IN THE UNDERCOVER POLICING INQUIRY

SUBMISSIONS RELATING TO THE REHABILITATION OF OFFENDERS ACT 1974 SERVED ON BEHALF OF THE NATIONAL CRIME AGENCY

Introductory

1. These are the National Crime Agency's submissions relating to the Rehabilitation of Offenders Act 1974 ('the 1974 Act') and its impact on the Inquiry's work, which are served pursuant to the Chairman's direction dated 1 March 2017 (the time limit given in that direction having been subsequently extended).

2. We gratefully take as our starting point for these submissions the detailed analysis contained in CTI's Note dated 1 March 2017. There is much in the Note with which we agree. On those points, we have simply indicated our agreement with CTI, rather than setting out any detailed argument.

3. These submissions address what we understand to be the five core issues that are raised by CTI's Note. Those issues are:

    a. How and to what extent is it likely that the Inquiry will need to receive / consider / admit evidence of spent convictions, and/or circumstances ancillary to such convictions?

    b. What conduct on the part of the Inquiry in relation to a person's spent conviction will amount to a prima facie breach of the requirement under section 4(1) of the 1974 Act to *"treat"* such a person *"for all purposes in law"* as a person who has not committed the offence in question?

c. Do the proceedings of the Inquiry amount to *"proceedings before a judicial authority"* pursuant to section 4(6) of the 1974 Act?

d. Can the Inquiry admit evidence of spent convictions under section 7(3) of the 1974 Act?

e. Should the Chairman seek an express statutory exception under section 4(4) and/or section 7(4) of the 1974 Act? If so, in what terms?

How and to what extent is it likely that the Inquiry will need to receive / consider / admit evidence of spent convictions, and/or circumstances ancillary to such convictions?

4. We endorse the submissions made by CTI on this issue at paragraphs 7 to 19 of their Note. We agree that it is likely to be necessary for the Inquiry to adduce evidence of spent convictions and/or circumstances ancillary to such convictions[1] in each of the three situations that CTI posit.

5. The last of those three situations – anonymity applications – is of particular relevance given the procedural matters on which the Inquiry is presently focused. The NCA is currently in the process of drafting two anonymity applications on behalf of undercover officers. Without giving detail of the applications themselves, we confirm that the types of factual issue concerning risk set out at paragraph 17 of CTI's Note are the types of matter that we may wish to rely upon either in these or in future applications. We agree with the point made by CTI at paragraph 19 of their Note that, for the reasons they give, it is unlikely to be possible in this type of situation to seek the consent of the rehabilitated person for the admission of the spent conviction(s).

6. We would emphasise one further point under this head. Whilst the three practical situations identified by CTI establish that the inquiry will inevitably need to adduce evidence of some, perhaps many, spent convictions, it by no

[1] References hereafter to 'spent convictions' include, unless the context indicates otherwise, factual matters ancillary to such convictions

means follows that it will be necessary for evidence relating to such convictions to be adduced routinely or on a 'class' basis. The question of whether the Inquiry needs to adduce such evidence in order to fulfil its terms of reference will always be fact specific. For example:

a. It may be necessary (as CTI argue at paragraphs 12-15 of their Note) to adduce evidence of the spent convictions of the targets of an operation (either pre-dating or post-dating the operation) in order to form a proper view as to the justification for that operation. But whether or not this is necessary will require analysis in each case. It may not be necessary, for example, if the convictions – or some of them - are of little relevance or weight in justifying the operation (perhaps because of the offence involved, or because of the timing). Or it may be that admitting the conviction(s) is not necessary because the operation is well-justified by reference to other matters.

b. Similarly, it may well be that one or more spent convictions of a rehabilitated person are relevant to an anonymity application made on behalf of an undercover officer, because the conviction(s) go to the risk of harm that the officer or others would face were his or her identity to be revealed. But it would not follow that, in such a case, it would be necessary to disclose all of the rehabilitated person's spent convictions. Some might be irrelevant to the issue of risk, or at least not sufficiently relevant to justify disclosure.

What conduct on the part of the Inquiry in relation to a person's spent conviction will amount to a prima facie breach of the requirement under section 4(1) of the 1974 Act to *"treat"* such a person *"for all purposes in law"* as a person who has not committed the offence in question?

7. On the question of 'treatment', we endorse the reasoning at paragraphs 27-30 of CTI's submissions.

8. The Inquiry does not subject a person who is the subject of a spent conviction to any 'treatment' merely by receiving information about the spent conviction,

or by considering what action to take in respect of it. Similarly, where the Inquiry takes procedural steps relating to the spent conviction – including contacting the person and seeking his consent to adduce evidence of the conviction under section 7(2)(f) of the 1974 Act – such conduct on the part of the Inquiry does not amount to 'treatment' for the purposes of section 4(1).

9. We agree with CTI that the point in the procedural sequence at which this analysis changes is the admission of a spent conviction into evidence. In taking that step, the Inquiry would be subjecting the person to 'treatment' for the purposes of section 4(1) of the 1974 Act.

10. Such conduct would, moreoever, clearly amount to treatment 'for a purpose in law'. The Inquiry is a statutory inquiry performing a legal function and exercising legal powers.

Do the proceedings of the Inquiry amount to *"proceedings before a judicial authority"* pursuant to section 4(6) of the 1974 Act?

11. As CTI have identified, this issue is of some significance. That is because, if the Inquiry's proceedings do amount to 'proceedings before a judicial authority', then the Inquiry has a power under section 7(3) of the 1974 Act to admit evidence of spent convictions. If not, then the Inquiry has no such power and the provisions of section 4(2) will apply.

12. The term 'proceedings before a judicial authority' is defined at section 4(6) of the Act, in the following terms:

> "For the purposes of this section and section 7 below "proceedings before a judicial authority" includes, in addition to proceedings before any of the ordinary courts of law, proceedings before any tribunal, body or person having power—
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> (a) by virtue of any enactment, law, custom or practice;
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> (b) under the rules governing any association, institution, profession, occupation or employment; or
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> (c) under any provision of an agreement providing for arbitration with respect to questions arising thereunder;

> to determine any question affecting the rights, privileges, obligations or liabilities of any person, or to receive evidence affecting the determination of any such question."

13. The opening words of section 4(6) make it clear that, while the term 'proceedings before a judicial authority' includes proceedings before the ordinary courts of law, it is also covers proceedings before a far wider category of 'authority', namely 'any tribunal, body or person'. Absent any further qualification, that category is clearly almost limitless (and certainly includes the proceedings of this Inquiry, which, at least as presently constituted, are proceedings before 'a person').

14. It is the remainder of the section that provides the mechanism for determining which tribunals, bodies or persons are to be considered *judicial* authorities for these purposes, and which are not. A number of different tests could have been used for this purpose. It is noteworthy that the test used in the 1974 Act is a test that focuses on the powers vested in the authority in question. The test is a binary one – if the tribunal, body or person has the specified power(s), then it is a 'judicial authority' for the purposes of the Act. If it does not, then it is not.

15. The powers that section 4(6) identifies as being the hallmark of a judicial authority for these purposes are powers *"to determine any question affecting the rights, privileges, obligations or liabilities of any person, or to receive evidence affecting the determination of any such question."* There is no ambiguity about these words, and therefore no interpretative exercise to be carried out. The simple question that arises is whether or not the authority in question – here, this Inquiry – does or does not have powers of the type described in section 4(6).

16. In our submission, the Inquiry (or, perhaps more accurately, the Chairman) satisfies this test and is therefore a 'judicial authority' within the meaning of section 4(6). The Chairman clearly does have power to determine questions that *"affect the rights, privileges, obligations or liabilities of any person"*.

17. CTI draw a distinction in their Note between, on the one hand, the powers that the Chairman exercises in fulfilling the Inquiry`s overall or dominant purpose - i.e. the production of the report and the making of recommendations (referred to hereafter as the Chairman`s *substantive* powers), and, on the other hand, the Chairman`s *procedural* powers. Although, as we submit further below, the dividing line between these two categories will not always be readily identifiable, we accept that this is a useful distinction to draw for the purposes of analyzing the section 4(6) issue.

18. Our submission is that the section 4(6) test is in fact satisfied by reference both to the Chairman`s substantive and procedural powers.

Section 4(6) - substantive powers

19. As CTI argue (at paragraphs 39 and following of their Note) section 2(1) of the Inquiries Act is the starting point for this question. A 2005 Act inquiry has no power to determine any person's civil or criminal liability. However, two further points must be made.

20. First, the test under section 4(6) of the 1974 Act is not whether an authority has power <u>to determine</u> 'the rights, privileges, obligations or liabilities of any person', but rather (and this is plainly a much lower threshold) whether an authority has power <u>to determine any question affecting</u> 'the rights, privileges, obligations or liabilities of any person'.

21. Second, it is clear from section 2(2) of the Inquiries Act that an inquiry may make any factual findings that it considers necessary in fulfilling its terms of reference, and that it is not to be inhibited in doing so by any likelihood of civil or criminal liability being inferred from such findings. It was this provision that, to take an extreme example, enabled Sir Robert Owen to make the following detailed findings regarding responsibility for the death of Alexander Litvinenko:

> "10.10 I am sure that Mr Litvinenko did not ingest the polonium 210 either by accident or to commit suicide. I am sure, rather, that he was deliberately poisoned by others.
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> 10.11 I am sure that Mr Lugovoy and Mr Kovtun placed the polonium 210 in the teapot at the Pine Bar on 1 November 2006. I am also sure that they did this with the intention of poisoning Mr Litvinenko.
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> 10.12 I am sure the two men earlier attempt to poison Mr Litvinenko, also using polonium 210, at the Erinys meeting on 16 October 2006.
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> 10.13 I am sure that Mr Lugovoy and Mr Kovtun knew that they were using a deadly poison (as opposed, for example, to a truth drug or a sleeping draught), and that they intended to kill Mr Litvinenko. I do not believe, however, that they knew precisely what the chemical that they were handling was, or the nature of all its properties.
>
> 10.14 I am sure that Mr Lugovoy and Mr Kovtun were acting on behalf of others when they poisoned Mr Litvinenko.
>
> 10.15 …When Mr Lugovoy poisoned Mr Litvinenko, it is probable that he did so under the direction of the FSB. I would add that I regard that as a strong probability. I have found that Mr Kovtun also took part in the poisoning. I conclude therefore that he was also acting under FSB direction, possibly indirectly through Mr Lugovoy but probably to his knowledge.
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> 10.16 The FSB operation to kill Mr Litvinenko was probably approved by Mr Patrushev and also by President Putin."[2]

22. It is clear that those findings did not amount to a determination of the civil or criminal liability of Messrs Lugovoy, Kovtun, Patrushev or Putin for Mr Litvinenko's death. But it is, equally, difficult to avoid the conclusion that those findings did, to adopt the section 4(6) test, *"affect the rights, privileges, obligations or liabilities"* of those men. At the very least, there was an effect on the men's reputations, which is one component element of Article 8 (see in this regard CTI's Note at paragraph 57).

23. We do not of course suggest that the Chairman is likely to make similar factual findings in this Inquiry. But the section 4(6) question turns on the powers vested in the Chairman, not the way in which it may be thought likely that he will exercise those powers in this case. The Litvinenko example demonstrates that, whilst the report of a 2005 Act inquiry cannot determine

[2] Report of the Litvinenko Inquiry, Part 10

civil or criminal liability, it can certainly include factual findings that affect the rights of individuals. That is enougto satisfy the section 4(6) test., thus providing a further route by which the section 4(6) test is satisfied.

Section 4(6) - procedural powers

24. In *procedural* terms, the Chairman has power under section 21 of the Inquiries Act 2005 ('the Inquiries Act') to require persons to give evidence and to produce documents. Failure to comply with a section 21 notice is punishable criminally (Inquiries Act, section 35). Section 21 notices are clearly capable of affecting rights, privileges, obligations and liabilities. For example:

    a. A person might be ordered to give oral evidence to the Inquiry in public session in circumstances where the Chairman had previously refused to make a restriction order allowing that person to give evidence anonymously - on grounds (say) that, balancing all the factors in play, requiring the person to give evidence in their own name would amount to a proportionate interference with his Article 8 rights. The decision to issue a section 21 notice in such circumstances is clearly a decision that would *"affect the rights … of any person"*.

    b. Similar arguments would apply to a section 21 notice requiring a company to produce documents in breach of contractual duties of confidence that it owed to a third party.

    c. Decisions by the Inquiry upholding objections to giving evidence or to the production of documents are also relevant for these purposes. A decision by the Chairman to grant an anonymity application on Article 8 grounds, or a decision to vary or revoke a section 21 notice because of a duty of confidence, or an order under section 22 recognising a claim to legal professional privilege all amount to the determination of questions *"affecting the rights, privileges, obligations or liabilities of any person"*.

25. CTI's Note does address the significance of these procedural powers to the section 4(6) question (see in particular paragraphs 60-63), but does so in rather diffident terms. We respectfully submit that that diffidence is misplaced.

26. CTI question (see paragraphs 37 and 61-62) whether the analysis of an authority's powers for the purposes of the section 4(6) question should focus solely on its *substantive* powers. The implication that follows from this is that powers that are merely *procedural* in nature should be left out of account in the section 4(6) analysis. We make three points in response to this suggestion.

27. First, this qualification does not appear in the statutory language. As discussed above, the question posed by section 4(6) is simply whether or not powers of a certain nature are vested in an authority. The wording of the Act contains no extra gloss that in order to satisfy the test the powers must be of a substantive rather than a procedural nature. It is wrong to describe the suggested analysis as a 'narrow' interpretation of section 4(6). What the CTI analysis in fact involves is an impermissible addition to the statute of words that could have been but were not included by Parliament.

28. Second, the distinction between procedural powers on the one hand and 'substantive' powers that are related to the 'overall purpose' of the Inquiry on the other hand will on occasions be extremely difficult to define. Decisions that may appear to be procedural have a substantive effect, and will in any event be kept under review during substantive hearings. The practical difficulties of applying this distinction may of course be one reason why it does not appear in the Act.

29. Third, even at this early stage of the Inquiry's proceedings, it is clear that some of the apparently 'procedural' decisions affecting rights, liabilities etc that the Chairman will have to consider taking may impact directly on the means by which the Inquiry performs its 'substantive' role of providing a report and making recommendations. For example, it is at least possible that one consequence of restriction orders made to protect officers' identities and sensitive details of police operations and tactics might be that some elements

of the Inquiry's final report and/or one or more of its recommendations cannot be published.[3] This is a further illustration of the lack of any principled or workable distinction between 'procedural' and 'substantive' powers.

30. CTI's Note (at paragraph 63) raises a further, related, question. If the Inquiry's procedural powers do satisfy the section 4(6) test, does it follow that all the Inquiry's processes amount to 'proceedings before a judicial authority' within the meaning of section 4(6), or would section 4(6) (and, therefore, section 7(3)) only apply to procedural matters?

31. This is really a different way of formulating the same issue as that discussed above. Section 4(6) poses a single, binary question. There is no warrant in the statutory language for reading the definition as capable of being applied to some but not all of the same proceedings, nor would such an approach be workable in practice.

32. In summary, we submit that the Chairman's powers under the Inquiries Act satisfy the test at section 4(6) of the 1974 Act, and that in consequence the Chairman is a 'judicial authority' within the meaning of that provision. For the reasons that we have set out, we submit that it is not necessary (or, ultimately, entirely possible) to analyse this issue by reference to categories of `substantive` and `procedural` powers. If one does undertake this exercise, however, the answer is that the Chairman has powers in both categories that satisfy the section 4(6) test.

33. To answer the related question raised by CTI at paragraph 87 of their Note, we submit that all of the Inquiry's work should properly be regarded as amounting to 'proceedings before a judicial authority'. Putting the matter another way, if it is right that the Chairman is a 'judicial authority', then sections 4(2) and 4(3) of the 1974 Act will not be of any practical relevance to this Inquiry.

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[3] The Litvinenko Inquiry provides a precedent on both these counts.

Can the Inquiry admit evidence of spent convictions under section 7(3) of the 1974 Act?

34. If, as argued above, the Inquiry's proceedings amount to 'proceedings before a judicial authority', then, as a matter of principle, the Chairman is entitled to admit evidence of spent convictions under section 7(3) of the 1974 Act.

35. However, the section 7(3) power is an exceptional power. It can only exercised if 'justice cannot be done in the case except by admitting or requiring evidence relating to a person's spent convictions or to circumstances ancillary thereto'.

36. Under section 7(4) of the 1974 Act, the Secretary of State has power to make an order 'exclud[ing] the application of section 4(1) … in relation to any proceedings specified in the order … to such extent and for such purposes as may be so specified.' Where a relevant order has been made under section 7(4), the judicial authorities concerned have a more general power to admit evidence of spent convictions. But no order relating to public inquiries has (yet) been made under section 7(4).

37. If, on the other hand, the Inquiry's proceedings do not amount to 'proceedings before a judicial authority', then section 7(3) has no application (and nor does section 7(4)). Were the Chairman to conclude (contrary to the submissions above) that he is not a 'judicial authority' for the purposes of section 4(6), consideration would need to be given to inviting the Secretary of State to make an order under section 4(4) of the Act excluding the operation of section 4(2) – see further below.

38. CTI's Note raises the question of whether, assuming that the Chairman is satisfied that the Inquiry's proceedings are (as argued above) 'proceedings before a judicial authority' and that the section 7(3) power is therefore available to him, the use of that power would actually be workable in practice. CTI's suggestion appears to be that a section 7(4) order might be sought in order to avoid having to follow a more onerous procedure under section 7(3).

39. We are mindful that CTI are better placed than us to assess the volume of spent convictions that may need to be considered for admission into evidence, and the practical complications that are likely to arise in each such case. As a matter of principle, however, we submit that the Inquiry ought to use the section 7(3) procedure rather than inviting the Secretary of State to make an order under section 7(4). We make the following submissions in this regard.

a. The rationale of the 1974 Act is that spent convictions should be spent. The exceptional power under section 7(3) reflects this. That should be the Inquiry's approach. Spent convictions should be assessed individually, and should only be admitted into evidence where it is necessary and proportionate to do so.

b. Section 7(4) orders appear to have been designed to enable certain judicial authorities to admit evidence of spent convictions on a routine, class basis. These are authorities who have a routine requirement to receive the fullest possible information about the past history of individuals appearing before them. It does not appear to us that this Inquiry falls into that category (and still less do public inquiries generally).

c. If it decided to use the section 7(3) power, the Inquiry would clearly need to design its own procedure for doing so. The Chairman has a wide discretion in this regard under section 17 of the Inquiries Act. Whilst the two cases cited by CTI – *Thomas* and *Adamson* – would no doubt be of assistance in this regard, they were decided in very different factual contexts to that in which the Inquiry finds itself, and therefore amount to nothing more than general guidance. Of the two cases, the more authoritative is that of the majority of the Court of Appeal in *Thomas*, where the approach to section 7(3) procedure was notably less demanding than that proposed by Sedley J (in the factually very distant context of Magistrates' Courts) in *Adamson*.

Should the Chairman seek an express statutory exception under section 4(4) and/or section 7(4) of the 1974 Act? If so, in what terms?

40. For the reasons set out above, our submissions is that, if the Chairman concludes that the Inquiry's proceedings are 'proceedings before a judicial authority':

    a. No section 7(4) order should be sought; the Inquiry should use the section 7(3) power where it is necessary to admit evidence of spent convictions.

    b. No section 4(4) order should be sought. It does not appear to us that any issues regarding spent convictions are likely to arise that cannot be resolved, where appropriate, by means of an order under section 7(3).

41. If the Chairman concludes that the Inquiry's proceedings do not amount to 'proceedings before a judicial authority', then an order under section 4(4) disapplying section 4(2) will be needed.

42. If an order under section 4(4) and/or 7(4) is sought, our provisional view is that the wording of the order should be narrower than that proposed by CTI and in particular should be restricted to this Inquiry. Even if the need for such order(s) is established in the circumstances of this Inquiry, it does not follow that it will be appropriate for all present and future 2005 Act inquiries to be provided with the same licence.

ANDREW O`CONNOR QC

RICHARD O'BRIEN

28 April 2017.