised not simply by reference to: 'is there a procedure under which the applicant can argue for this information?', but it is the fact that the applicant was unable to access the particular information identified by the court as information which, in the fair balance of the relevant interests, she was entitled to receive.

Sir, to make the proposition good that that is not simply an approach out of kilter in this particular case, if I could just take you to a couple of others.

At tab 17 is [KH v Slovakia (2009) 49 EHRR 34]. That was the case where a number of women wanted to obtain photocopies of their medical records for analysis, because they suspected that they had been

subject to covert sterilisation procedures at an earlier stage when they had been under medical treatment for other reasons.

Again, Sir, we see really an identical structure in terms of the Strasbourg Court's approach to that which we saw in the previous case. Firstly, at paragraph 44 --

THE CHAIR: Tab?

MS WILLIAMS: I'm so sorry, Sir.

THE CHAIR: That's all right.

MS WILLIAMS: Tab 17.

THE CHAIR: Thank you.

MS WILLIAMS: So paragraph 44, under the heading "The Court's assessment". First of all, the court considered whether Article 8 is applicable. Yes, because the information concerned health and reproductive status.

Secondly, again, the next stage in the consideration, the reference paragraph 45, here, to the positive obligations inherent in respect for one's private life and the fair balance test to be applied.

At paragraph 46 there is a review of a number of the earlier authorities, including ones we referred to in our submissions, [Gaskin v United Kingdom (1990) 12 EHRR 36], [Guerra and others v Italy (1998) 26 EHRR 1], [McGinley and Egan v United Kingdom (1999) 27 EHRR 1], [Roche v United

Kingdom (2006) 42 EHRR 30], et cetera. And at the end of 46, identification of the positive obligation again has been one to provide an effective and accessible procedure enabling the applicant to have access to all relevant and appropriate information.

Then again, a similar structure to the previous case we looked at, at paragraph 47 the court then applying that obligation or transposing it to the present instance. The court says:

"Bearing in mind that the exercise of the right under art.8 to respect for one's private and family life must be practical and effective, the Court takes the view that such positive obligations ..."

That is to say the one they have identified in the previous paragraph:

"... should extend, in particular in cases like the present one where personal data are concerned, to the making available to the data subject of copies of his or her data files."

Pausing there, again, the court is not simply saying there needs to be a mechanism to determine the applicant's request. The court specifies the information that the applicant should be granted access to in order to discharge the obligation.

Then the balancing act is carried out. At

paragraph 53, the counter-arguments were not sufficiently compelling to outweigh the applicant's right to obtain copies of their medical records. And therefore, paragraph 58, there has been a violation of --

THE CHAIR: The court says explicitly in paragraph 49 in the second sentence that the point to be determined is whether in that respect the authorities complied with their positive obligation, and in particular whether the reasons invoked for the refusal were sufficiently compelling to outweigh the Article 8 right.

So there they are carrying out the balancing exercise.

MS WILLIAMS: Indeed, Sir, yes.

And they do that, as I say, over the next few paragraphs, and we see their conclusion on that aspect at paragraph 53.

Sir, if you then go back to the tab immediately prior to that, the Roche case --- which I know you looked at in relation to the restriction orders ruling -- it was a case of the applicant, a former serviceman, who had participated in tests at the Portadown barracks, and he had a subsequently diagnosed medical condition, which he was worried was linked to those tests, and he sought access to information related to this.

The relevant parts of the decision are at paragraph 139 onwards. Paragraph 139 sets out the application. I can then take you straight on to the court's assessment, which is 155 onwards, page 643. So again, same structure, paragraph 155 onwards, the court considers whether the information is of a kind to render Article 8 applicable, and concludes, for the reasons it there states and in the next paragraph, that it is.

Then 157, the familiar reference to positive obligations and the fair balance test. Then reference to some of the earlier authorities. I don't need to take you through the detail of that. Then identification of the positive obligation at paragraph 162, again identified by reference to the particular information that the court holds the applicant should have access to. So here, enabling the applicant to have access to all relevant and appropriate information which would allow him to assess any risk to which he had been exposed during his participation in the tests. And at 167 concluding that the applicant had not been given that access in this instance.

Sir, if I may, can I then take you to --

THE CHAIR: So the Government was not arguing that there were national security reasons why this information should be kept secret. It was simply saying: we have

a procedure in the [Pensions Appeals Tribunal], and the Strasbourg court distinguish McGinley from it.

MS WILLIAMS: Indeed. And actually this may be important to make good the point I was making earlier and was going to come on to. If you look at paragraph 164.

Having referred to McGinley, which will I take you to next:

"The Court considers that the conclusion does not apply in the present case since the essential complaints of Messrs McGinley and Egan and the present applicant are not comparable. The search for documents by the former was inextricably bound up with their domestic applications for pensions in respect of illnesses they maintained were caused by their participation in nuclear tests. In contrast, the present applicant had made numerous attempts to obtain the relevant records independently of any litigation and, in particular, of a pension application."

Sir, as I mentioned earlier, a key feature, if the court is to hold that an existing procedure is sufficient to constitute compliance with the positive obligation, is that the applicant has failed to use it, but if they had used it they could have obtained the documents that way.

That was the case in McGinley, as we will see,

whereas here the applicant had made numerous attempts to obtain the relevant documents by one means or another and had not been successful.

So when one looks at McGinley, and in particular the other case that my learned friend Mr Hall relies on, [MG v United Kingdom (2003) 36 EHRR 3], one sees that it is not the sheer fact that a process existed that meant there was no violation; it is the fact that a process existed under which the applicant could have got the documents but had not sought to do so. That was why there was no violation of the positive obligation.

So if I can make that proposition good, briefly, by those two cases, Sir. Firstly McGinley, which is tab 7 in volume 1. I'm not going to take you through all the reasons for the positive obligation, which you have now seen several times over, and one sees it again in this case. But I just want to take you to the part which deals with the points I have just made.

THE CHAIR: Can I ask you to pause just for a moment. I want to give the transcribers a break. Would now be convenient?

MS WILLIAMS: Indeed, Sir.

THE CHAIR: All right. I will come back at 12 o'clock.

(11.52 am)

(A short break)

(12.06 pm)

MS WILLIAMS: Thank you, Sir. I was going to take you to the relevant passages in McGinley. If you still have it open, it is tab 7, volume 1.

THE CHAIR: Thank you.

MS WILLIAMS: As I was saying before the break, I will just take you to the key passages in respect of the point I was making before the break, namely why the violation was not found in this instance.

The court's assessment starts at paragraph 96, but for present purposes I will take you to paragraph 99. The court there refers to documentation relating to exposure to high levels of radiation. It notes:

"The Court recalls that the applicants submitted [...] that the radiation level records would not have been of use to them in the proceedings before the [Pensions Appeals Tribunal]. Nonetheless, the court considers that, since these documents contained information which might have assisted the applicants in assessing radiation levels in the areas in which they were stationed during the tests, and might indeed have served to reassure them in this respect, they had an interest under Article 8 in obtaining access to them. As it has been observed above, the existence of any other relevant document has not been substantiated and is thus no more than a matter

of speculation."

Then at 102, the court goes on to say that under the Tribunal Rules the applicants could have acquired the radiation level documents referred to in paragraph 99. So in other words, Sir, and hopefully making good the proposition I referred to before the break, the reason why there was no violation in this case was not simply that the Tribunal Rules of the Pensions Appeal Tribunal provided for a procedure, but it was a procedure under which the applicants could have obtained, had they sought them, the only relevant documents that were known to exist. And that's the important distinction.

So one also sees the distinction between the present case and that kind of situation in the MG case, which is the second case, along with McGinley, that my learned friend Mr Hall refers to in paragraph 16, which is the key paragraph for present purposes of his skeleton.

MG is to be found at tab 11. This is a case where the applicant, as a child, had been in local authority care. Looking back as an adult he believed he had been abused by his father, and he sought access to his social service records in order to establish whether his father had ever been investigated for or convicted of crimes

against children.

As the headnote records in the first paragraph, he was given limited access to the file and his request for full access was denied on the ground of confidentiality to third parties. He complained that failure to gain unimpeded access was a violation of Article 8.

The material part of the court's judgment begins at paragraph 23. A similar structure, again. The court considers that, given the nature of the subject matter, Article 8 was applicable. And at paragraph 29 one sees the reference to positive obligations and the fair balance tests. Then reference to why the applicant wanted these documents. At paragraph 30, reciting those which the applicant had been unable to obtain. Then 31:

"In such circumstances, the Court concludes that there has been a failure to fulfil the positive obligation to protect the applicant's private and family life in respect of his access to his social service records from April 1995 when [he] first requested them.

"However, from 1 March 2000 (the date of entry into force of the Data Protection Act 1998) the applicant could have, but has not, appealed to an independent authority against the non-disclosure of certain records on grounds of a duty of confidentiality to third parties. He has not demonstrated therefore any failure

by the State to fulfil a positive obligation after 1 March 2000 since he failed to use the appeal process available from that date."

So that's the point: there was a positive obligation which, on the fair balance test, applied. The court found there was no violation of it because the applicant had not sought to use a procedure that was available to him to obtain the relevant documents. Very much, we respectfully submit, in contradistinction to the kind of situation we are dealing with here, where our clients have -- and we have, for present purposes, but summarised their efforts in our submissions --- have indeed been endeavouring to obtain the requisite information, namely knowledge whether their deceased child's identity was used, but have been utterly unsuccessful so far because they have been met with the [Neither Confirm Nor Deny] response at each juncture.

Sir, I don't propose, on this topic, to ask you to turn up any further authorities. But I would simply ask you to note that other authorities that we cited before in relation to Article 8 are also concerned with a violation arising from the non-provision of information sought by the applicant, not simply from the lack of a process.

If I can just give you the reference, for example,

the Guerra case, which is tab 6. You will see from paragraph 60 that it was the failure to provide the families with essential information that would have enabled them to assess the risk to health from the chemical factory that led to the violation.

In the Northern Ireland case that we cited at paragraph 44 of our submissions, [MacMahon's (Aine) Application [2012] NIQB 93], tab 22. We don't need to turn it up. The positive obligation that arose there in relation to the partner of the deceased, and the obligation on the prosecution authorities to inform her of decisions taken in relation to a prosecution against those who may have been responsible for his death, was cast or characterised in paragraph 21 in terms of an obligation to inform her. So again, not simply to provide a process under which she could have sought information, but to substantively inform her.

So these Article 8 authorities are not simply about the State setting up a process. They are about the State being obliged, in circumstances where Article 8 is engaged and the fair balance test made, to deliver the information in question that is sought.

So, Sir, unless it would assist, I don't intend to take you to any of the other authorities on that topic.

THE CHAIR: Thank you.

MS WILLIAMS: I move, then, to question 7, because it appears, other than the point about the scope of family members to be contacted, there are not any live issues between the participants or the participants and Counsel to the Inquiry relating to questions 3 to 6.

In relation to question 7, as you will be aware from our skeleton, Sir, we have addressed it by reference to the three categories of families that Counsel to the Inquiry identified in their further note. We have dealt with that at paragraph 20 of our submissions.

In relation to category one families, namely those instances where the evidence of use of a covert identity obtained from a deceased child is to be given in evidence at the Inquiry, either because a restriction order has not been sought or one has not been made, we entirely agree that the family should be informed as soon as is reasonably possible once the decision not to make the restriction order, if sought, has been arrived at.

In relation to category two families, namely where a restriction order is made, again there is no issue between us because we accept, under the Inquiries Act 2005, that so long as the restriction order remains in force families in that category cannot be told.

We then turn to consider the third category of

families, namely where the family has become aware that the answer is no, that their deceased child was not in fact used to create an undercover police officer's legend. Sir, this is another area where we do submit that it is important to consider whether an Article 8 duty to inform arises.

We have dealt in our earlier submissions, in particular at paragraphs 55 onwards, as to why we say the duty would arise in these circumstances. Plainly it informs the question of the weight to be given in the balance to [Neither Confirm Nor Deny] considerations. And as we said in paragraph 21 of our submissions, it is, we suggest, important not to frame the resolution of this issue, i.e. the issue of if and when families in category three can be told, as simply a question that arises under the [Neither Confirm Nor Deny] policy, rather it is a question of the Article 8 fair balance in respect of which [Neither Confirm Nor Deny] considerations are of course a factor.

My learned friend Mr Barr has acknowledged in his address to the Inquiry that there are significant factual differences between the situation we are now in and the Scappaticci case. In those circumstances, I don't intend, unless it will assist you to do so, Sir, to take you to that authority, which I know you are

familiar with, but you will have in mind the various factors that we have highlighted from paragraph 23 through to 27 of our skeleton, as to why we say that on the facts of that case it really was a very different situation to the present difficulty that the Inquiry has to consider.

As regards the weighing of the respective public interests -- and obviously here we are not talking about restriction orders because it is a child's identity which was not used by any police officer -- but insofar as you identified the relevant public interests and the correct approach in relation to [Neither Confirm Nor Deny] in your restriction orders ruling, Sir, we submit that it is of considerable assistance in indicating the approach that you should take here in relation to the fair balance assessment.

Without taking you through matters that I am sure you are very familiar with, we commend in particular paragraphs 145, 146 and 148 of your ruling in relation to restriction orders, where you set out in effect your conclusions, having reviewed the [Neither Confirm Nor Deny] authorities, as to the balancing exercise that should be conducted, because it is a fact-sensitive exercise that will not necessarily admit of the same answer in each instance.

We drew attention, in particular, Sir, to your observation in paragraph 146, which you made when addressing the evaluation of the relevant public interests. You said whether and what information should be restricted will depend on, one, the sensitivity of the information for which protection is sought; two, the prominence of the countervailing interest; and three, a careful measure of the harm that would result from the disclosure and from the non-disclosure.

Well, as regards one, the sensitivity of the information, plainly that will depend on what is covered by restriction orders that have been made. I have dealt with the prominence of the countervailing interest.

Thirdly, the careful measure of the harm that would respectively result from the disclosure or the non-disclosure: the harm that is said to give rise to concern if disclosure is made to families in category three is the worry that families in category two who have been told nothing, or been told that the Inquiry cannot give them an answer, will infer from the fact that families in category three are told the answer is no, their deceased child's identity was not used, that it was used in relation to those in category two.

Sir, in the balancing exercise to be undertaken, the relative likelihood of that inference being drawn, or

not drawn, is important, as are the steps that can be taken by the Inquiry to minimise any risk of that inference being drawn.

We do note -- and I hope I'm not seen to be making a cheap forensic point because I'm not intending to and I do of course understand the anxious consideration that is quite properly given to these matters -- but the Counsel to the Inquiry in their further note described the risk, and we have quoted it in paragraph one of our skeleton, that it will be obvious to close family members who ask the Inquiry for an answer but are told that one cannot be given, that they will infer that it must mean their case falls into the second category, i.e. that the identity was used, if those in the third category are told the answer no. So it was then being said it is obvious that that is the inference that will be drawn.

My learned friend Mr Barr, when he addressed you this morning, said that the concern was it is a harmful interest that can be drawn, so one does have to carefully weigh realistically how likely is it that families in category two would draw that inference, and if it is in fact a relatively remote prospect then that is something to bear in mind.

We have respectfully drawn attention to two features

in particular in terms of the likelihood or otherwise of category two families drawing that inference if category three families are informed.

Firstly, the point that we make in paragraph 32 of our skeleton, which is that category two families will be aware -- assuming they are following the topic, because if they are not following the topic they are not going to draw any inferences from what happens to category three anyway -- but if they are following the topic, they will be aware from the evidence given at the Inquiry that various deceased children's identities have been used and the Inquiry is hearing evidence about it.

So in other words, this is not simply a binary situation where all those whose deceased child's identity were used are told no, so that those who hear nothing infer the answer must be yes; all those in category one will be families in respect of which their evidence is heard openly at the Inquiry. In relation to a category two family that hears nothing, why should they infer their situation is the same as those in respect of which that evidence has been given? We respectfully submit they are just as likely to infer that the fact that such evidence has not been given in relation to their child either means that the position has not been ascertained or that there is no relevant evidence to

give.

Secondly, we respectfully submit -- and this is dealt with in paragraphs 33 and 34 of our skeleton -- that the way that the Inquiry advertises and communicates with the relatives who have already or may express an interest in learning of this information can itself help to reduce any risk of inference. We have suggested -- obviously this is simply one suggestion and it can be adapted as the situation arises -- we have suggested in paragraph 34 that the Inquiry in any advertisement makes it clear that it will not necessarily be possible for the reassurance sought to be given one way or the other, whether it is then simply left open-ended or it might be positively suggested that that might arise because it is simply not possible given the passage of time for the accurate position to be established.

We also suggest that such qualifications are reiterated upon acknowledgement by the Inquiry of receipt of any notification by a relative of a desire to be informed, and indeed in relation to those who have already made that desire known.

We have also suggested -- and we entirely understand the spirit in which my learned friend Mr Barr's suggestion is made -- but we have suggested that in fact

if disclosure to category three families were to take place in tranches, it is less likely to give rise to any risk of inference on the part of those in category two than if assessment occurs at a one-off point in the future after all relevant material is before the Inquiry and has been considered by the Inquiry. Because if the prospect is at that stage that everyone in category two either be told nothing or be told no, the risk of those -- I'm sorry, those in category three be told nothing or be told no, the risk of category two families drawing an inference is likely to be, although we respectfully submit still not great, that much more substantial under that situation than if information is provided in tranches.

Presumably the fear is that the information comes to the attention of a category two family as a result of something they read in the media, or as a result of having got to know another concerned family during the course of these processes and sharing information. The sheer fact that somebody has heard and somebody else has not heard, if information is being released in tranches, is in our submission unremarkable and does not allow of itself for the inferences to be drawn that concern Counsel to the Inquiry.

We can't say to you, Sir, that there is no risk whatsoever of such inferences being drawn because that

would not be realistic. But what we can say is that if matters were managed in this way, or indeed any other way that the Inquiry thinks appropriate to reduce the risk, then the prospect of any such inferences being drawn by those in category two is at best a small one.

As you identified, Sir, as I have alluded to in paragraph 146 of your restriction order ruling, that is to be weighed in the balance along with the harm that would result from non-disclosure. And here, of course, the harm that we are primarily concerned with -- it may not be the only harm because there may also be losses in terms of accountability and transparency -- but the particular harm we are concerned with is the effect upon families who are in category three, both if there is a protracted delay in them finding out the answer to the question which could be avoided -- of course there is going to be some period of time inevitably, because the Inquiry has to consider and manage the vast amount of information relevant to these topics -- but protracted delay will increase their anxiety, distress, frustration, concern in circumstances where their Article 8 rights are engaged.

Of course, if the process is managed in a way that we fear may enhance rather than reduce the risks of any inference being drawn, then it may of course ultimately

mean that no answer is possible to those in category three and that would potentially occasion very considerable harm to those within that grouping.

Sir, we also recognise it may not be possible to decide these matters definitively at this stage, save of course in terms of the practical question of how one manages the advertising process and what one says and so on, and we do understand that. For example, we are not clear -- and we are not clear if the Inquiry is clear -- at this stage how many restriction order applications in relation to cover identities are going to be made, or more particularly are likely to succeed, albeit we have stressed in our earlier submissions that because for these purposes we are only concerned with disclosure of cover identities, it may very well be that the number of restriction orders made is small.

My learned friend Mr Barr referred to the fact that there may only be one family in category two and it is still significant. Of course it is still significant, but if there is only one family in that category, it in itself reduces the risk of the inference that concerns the Inquiry team being made.

Also, in terms of the relative assessment of harm, one would expect that those in category three are probably a rather larger category, depending of course ultimately

on how many families contact the Inquiry, but probably a rather larger category and so one does very much have to weigh in the balance the harm that will be occasioned to them by, firstly, delay -- it has already been three years since Operation Herne's report -- and, secondly, if the process is conducted in a way that means it is unlikely that they will ever hear the answers.

Sir, unless I can assist you further, those are our submissions on those points.

THE CHAIR: Thank you very much.

I noticed that you are content that whatever the terms of the advertisement, those who do make application to the Inquiry should, if possible, be given the opportunity to contribute to the question whether a name should be disclosed or not.

MS WILLIAMS: Yes, Sir. Because we have accepted, and it must be right, that one cannot draw assumptions one way or the other as to what those families would wish to know.

It just reminds me -- it may or may not be helpful to observe because obviously the detailed management of the process is really for the Inquiry -- but in terms of the form of advertisement, we had perhaps thought something on the Inquiry's website but accompanied by a press release to hopefully draw attention to the

advertisement in question.

THE CHAIR: I notice you hazarded the view that one would not be aiming this advertisement at anyone whose child was born within the last 40 years.

MS WILLIAMS: I'm not sure we were able to be quite as dogmatic as that.

We felt the category of years is likely to be focused upon the period identified in the Operation Herne first report. But we understand that that did, as it were, leave the door open to the possibility that other deceased children's identities had been used in other years.

We are certainly content -- and indeed would endorse the process in theory -- that if it is possible to either offer reassurance by reference to criteria such as gender or dates of birth and/or to focus the advert upon those who do not fall within those categories, then we are content for that, but I am not sure it is going to be possible.

THE CHAIR: It is in one of your footnotes. I am afraid I forgot to make a note of it.

MS WILLIAMS: I think that must be in our original submissions then, Sir. If you give me a moment --

THE CHAIR: Here we are, it is footnote 43, page 29 of your first written submissions.

MS WILLIAMS: Thank you very much. I'm sorry if I did not have that immediately in mind.

Yes, I think what we were suggesting there was that the text could refer to circumstances such as "the likely period in question". In other words, we were not suggesting that other years be excluded altogether.

THE CHAIR: That is the problem here, isn't it? We know that Herne concentrated on the [Special Demonstration Squad] and we know of one undercover name used by [a National Public Order Intelligence Unit] officer, but we have to be careful about setting parameters.

But subject to that, the Inquiry would be likely to take advice from all those involved as to what the proper terms of publication would be.

MS WILLIAMS: Yes, Sir. That would seem a very sensible course.

THE CHAIR: Thank you very much.

MS WILLIAMS: Thank you.

THE CHAIR: Mr Hall?

Submissions on behalf of the Metropolitan Police Service by MR HALL

MR HALL: Sir, in light of the oral submissions, I can and will be relatively brief.

It does seem clear that every family member, whether a parent or an aunt or other close relative, will have

their interest in knowing the truth, or obtaining what I have referred to as negative reassurance, fairly and fully considered in the restriction order process.

I need to take you to one part of Ms Williams' skeleton argument, at footnote 21 on page 7, where I think we take a different approach.

THE CHAIR: Do you mean skeleton argument or written submissions?

MR HALL: The most recent document.

THE CHAIR: Right.

MR HALL: Footnote 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."

It seems to us that that is not the case. The information that a name was not used is information just as much as information that a name was used. It will always --

THE CHAIR: And if it might have an adverse knock-on effect with regard to a real identity, you might apply for a restriction order in respect of it?

MR HALL: Correct. We say that all of it falls under the restriction order regime.

It is obviously highly unlikely that a person who had no genuine family interest would come forward, but if such a person came forward, the Inquiry could consider the extent of their interest and act fairly, not circumscribed by Article 8 considerations about what proximity, parent, aunt, sibling and the like. It does seem to us it is therefore not necessary to wrestle with the subtleties of the Article 8 case law.

Three short points. One is all of the case law you have in your bundles are concerned with the supranational perspective. In other words, the Strasbourg court looking at what the State as a whole has done rather than looking at what any individual component of the State ought to do.

Secondly, there is uncertainty as to whom the duty would be owed -- we have already had that exposed by Mr Barr -- and practical sense does suggest that it cannot be right that the Inquiry must always be the mechanism when it is in possession of this sort of information.

So, for example, a person might naturally come forward and say "Was I monitored by the police in 2015 in a way that engages my Article 8 interests?" Could it be said you, the Inquiry, have the information, therefore you are under a duty to carry out this

weighing exercise? In other words, do you have a duty to be the mechanism?

Our submission is that none of the case law says that the Inquiry would be under that duty. The mechanism could be another part of the machinery for disclosure such as the [Freedom of Information Act 2000] or the [Data Protection Act 1998].

So to summarise, the Inquiry may be the mechanism for ensuring that interests are fairly balanced but it doesn't have to be. We agree, therefore, with what the Counsel to the Inquiry said in their first note. I will just give you the reference, it is at paragraphs 20 to 22 where they said that.

So that is all I think I need to say about the Article 8 issue, unless there is anything you want to deal with. I was just then going to turn to two short practical points.

THE CHAIR: No, thank you.

MR HALL: On the practical points, there is the question of contacting close relatives so they can be informed if a restriction order is refused, so that they can either be warned or be given an opportunity to make submissions.

We understand why Ms Williams asks for this to include as many degree of relatives as possible and we

have done some work on this. The short point is that it is not proving easy. I have a draft paper prepared by Superintendent Hutchinson on the practical realities and the difficulties of even identifying parents. If one has a birth certificate it is quite old and it is not necessarily easy to trace where they are now.

I'm happy to share that with Mr Barr and find a way of sharing as much information as possible with Ms Williams, but just to give you the heads up that it is not an easy task even with the resources available to the [Metropolitan Police Service].

THE CHAIR: I think on that kind of issue, Mr Hall, the Inquiry team will have to reconsider these issues in order to decide what is the best way forward. We may need your efforts and cooperation but we can only ask you to do what is reasonable.

MR HALL: We will do whatever we can to help on this.

THE CHAIR: Right.

MR HALL: So, in summary, the second practical point is the negative reassurance cases.

We just think it is impossible to draw any hard and fast conclusions as to the process now as category three has been referred to. It is tricky. I agree we should not prolong. If reassurance can be given, that is good, but we need to tread carefully and not take short cuts and

see how the facts resolve.

THE CHAIR: It is the measurement of the risk of harm that might result from handing out information which on the face of it is innocuous --

MR HALL: That's right.

THE CHAIR: -- but might lead to consequences that were not foreseen that is the difficulty.

MR HALL: Quite.

THE CHAIR: All right.

MR HALL: Sir, those are my submissions.

THE CHAIR: Thank you very much.

Anybody else on your side taking part in this? No.

Do I have any written submission from you?

MR BRANDON: Sir, you don't.

Sir, could I have the opportunity to address you on one –

[There was no microphone in front of Mr Brandon]

THE CHAIR: Not being expected to speak, you cannot be heard, Mr Brandon.

MR BRANDON: Is that a practical matter or --

THE CHAIR: For the moment it is practical.

MR BRANDON: Why don't I move, Sir? I am going to be very short, if it will assist.

Submissions on behalf of the separately represented police officers by MR BRANDON

MR BRANDON: Sir, I wonder whether I might have the

opportunity to briefly reply to one matter raised in submissions today?

Sir, you have not had written submissions from us in advance of this hearing as the issues raised did not appear to us to directly affect those whom we represent, particularly given that there was a measure of agreement that, insofar as the separately represented officers were concerned, disclosure could not be made independently of the section 19 applications for restriction orders made by them.

In the most recent submissions made by counsel for the Relatives, however, a narrow point of difference has arisen which we feel we ought to address. That issue, Sir, is the assertion made by counsel for the Relatives that their Article 8 rights are not to be equated to those afforded to undercover police officers.

Mr Barr, Counsel to the Inquiry, has already addressed you on this matter and, shortly, we support the submissions he made to you this morning. But we would wish just to underline one or two points made by Mr Barr, and that is of course to underline the basis of the applications for restriction orders made by the separately represented officers is not to protect merely their own rights and identities but also the rights of their partners, families and children. We know that

that is a matter that is before you, Sir, and that you will consider when the time comes.

Sir, it is also said by those representing the relatives of the deceased children that undercover officers' Article 8 rights may be diminished because they have chosen to build legends on the basis of deceased children's identities.

Sir, we say that one of the many issues for this Inquiry will be the extent to which officers attached to a disciplined service were acting in accordance with their training, guidance and instructions. We would respectfully submit that to argue at this very early stage of the Inquiry that undercover officers' rights should be diminished by reason of what is described as their own choices in this context is both presumptive and, we would say, premature.

In short, Sir, we agree with Counsel to the Inquiry that the issues of disclosure, the use of deceased children's identities, is a matter of evidence to be weighed in the public interest balance when each individual restriction order application is considered by you. In our respectful submission, no preference or presumption as to the weight to be afforded to individual factors or participants should be fixed before that process takes place.

Sir, those are the very short submissions I have, unless there is anything you wish me to address you on.

THE CHAIR: Then I will admit them, Mr Brandon.

MR BRANDON: I am very grateful, Sir, thank you.

THE CHAIR: Ms Williams?

Further submissions on behalf of the Relatives by by MS WILLIAMS

MS WILLIAMS: I am afraid it is not strictly a reply point.

I meant to say it before and you may have the point very well in mind anyway, but Ms Murphy helpfully reminded me that I had omitted to say to you that although it is flagged in paragraph 16 of the Metropolitan Police Service's skeleton argument by my learned friend Mr Hall, the Data Protection Act 1998 would not come to the assistance of the families whom we represent, because it only covers access to personal data relating to the applicant themselves. That was a point in fact made --

THE CHAIR: Mr Barr made that point --

MS WILLIAMS: Exactly.

THE CHAIR: -- when he opened.

MS WILLIAMS: So that was superfluous, but I just wanted to be clear.

THE CHAIR: Thank you very much.

MS WILLIAMS: The second point, in relation to points made

by my learned friend Mr Brandon in relation to the role that officers may have taken in choosing to use an identity from a deceased child, we simply flag the point at this stage and express it in terms of "if it was their own choice". We accept there will be evidence to be heard whether that is the case or not.

THE CHAIR: All right.

Mr Barr?

Submissions in reply by COUNSEL TO THE INQUIRY, MR BARR

MR BARR: Sir, just one point in reply. It is a reply to Mr Hall's analysis of how a 'no' answer fits in with section 19 of the Inquiries Act 2005.

Section 19(1)(b) permits restrictions on the "disclosure or publication of any evidence or documents given, produced or provided to an inquiry".

Now a 'no' answer will not be direct evidence or in a document; it will be the conclusion drawn from the absence of evidence that the deceased child's identity was used.

That is not a problem. The way in which a 'no' answer is connected to section 19 is to publish a 'no' answer would undermine any restriction order that had been made in relation to an officer who had used the deceased child's identity. It would therefore tend to undermine the order and it is for that reason that the

Inquiry could not publish a 'no' answer if the fair balance came down against publication.

THE CHAIR: Or might do so?

MR BARR: Might do so.

THE CHAIR: Which means that in the course of considering an application for a restriction order, I would have to consider the measures that the Inquiry would have to take to protect it.

MR BARR: Yes.

THE CHAIR: And it might include not disseminating negative information.

MR BARR: It is very common in such orders to have a provision prohibiting publication of anything that would tend to identify the subject of the restriction order, and that is what would happen if the Inquiry followed a policy of always giving a 'no' answer.

THE CHAIR: All right.

As usual, I am very grateful to everyone for their submissions. I will take time and, as soon as I reasonably can, I will publish a ruling.

As I hinted earlier, that may not be the end of the matter, because with regard to practical considerations we may need the assistance of core participants in deciding exactly how we issue any advertisement or cry for help from the public in general.

Thank you all.

(12.50 pm)

(The hearing concluded)