IN THE MATTER OF THE UNDERCOVER POLICING INQUIRY

NON-POLICE, NON-STATE CORE PARTICIPANTS'
REASONS FOR ORAL HEARING
TO ADDRESS
THE REHABILITATION OF OFFENDERS ACT 1974

Introduction

1. On 2 August 2017, the Chairman issued a "minded to" note in relation to the Rehabilitation of Offenders Act 1974 ["the 1974 Act"] and its impact on the Inquiry's work. The note indicated three directions the Chairman is "minded to" make and invited core participants to notify the Inquiry by 4pm on Thursday, 14 September 2017 whether they wished to be heard orally upon any, and if so, which of the directions.

2. As previously indicated in email correspondence from Tamsin Allen to Piers Doggart[1], the NPSCPs request to be heard at an oral hearing. The proposed directions they seek to challenge are those set out at subparagraphs (ii) and (iii) of paragraph 1 of the Chairman's "minded to" note, namely:

    (ii) the blanket refusal to afford to any person whose convictions may be admitted in evidence for the purpose of determining restriction order applications any opportunity to make representations about them at that stage. And

    (iii) the intention to invite the Secretary of State for Justice to lay before Parliament the following amendment to Schedule 3 to the Rehabilitation of Offenders Act 1974 (Exceptions) Order 1975: "24 Any Inquiry caused to be held by a Minister under section 1 of the Inquiries Act 2005 designated by the Secretary of State for Justice." And the intention to invite the Secretary of State so to designate this Inquiry.

[1] On 8 August 2017, Tamsin Allen wrote via email on behalf of the NPSCP RLR group to Piers Doggart indicating that the NPSCPs wished to be heard orally on the issue of the Rehabilitation of Offenders Act 1974. Mr Doggart replied on the same date requesting confirmation of the directions on which the group wished to be heard and a brief summary of the reasons why.

Summary of reasons

3. There are four principal reasons why the NPSCPs seek to challenge proposed direction (ii):

   It is submitted that where reliance is placed on a spent conviction for the purposes of a restriction order application, a blanket refusal to afford the convicted person any opportunity to make representations about the conviction prior to determination of the application:

   a. undermines the Inquiry's ability to get to the truth and to allay public concern;
   b. is contrary to the Article 8 rights of the convicted person;
   c. is unfair and contrary to the Chairman's statutory duties under section 17(3) of the 2005 Act and section 4 of the Data Protection Act 1998 ["DPA"], read with the first, third, fourth and sixth Data Protection Principles; and/or
   d. risks the Inquiry applying the wrong test in law for admission of evidence of spent convictions.

4. Further, it is submitted that proposed direction (iii) constitutes an unnecessary and disproportionate interference with the Article 8 rights of those who would otherwise enjoy the statutory protections afforded by section 4(1) of the 1974 Act.

5. These issues are of sufficient importance to require there to be an oral hearing at which the core participants may be heard.

6. The above grounds of complaint are briefly expanded upon below. However, this note is not intended to be a skeleton argument – the NPSCPs note the solicitor to the Inquiry's request for "a brief summary of the reasons". The NPSCPs would seek to develop their reasons further in writing in advance of an oral hearing.

The accurate and fair determination of RO applications is crucial to the Inquiry's ability to get to the truth and to allay public concern. Uncritical reliance on spent convictions precludes that.

7. The accurate and fair determination of restrictions orders, particularly those granting anonymity to undercover officers, is pivotal to the Inquiry's success, both in terms of its ability to conduct an effective investigation and its ability to allay public concern. It is respectfully submitted that the suggestion made in proposed direction (ii) that use of spent convictions for the purposes of determining restriction order applications is a "limited purpose" and that "if necessary" the interests of fairness can be met by allowing the affected individual to give evidence during the substantive phase of the Inquiry is wrong in both respects.

8. The impact of restriction orders on the efficacy of the Inquiry is very significant. Where a restriction order prevents core participants and witnesses from having access to relevant information, their ability to participate meaningfully in the Inquiry is compromised[2]; the Inquiry will not be able to resolve material conflicts of evidence, such as those which limited the Herne and Ellison reviews[3]; and ultimately the Inquiry will be unable to allay the public concern that led to its inception[4].

9. Importantly, a restriction order has the potential to preclude evidence from emerging that would otherwise have undermined the very grounds on which the restriction order itself was granted. This is of real significance in the context of an inquiry that is tasked with investigating the justification for the targeting of undercover policing operations and with identifying potential miscarriages of justice. In other words, there is a real risk of "intelligence" and convictions which ought properly to be the subject of the Inquiry's investigation being relied upon to justify restriction orders, which thereafter preclude the necessary evidence

[2] See restriction orders legal principles and approach ruling pp. [109]-[111] and ruling of 2 May 2017 [191].
[3] See restriction orders legal principles and approach ruling [105].
[4] Ibid. [104] & A3.

from emerging which would have undermined the premise for the restriction in the first place. The Inquiry cannot assume, for the purposes of determining restriction order applications, the truth of the matters that it should be investigating. For example, if an undercover officer (X) were to have falsely implicated a member of the public (Y) in a serious criminal offence, and X were to apply to the Inquiry for a restriction order on the basis that Y poses a significant risk of harm, as evidenced by her conviction, there is a real risk that any resulting restriction would preclude Y from being told of the information that would have enabled her to realise (and therefore to give evidence of the fact) that she had in fact been set up by X.

10. Such a scenario is not unrealistic given the matters that led to the setting up of this Inquiry. It demonstrates why the Inquiry cannot defer critical examination of the allegations of threat underpinning restriction order applications until the substantive phase of its investigation and why it is critical for the Inquiry's own efficacy that it has, to the greatest extent possible, obtained information from all sources, including NPSCPs, which might call into question the basis on which a restriction order is sought prior to determining whether such an order should be imposed. It is submitted that, even without consideration of the rights of the individuals concerned (discussed below), the Inquiry's own interests require a process which enables NPSCPs to know, in as much detail as possible consistently with the restriction order application, that their spent convictions are being relied upon in order that they may make any relevant representations to the Inquiry in relation to them. Efficiency savings cannot possibly justify the postponement of this step until the substantive phase of the Inquiry, given the chilling effect that wrongly imposed restriction orders will have on the Inquiry's ability to get to the truth and to allay public concern.

Reliance by the Inquiry on spent convictions for the purposes of making a restriction order, without affording the convicted person any

opportunity to make representations, is contrary to the convicted person's Article 8 rights

11. It is well established that spent convictions engage the convicted person's Article 8 rights: R (T) v Chief Constable of Manchester [2015] AC 49 [18] and R (L) v Commissioner of Police of the Metropolis [2010] 1 AC 410 [27]. This is the case even in relation to retention of information about such convictions, i.e. prior to considerations about their disclosure or use to the potential detriment of the convicted person: R (Catt) v ACPO [2015] AC 1065, in particular at [6], [47] & [60]. It is clear, therefore, that use by the Inquiry of spent convictions for the purposes of determining restriction order applications (as well as during its substantive phase) constitutes an interference with the convicted person's Article 8 rights. The NPSCPs contend that to do so, without affording the convicted person an opportunity make representations as to why his or her spent conviction(s) ought not to be used in this way, is not in accordance with the law, is unnecessary and gives rise to an unacceptable risk of such convictions being used disproportionately.

12. It is submitted that refusal to afford a convicted person an opportunity to make representations in relation to the use of her spent convictions is contrary to the Chairman's statutory duty under section 17(3) of the Inquiries Act 2005 ["the 2005 Act"] to act with fairness and contrary to the fundamental rule of natural justice that a person who may be adversely affected by a decision should have an opportunity to make representations. For the reasons set out above, this is not a situation in which unfairness can be rectified by affording an opportunity to make submissions after the decision has been taken.

13. Further, a blanket refusal to afford convicted persons an opportunity to make submissions in respect of the use of their spent convictions in the context of restriction order applications is unnecessary. For the reasons outlined above, the consequences of an unwarranted restriction order on the Inquiry's ability to fulfil its terms of reference and to allay public concern are too significant to justify the exclusion on grounds of

efficiency or expedience. Nor is it the case that blanket exclusion is required as a matter of practical necessity. The NPSCPs contend that there are a number of ways in which the Inquiry could enable convicted persons to make submissions about reliance on their spent convictions for the purposes of restriction order applications without undermining the purpose of the application.

14. A blanket refusal to afford convicted persons an opportunity to make representations concerning the use of their spent convictions in the context of restriction order applications risks such convictions being relied upon where there is inadequate justification for doing so and/or may result in the Inquiry imposing an order on a false or exaggerated premise, with the consequence that it is subsequently unable to get to the truth. Use of spent convictions in either case would be unjustified and disproportionate.

15. The above arguments are founded on the convicted person's right to respect for privacy in relation to her spent convictions *per se*. However, there is a further basis on which restriction orders imposed without an opportunity for representations by the convicted person may constitute a breach of their Article 8 rights. This is because the *consequences* of such an order may be to preclude the individual from learning about information affecting important aspects of their private life, to which they are entitled under Article 8 [see [36]-[41] of the NPSCPs' submissions on disclosure of personal files dated 31 May 2017].

16. This affords an additional basis on which the Article 8 rights of the convicted person require them to be afforded an opportunity to make submissions where reliance on their spent convictions may lead to the making of a restriction order. As previously drawn to the Inquiry's attention in the witness statement of Harriet Wistrich dated 31 May 2017, in the case of some NPSCPs, the continued absence of disclosure of information pertaining to their contact with undercover officers is causing them recognised psychiatric harm. The NPSCPs note that paragraph 5

of the Chairman's "minded to" note on the 1974 Act refers to the fact that the determination of a restriction order will determine a question affecting the right to respect for private life of the person seeking the order, but makes no mention of the fact that such a determination may also affect the right to respect for private life of a person who will be denied information about her private life as a result of the order, and who may be caused recognised psychiatric harm as a result. The "minded to" note refers to the Inquiry receiving evidence affecting the determination of the first issue, but makes no reference to receiving evidence affecting the second. This omission is reflected in the "minded to" reasons so far published in respect of restriction order applications. The NPSCPs will make further representations in relation to this in their submissions in relation to restriction orders. However, they flag it up here, because it provides a further Article 8 basis for the necessity of the Inquiry affording convicted persons an opportunity to make submissions on the use of their spent convictions for the purposes of determining restriction order applications.

Blanket refusal to afford an opportunity to convicted persons to make submissions about the use of their spent convictions in the determination of restriction order applications is unfair and contrary to the Chairman's statutory duties under section 17(3) of the 2005 Act and section 4 DPA

17. As noted above, section 17(3) of the 2005 Act requires the Chairman to act with fairness. Section 4 DPA requires the Chairman, as a data controller within the meaning of the Act, to act in accordance with the Data Protection Principles ["DPPs"]. Spent convictions are sensitive personal data within the meaning of the Act. The first DPP requires that personal data (which includes sensitive personal data) be processed fairly and lawfully. The third DPP requires that personal data be adequate, relevant and not excessive in relation to the purpose or purposes for which they are processed. The fourth DPP requires that personal data be accurate and, where necessary, up to date. The sixth

DPP requires that personal data be processed in accordance with the rights of data subjects under the Act.

18. For the reasons outlined above, it is a basic principle of fairness that a person adversely affected by a decision should be afforded an opportunity to be heard by the decision-maker. Given the effect of restriction orders, it is important that that opportunity should be afforded before the decision is made. Likewise, there must be significant doubt about the ability of the restriction order process to ensure the adequacy, accuracy and relevance of the personal data relied on to justify restriction applications without an opportunity for the data subject to challenge it and/or to make representations about its relevant context. This is particularly so in view of the history which has led to the establishment of this Inquiry.

The documents issued by the Inquiry to date suggest that the wrong legal test for the admission of spent convictions may be used in the context of restriction order applications.

19. Leaving aside the effects of proposed direction (iii), which are addressed in outline in the next section, the Chairman has indicated in proposed direction (i) that he will admit evidence relating to a person's spent convictions and to circumstances ancillary thereto when considering restriction order applications when he "*consider[s] that justice cannot be done when determining the application except by admitting such evidence*." This reflects the statutory test set down by section 7(3) of the 1974 Act for the admission of evidence of spent convictions in judicial proceedings. It is respectfully submitted that this is the correct test, which should be applied. It reflects the balance struck by Parliament and requires fact specific consideration to be given to the question of whether justice requires the admission of the evidence: A v B [2013] IRLR 434; 3G Mobile Phones Ltd v HMRC [2013] UKFTT 719 (TC). It is respectfully submitted that it is not co-extensive with the question of whether admission of the evidence is relevant and necessary for the

purposes of the Inquiry, as suggested by counsel to the Inquiry at [3] and [23] of their supplementary note on the 1974 Act.

20. In the restriction order legal principles ruling, the then Chairman pointed out at [32] that the public interest balance that is required to be carried out under section 19(3) of the 2005 Act is not limited to an assessment of what is conducive to the fulfillment of the Inquiry's terms of reference, but rather regard must also be had to other public interests. This demonstrates that the question of what justice demands in the context of a restriction order application is not limited to that which is relevant and necessary to the purposes of the Inquiry. There are public interest considerations which the overall determination of justice requires to be taken into account, even though these may be contrary to the purposes of the Inquiry. The public interest in the rehabilitation of offenders, as reflected in the 1974 Act and Article 8, is such a consideration. The statutory test laid down in section 7(3) of the 1974 Act requires that this interest be taken into account in assessing what the interests of justice require in a way that a focus solely on what is relevant and necessary for the purposes of the Inquiry does not. In this way the section 7(3) test is stricter and affords greater protection to the public interest in the rehabilitation of offenders than the question of what is relevant and necessary for the purposes of the Inquiry. The two tests are not co-extensive.

21. As addressed in the next section, if proposed direction (iii) is made and acceded to by the Secretary of State, then there won't even be individual consideration of whether admission of spent convictions are relevant and necessary for the purposes of the Inquiry. The NPSCPs contend that this would be unlawful for the reasons set out below. However, if and in so far as the Chairman continues to act in accordance with his proposed direction (i) (i.e. applying the s.7(3) "justice cannot be done" except by admitting such evidence test), then it is important to acknowledge the distinction between the s.7(3) test and the question of what is relevant and necessary for the purposes of the Inquiry. The

former requires acknowledgement of the interest in the rehabilitation of offenders and, therefore consideration of the effect of any departure from the usual statutory protection on the rehabilitated person. The latter focuses on the utility of the information for the purposes of the Inquiry and risks leaving out of account the legitimate interest in treating individuals as rehabilitated after the period determined by Parliament has passed.

22. To the extent that this issue remains live in light of proposed direction (iii), the NPSCPs would wish to be heard on it.

Proposed direction (iii) constitutes an unnecessary and disproportionate interference with Article 8 rights

23. As noted at [11] above, the retention and use of spent convictions engages the Article 8 rights of the convicted person, even when such use does not involve onward public disclosure. As such, interference with such rights must be "in accordance with the law" and must be necessary and proportionate to the pursuit of a legitimate aim. A provision which permits overbroad and insufficiently tailored use of spent convictions and which does not contain adequate safeguards against arbitrary interferences will be unlawful: R (T) v Chief Constable of Manchester [2015] AC 49; R (P) v SSHD [2017] 2 Cr App R 12.

24. In the present case, a substantial part of the reasoning behind seeking the amendment to Schedule 3 to the 1974 Act is to remove the administrative burden on the Inquiry to consider whether the section 7(3) test is met in respect of spent convictions ["minded to" note [10]]. However, it is precisely that test which enables the Inquiry to conduct the proportionality assessment which is required by Article 8(2). Removal of that safeguard in order to allow blanket admission of spent convictions in the interests of expediency, in circumstances where the very subject matter of the Inquiry gives rise to a need for caution about the accuracy and wider context of those convictions, is the antithesis of the type of system required to ensure compliance with Article 8. Nor is such a

radical approach necessary given that the Chairman acknowledges that he has the power to address spent convictions justly under section 7(3) of the 1974 Act in the context of restriction order applications.

25. For the reasons set out in their original submissions on the Rehabilitation of Offenders Act 1974, the NPSCPs submit that the section 7(3) power applies equally in the context of the Inquiry's substantive hearings. In so far as the Chairman considers that to be "more open to debate", it is respectfully submitted that the solution is not to seek wholesale disapplication of the protections afforded by section 4(1) of the 1974 Act without seeking to have adequate substitute safeguards put in place.

26. The above submissions apply to the proposed disapplication of section 4(1) of the 1974 Act in the context of the present Inquiry. *A fortiori*, it is unnecessary and disproportionate for this Inquiry to seek an amendment to Schedule 3 of the 1974 Act that would enable removal of the protections afforded by section 4(1) of the Act in respect of any inquiry established under section 1 of the 2005 Act upon the designation of the Justice Secretary.

Conclusion

27. For all of the reasons set out above, the NPSCPs submit that an oral hearing is necessary for the determination of whether the proposed directions set out at paragraph 1(ii) and (iii) of the Chairman's "minded to" note dated 2 August 2017 should be made. In view of the relevance of the Inquiry's approach to spent convictions to the determination of restriction order applications, it is submitted that such a hearing should take place as a matter of urgency and before any further final determinations of restriction order applications are made.

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