

In the matter of section 19 (3) of the Inquiries Act 2005
Applications for restriction orders on behalf of 'Dr RXT'
Minded to Note

Introduction

1. On 6 October 2016 the Inquiry received an application (apparently dated 6 September 2016) from a consultant psychiatrist, provisionally known in the Inquiry as 'Dr RXT', for a restriction order under section 19 (3) of the Inquiries Act 2005.
2. The Inquiry sought further information and explanation about the application from Dr RXT and from Scott Ingram on whose instructions Dr RXT had acted. Dr RXT replied in a document dated 16 October 2016 and Mr Ingram on 17 October 2016.
3. On or about 28 July 2016 Dr RXT was instructed by Mr Ingram to interview, examine and prepare expert psychiatric reports upon five of the former Metropolitan Police officers for whom he is the recognised legal representative in the Inquiry. The reports were required for submission to the Inquiry in support of the applications made on behalf of the officers for restriction orders granting anonymity to them. The Inquiry understands that Dr RXT has seen and prepared reports upon four of the officers but so far has not provided the reports either to Mr Ingram or to the Inquiry. On 9 November 2016 Mr Ingram confirmed that he had also asked Dr RXT to provide supplementary expert opinion about another of his former Metropolitan Police officer clients. This means that the progression of applications for restriction orders from six officers now awaits reports from Dr RXT.
4. Dr RXT seeks an order for anonymity whose effect would be to prohibit the disclosure or publication of any evidence or document (or

part of any evidence or document) provided to the Inquiry that would, directly or indirectly, identify the applicant.

The grounds of the application

5. Dr RXT is not legally represented. While Mr Ingram has assisted Dr RXT's communications with the Inquiry he is not instructed to act on Dr RXT's behalf. Dr RXT fears that by accepting instructions given on behalf of policemen alleged to have "infiltrated various groups" he/she will be perceived as holding particular political views that would be harmful to his/her professional reputation and, possibly, to the careers and/or well being of close family members and work colleagues.
6. Asked to explain this fear, Dr RXT replied to the effect that Dr RXT might be tainted by the accusations being made against some undercover police officers. Dr RXT fears that the anger of activists towards undercover officers may be directed towards Dr RXT with consequential adverse effects upon his/her professional and family life and possible adverse effects upon family members and work colleagues.
7. I shall therefore consider the application under:
 - (i) section 19 (3)(a) of the Inquiries Act 2005 that enables the Inquiry to impose restrictions that are required to give effect to statutory provision (for these purposes section 6 of the Human Rights Act 1998 applying Article 8 of the European Convention on Human Rights);
 - (ii) section 19 (3)(b) of the Inquiries Act 2005 that permits the making of restriction orders that are conducive to the fulfilment of the Inquiry's terms of reference;
 - (iii) the principle of fairness at common law and under section 17 (3) of the Inquiries Act 2005.

Assessment

The obligations of an expert witness

8. It seems to me that Dr RXT is labouring under a misunderstanding of the role of an expert medical witness as it is generally understood in England and Wales and, thus, the risk of perceived political opinion derived from his/her instruction.

9. The General Medical Council (www.gmc-uk.org) has issued the following guidance (2013) to members of the medical profession (referred to by Dr RXT in the application):

“Acting as a witness in legal proceedings

...

- 4 Whether you are acting as a witness of fact or an expert witness, you have a duty to the court (also tribunals and other public inquiries such as coroners’ inquests) and **this overrides any obligation to the person who is instructing you or paying you**. This means you have a duty to act independently and to be honest, trustworthy, objective and impartial. You must not allow your views about a person to affect the evidence or advice you give.
[bold emphasis added]

...

Giving evidence as an expert witness

...

- 13 You must give an **objective, unbiased opinion** and be able to state the facts or assumptions on which it is based. If there is a range of opinion on an issue, you should summarise the range of opinion and explain how you arrived at your own view. If you do not have enough information on which to reach a conclusion on a particular point, or if your opinion is qualified (for example, as a result

of conflicting evidence), you must make this clear.” [bold emphasis added]

10. Similar requirements are placed upon medical and other expert witnesses in criminal cases by Part 19 of the Criminal Procedure Rules (2015) and in civil cases by Part 35 of the Civil Procedure Rules (2014).

Perceived ‘political’ bias

11. In my opinion, there is no reasonable prospect that, having accepted instructions from Mr Ingram, Dr RXT would be perceived by activists or anyone else as holding any particular political opinion or that Dr RXT was biased in favour of undercover policemen. On the contrary, members of the public in England and Wales will be perfectly well aware that doctors, having been consulted as expert witnesses on medical matters, have a duty of objectivity and integrity towards the tribunal for whom their evidence is prepared.
12. I cannot exclude the possibility that individuals or groups (holding strong views against undercover policing or against undercover police officers seeking to retain their anonymity) will make their views known over the internet or by social media. But, in my provisional opinion, adverse comments against the police cannot sensibly be the basis for any perceived bias in Dr RXT.
13. There is, in my opinion, no significant risk that, in consequence of accepting Mr Ingram’s instructions, Dr RXT or family members or work colleagues will suffer significant interference in their professional, private or family lives. Any adverse comment that there may be will be directed against the police, not against the expert witness.

Article 8 of the European Convention on Human Rights

14. It is an ordinary incidence of a medical expert witness's professional life that their identity and professional address will be known to the court or tribunal in which they give evidence, to the parties to the litigation, and to the public. By accepting instructions as a professional witness to give evidence on behalf of one or more of the parties the expert accepts these limitations upon the enjoyment of privacy.
15. There is, in my opinion, no reasonable basis for a fear that Dr RXT's professional or family affairs may be exposed to harassment or other forms of significant interference in consequence of the engagement to report upon the mental health of former police officers.
16. To the extent that a requirement that Dr RXT's own name be disclosed constitutes an interference with the right of respect for private and family life it is, in my view, a minimal one. If, which I doubt, the interference would meet the Article 8 threshold of seriousness, the requirement would be in accordance with law and necessary and proportionate in a democratic society in pursuit of the legitimate aims of the detection and prevention of crime and the protection of the rights and freedoms of others, for the following reasons.
17. The Inquiry is investigating, among other things allegations of misconduct and mismanagement in undercover police operations. Their effect on individuals and the public will be examined. While the Inquiry will not be determining civil rights or making findings as to guilt of criminal offences, the Inquiry will make findings of fact and, in due course, will make recommendations as to the future conduct of undercover policing. Both the public and individuals affected by undercover policing have a legitimate interest in the process of a statutory inquiry that will be making findings of fact and offering recommendations affecting the state's responsibility for the detection

and prevention of crime and the protection of the rights and freedoms of its citizens.

18. Applications for anonymity by those whose conduct is being investigated at a statutory inquiry require, in the public interest, a publicly accountable process. It may well be that much of Dr RXT's evidence (which I have not seen) could not be put into the public domain, by reason of its intensely personal nature, but the identity of the person expressing relevant expert opinion as to the mental health of an applicant should be disclosed unless there are strong countervailing considerations. In my view, no strong countervailing factors are revealed in the application.
19. The Article 8 balance is provisionally, in my view, clearly in favour of disclosure Dr RXT's name.
20. The Inquiry has asked the Metropolitan Police Service whether it has any public interest submission to make in favour of a restriction order. No such submission is made.

Conducive to fulfilment of the Inquiry's terms of reference

21. Dr RXT is the second medical expert to be instructed by Mr Ingram to prepare psychiatric reports upon the original five former Metropolitan Police officers referred to in paragraph 3 above. On 22 July 2016 the Inquiry was informed that the expert originally instructed had withdrawn having seen only three of the officers. On 28 July 2016 Mr Ingram notified the Inquiry that he had located a further expert, Dr RXT, who wished to receive some re-assurance as to anonymity. On the same day the Solicitor to the Inquiry responded:

"5. The expert will receive provisional anonymity subject to and pending a formal application for a restriction order.

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6. *The Inquiry would be happy to meet with yourself and the expert before the formal application for anonymity is made so as to understand any specific concerns and to provide such re-assurance as it is able to do.”*
22. Mr Ingram forwarded this email to Dr RXT on 11 August 2016. The Inquiry received no response to its invitation to take part in a preliminary meeting or to file an application for a restriction order. It received a letter dated 12 September 2016 from Mr Ingram conveying, among other things, a request from Dr RXT for information as to what was required by way of formal application for a restriction order. After a telephone conversation between Mr Ingram and Mr Stephen Brown at the Inquiry, on 14 September 2016 Mr Ingram informed Dr RXT that the Inquiry required a written statement from Dr RXT setting out the reasons for seeking anonymity.
23. On 21 September 2016, in an email to Mr Ingram, Dr RXT claimed that it had been agreed from the outset that Dr RXT would only prepare reports if anonymity was granted.
24. On 6 October 2016 the Inquiry received Dr RXT’s application for a restriction order. In it, Dr RXT wrote:
- “Prior I agreed to do these I agree with Mr Ingram that I would only do the reports if I was given the anonymity. This I understand he discussed with the Chairman of the Inquiry and I have now been asked to do the application (sic).”*
25. On the same day the Inquiry asked Mr Ingram for clarification of this claim. He replied, also on 6 October 2016, that he had met with Dr RXT on 27 September to assist with the preparation of the application. Mr Ingram did not agree that there was any understanding or agreement as claimed by Dr RXT, but he conceded that Dr RXT “may

have misunderstood the effect of the reassurance given". He supports Dr RXT's application on behalf of his other clients.

26. The Inquiry would not and could not give an undertaking to any witness, let alone an expert medical witness, in advance of receiving an application with detailed grounds, that a restriction order would be made providing the witness with anonymity in the Inquiry. For the avoidance of doubt, no conversation was held between Mr Ingram and the Chairman of the Inquiry. The Chairman did speak with the Solicitor to the Inquiry, Mr Piers Doggart, on 28 July 2016, to discuss the Inquiry's appropriate response to Mr Ingram's email of the same day. The result was Mr Doggart's reply, the material part of which is set out at paragraph 21 above.
27. I have summarised the history of the application only because it is relevant to consideration as to whether the making of a restriction order would be conducive to the fulfilment of the Inquiry's terms of reference by way of reducing delay and saving additional costs (section 19 (4)(d)(i) and (ii) of the Inquiries Act 2005) and whether, in the circumstances, it would be appropriate to exercise my discretion in that way.
28. I do not consider that Dr RXT has a reasonable fear of adverse consequences should his/her name be disclosed by the Inquiry. I would expect an expert in Dr RXT's position to adopt a reasonably robust approach to the prospect of some publicity when providing expert reports on the mental health of core participants in this Inquiry. Experts do not usually choose their patients/clients according to a measure of popularity and do not usually flinch from an examination of their professional opinion. The requirements of impartiality and objectivity of expert witnesses is their protection against accusations of partisanship.

29. While the making of the restriction order requested would undoubtedly save time and money (by avoiding the need to instruct a yet further expert) and, for that reason, would be conducive to the fulfilment of the Inquiry's terms of reference, it would, in my view, be wrong in the present circumstances to sacrifice public accountability for the witness's evidence for the expediency of faster resolution of difficult but key anonymity applications by former police officers.

Fairness

30. I shall assume that when accepting instructions from Mr Ingram Dr RXT mistakenly understood that he/she would have anonymity in the Inquiry and would not, but for that misunderstanding, have accepted his instructions. On that assumption there are now, it seems, three alternative courses: (i) A restriction order is made, (ii) Dr RXT's evidence is received and the application for anonymity is abandoned, (iii) Dr RXT and/or Mr Ingram terminate Dr RXT's letter of instruction.
31. As I have said, the weight of the public interest in accountability for the Inquiry's process of deciding key applications for restriction orders is such that it should not be sacrificed to meet the mistaken expectation of the witness. In reaching this provisional conclusion I have also taken into account the dismay that will be felt by the officers who have already been required to submit themselves for interview, some on more than one occasion. Taking into account the issues of fairness, separately and cumulatively, my provisional view is that the public interest must in this instance prevail. Either the application should be abandoned or Dr RXT's instructions withdrawn.

Conclusion

32. I am minded to refuse Dr RXT's application.

Next steps

33. A draft of this minded to Note was provided to Scott Ingram and Dr RXT under embargo in advance of its publication. I have made some amendments to my draft in consequence of representations that I have accepted. They do not affect my judgement as to the application of principle to the circumstances that I have described.
34. The Inquiry has been informed that, having considered the contents of the draft provided to them, Dr RXT and Mr Ingram have mutually agreed the withdrawal of Dr RXT's instructions. An oral hearing is not requested. Accordingly, this minded to Note may be treated as my Ruling.
35. The regrettable but necessary consequence of these events is that Mr Ingram will need, as a matter of urgency, to seek the assistance of a further expert medical witness.

30 November 2016

Sir Christopher Pitchford
Chairman, Undercover Policing Inquiry