IN THE UNDERCOVER POLICING INQUIRY

SUBMISSIONS ON BEHALF OF
PETER FRANCIS
RE
THE CHAIRMAN'S 'MINDED TO' NOTE DATED 3 AUGUST 2017
RE RESTRICTION ORDER APPLICATIONS

Introduction

1. These submissions are made on behalf of Peter Francis ('PF') in response to the 'minded to' indications published by the Chairman in his note dated 3 August 2017 in relation to restriction orders relating to 28 of the 29 officers whose cases he has considered ('the minded to note').

2. We note that the Chairman has decided not to follow the 'minded to' procedure in relation one officer, HN7, and that according to CTI's explanatory note of the same date "He has therefore made a final determination based on medical evidence which cannot be properly disputed" [6]. We note also the Chairman's ruling of 3 August in relation to HN7 that he shall make the order sought.

3. It is PF's view that, given the very purpose of this Inquiry combined with the common law presumption of open justice and the scheme of the Inquiries Act itself (as interpreted by the previous Chairman[1]), the starting point must be that the *undercover* names of all SDS and NPOIU undercover officers should be disclosed. These submissions are therefore limited to those officers in relation to whom the Chairman is or *may* be minded to refuse to publish cover names. We will address the following:
   i) The HN7 procedure;

[1] *Restriction Orders: Legal Principles and Approach Ruling*, [89] and A11.

ii) The envisaged closed hearings in relation to HN16, HN26, HN81;

iii) The 'minded to 'decisions in relation to HN58, HN123 and HN333.

HN7

4. The procedure adopted in this particular officer's case was, in our view, wrong. In addition to the 3 August ruling, we note also the contents of the letter of 4 September 2017 from the Solicitor to the Inquiry to the NPSCP (copied to PF), sent in response to specific requests from the NPSCP in relation to the HN7 ruling. That letter included the link to the restriction order ('RO') as actually made and included the submissions dated 20 July 2017 made by the MPS Designated Lawyers on behalf of HN7. It also included the CVs of three psychiatrists who have been assessing the likely psychological impact of disclosure of real and cover names on undercover officers ('UCOs').

5. Firstly, it seems to us, that all those matters should have been disclosed to CPs as a matter of course, and not because a particular CP sought further clarification and further disclosure. Secondly, it should have been disclosed *before* the decision to move straight to a final decision was made. Had the NPSCPs not written in the terms they did, it appears that we would not have had the disclosure outlined in [4] above. This, in our view, is an arbitrary and unacceptable approach to such a fundamental issue. We note that in CTI's 'Note for the Hearing on 5 April 2017' it was said that the restriction order process in relation to anonymity is profoundly important, in particular as "*it is the gateway to transparency*"[37], a proposition which we fully endorsed at the time. By way of example, the CVs, once actually disclosed, raised a legitimate question from PF as to the special relationship between The Priory Ticehurst trauma service and the MPS and thus the consequential potential impact on the independence of two of those experts (as set out in our letters of 20 September and 29 September, the second of which we await a reply to). Whilst this does not affect Professor Fox (who has assessed HN7), it demonstrates why the procedure used *could* be both unfair and lead the Chairman into error.

6. Further, we note from the "Designated Lawyers" submissions that it was this submission that caused the Chairman to take a different course from his initial intention to issue a 'minded to' note in the usual way, on the somewhat contorted basis that in

order for CPs to effectively participate in the RO decision-making process, it would be necessary to disclose details of HN7's medical history, and that in itself would preclude subsequent disclosure of his identity, because the revelation of sensitive medical information would effectively strengthen their application, because it would inevitably result in further medical evidence ("a further report from Professor Fox as to the likely outcome for HN7 bearing in mind the prior publication of detailed information about his mental health"). This would cause "any challenger to complain that the prior publication of the "minded to" reasons and gist had effectively presented them with an unchallengeable decision as a fait accompli." The Chairman accepted this reasoning, it seems, and moved straight to a final ruling, thus presenting all CPs with a different *fait accompli*, but also providing a precis of HN7's medical condition.

7. It is not clear to us why the CPs could not have been asked to make submissions based on a minded to note in similar terms to the final note, with an explanation for the heavier than usual gisting. However exceptional the particular mental fragility of HN7, it is of real concern to PF that such a procedure has set a dangerous precedent.

Closed hearings in relation to HN16, HN26, HN81

8. The Chairman has given some explanation in relation to HN81 as to why is he is taking what he describes as an 'exceptional course' [6], but no explanation has been provided in relation to HN16 and HN26. In our submission, given the accepted exceptionality of this procedure, further details should be provided as to the necessity of taking this course in relation to HN16 and HN26.

9. In any event, we submit that it is of vital importance that PF and other CPs have a proper opportunity to make meaningful submissions should the Chairman be minded to grant ROs in relation to cover names, after closed hearings of the kind envisaged here.

10. Without prejudice to the right to make full and more meaningful submissions in due course, if necessary, PF makes the following preliminary submissions. As far as HN81 is concerned, it is inconceivable that his undercover name(s) could be properly withheld, given his deployment against a group supporting the Lawrence family and his

alleged role. As is well known, that information only came to light because of PF's public revelations about his own involvement in targeting such groups. The alleged activities of N81 cover at least seven of the points identified as points of 'public concern' by the previous Chairman at [90] of *Restriction Orders: Legal Principles and Approach Ruling*), and of course those proper concerns are part of the reason for setting up this Inquiry. As is now well known, in the *Ellison Review* HN81 was described as follows: "The reality was that N81 was, at the time, an MPS spy in the Lawrence family camp during the course of judicial proceedings in which the family was the primary party in opposition to the MPS". The factual disputes between PF and N81 are well documented in both *Ellison* and *Herne* and will need to be resolved in due course if the Inquiry is to fulfil a fundamental part of its terms of reference (and avoid falling in to the same error as *Herne* in the way that it purposed to resolve such a dispute). That will be an impossible task for the Inquiry without further evidence from others, which in turn depends on disclosure of his cover name(s).

11. The Chairman summarises his view of the balancing exercise he has to conduct in relation to HN81 at [6]. The impact on his mental health is described as severe if his cover nameis disclosed, presumably because of HN81's subjective fear that this will lead to identification of his real name which will then put him at risk of apparent physical harm. It was submitted by PF at the hearing in April this year (in relation to the MPS adjournment application) that compelling evidence should be required before the Inquiry accepts that an officer's real identity would be revealed by disclosure of their cover name(s). The previous Chairman effectively accepted that submission in his ruling of 2 May 2017 at [198], making plain that there can be no such presumption:

> "when an officer has retired from undercover deployment with the concealment of the link between their real and cover identities preserved, there is no obvious reason, from a security standpoint, why the cover name(s) should not be revealed, provided that measures are taken calculated to ensure that the cover name is not thereafter linked to the real identity and personal details of the witness."

12. In any event, PF reminds the Chairman that neither he nor other officers now publicly associated with N81 (such as Bob Lambert and Richard Walton) have been subject to any physical harm from any family justice or other groups.

Dr Busutil

13. Separately, as far as Dr Walter Busutil is concerned PF has raised a concern about potential conflict / independence, as identified in [5] above, and it is submitted that that concern should be fully explored and tested in any hearing. Given that Dr Busutil's reports in relation to HN26 and HN81 have effectively been withheld and reduced to one sentence, it is impossible to make any meaningful observations about the alleged level of psychological risk arising from disclosure of even a cover name (if that event were to occur), other than to say in relation to HN26 that the risk as expressed appears not even to cross the Article 8 severity threshold. The gisted risk assessment provided for HN16 on the Inquiry website in fact appears to be for HN15, and a further risk assessment is still outstanding. There appears to be no medical report for HN16. We therefore require further disclosure in order to effectively participate in this process.

The promise of confidentiality

14. In so far as HN16 or HN26 or HN81 or any other officer relies on a promise of confidentiality, PF has already asserted that no such promise was made to him, and thus any such alleged promise should be properly tested. Furthermore, the previous Chairman accepted as follows at [165] and [166]:

> "…Since the activities of the Special Demonstration Squad were directed towards the collection of intelligence rather than evidence Special Demonstration Squad officers would not routinely expect to be exposed to court proceedings. However, I am inclined to accept the submission made to me by Mr Emmerson QC that any assurance or understanding, even in the case of a Special Demonstration Squad officer, must have been qualified and could not have been absolute, for the very good reason that every police officer is aware of the supremacy of a judicial decision on disclosure should the officer find that his activities have become relevant to a civil or criminal trial. This reservation will apply with particular force to officers whose undercover activity was conducted for the purpose of acquiring evidence.
>
> The public interest against which the expectation of confidentiality has to be measured is an exceptional one – "the need to investigate as openly as possible the activities, management and justification for these very undercover police operations so as to allay public concern. I

consider that while an expectation of confidentiality is both a material and weighty consideration it is not likely, **except in unusual circumstances**, to make the difference between disclosure and non-disclosure if disclosure is necessary in the fair pursuit of fulfilment of the Inquiry's terms of reference." [emphasis added]

15. In summary, as far as PF is concerned, on what little that has been disclosed to date, he can see no reason why the cover names of *any* of these three officers cannot be disclosed.

The 'minded to' decisions in relation to HN58, HN123 and HN333.

HN58

16. The Chairman has indicated at [4] that he is minded to restrict disclosure of *both* the real and cover identities of HN58 and he is minded to grant him screens. Surprisingly, the Chairman has simply described HN58 as having had managerial position in the SDS between 1997 and 2001, having previously deployed as an UCO. This summary appears to deliberately underplay his significant role.

17. Documents in the public domain confirm that he was a DCI and the *head* of the SDS in August 1998, when he received Bob Lambert's report on the now well-known meeting between N81 (for whom he was directly responsible) and Richard Walton, described in the *Ellison Review* and the IPCC report *(Ellison Review – Walton, Lambert and Black)*. In response to the meeting he is said to have commented: "An excellent meeting and a good example of the strides N81 has made over the last 12 months" (*Ellison* at[p. 229). He is also said to be the author of an SDS Intelligence Update in September 1998, titled 'Extremist involvement in the Stephen Lawrence Campaign' where he wrote: "N81's unique insight into the behind-the-scenes machinations of the Lawrence campaign has also proved invaluable to A/DI Walton who is currently attached to the Stephen Lawrence review team" (*Ellison* at[p.229).

18. Further, he was investigated for gross misconduct by the IPCC under the cipher N34 following *Ellison*. He refused to answer their questions. There was an adverse finding against him (see p. 366 of the IPCC Report).

19. PF submits that these are matters of very significant public concern which militate against withholding his cover name(s), particularly in light of the very low risk of very low harm ("a stress reaction") to him if the cover name(s) was disclosed. In our submission the Chairman has failed to carry out a proper balancing exercise and / or follow the approach as set out by the previous Chairman (as per the summary at Part 6A of *Restriction Orders: Legal Principles and Approach Ruling*) . If he had, how could it properly be said that the public interest in openness is outweighed by the countervailing public interest of protecting this officer from harm and thus an RO withholding both cover and real names is necessary? We submit that the Chairman has fallen into error and that N58's cover name(s) must be disclosed.

HN123

20. The minded to note indicates that the Chairman is minded to grant a restriction order in respect of HN123's real and cover names. None of the material evidence leading to this conclusion has been disclosed. The Chairman describes HN123's role as being "involved indirectly in deployments affecting the Lawrence family" and that he can give evidence about that under a cipher at [9]." He also says that "[t]o the extent that it is contentious, it can be challenged just as effectively, as if given in the real or cover name."

21. A great deal more is publicly known about HN123 via both the *Ellison Review* and *Herne* than simply that one sentence.,. The *Ellison Review* includes the following at p. 211: "N123... spoke on the telephone to Operation Herne in November 2013: "Francis was lying about the smearing of Lawrence…" N123 had taken over from Mr Francis when in the back office. Mr Francis had told him that it was their role to provide "gossip for the field…" N123 had spent nine months in the back office and amongst management and had gone to field meetings. Not once did N123 see or hear any instruction to 'smear' the Lawrences. He did not see any paperwork to reflect this either."

22. Further, *Ellison* states at p.214 that according to Bob Lambert, N123 started his undercover work after Lambert had become head of the SDS and stated: "I am sure from day one the Stephen Lawrence case would have been on N123's agenda, and…

they must have attended, started to attend meetings with the Stephen Lawrence campaign, almost goes as read that they would have been there… they would want to be inside the meeting, to have a speaker on the platform and so N123 is following close behind 'Pete Francis'… they became quite close friends and times would have been at the same events… May well have been events specifically in support of the Stephen Lawrence campaign…"

23. He is also mentioned in Herne II as being a UCO with the potential to report on the Lawrence family at [12.2].

24. PF has not been asked to provide any formal evidence to the Inquiry at this stage. The assertion by the Chairman that HN123 was only involved "indirectly" in the Lawrence campaign appears to be a premature finding of fact when this is one of the very issues that goes to the heart of what the Inquiry was set up to resolve. HN123's level of involvement in relation to deployments affecting the Lawrence family is in fact a matter of dispute, a dispute that PF is directly involved in, and a matter which the Inquiry will have to resolve in due course: how close was he to the Lawrence family campaign? What role did he actually play, etc.? That factual dispute is one that the Chairman has recognised as necessary to resolve in relation to N81, and has accepted that in order to have all the evidence possible to do so, his cover name(s) would have to be released ("I can at present see no means of resolving disputed issues of fact about them without the cover name of HN81 being published" - at [6]). It is difficult to see why a different approach should apply in the case of HN123 to that of HN81. Indeed it is submitted that a different approach is irrational.

25. PF submits that it is essential that HN123's cover name(s) is disclosed so that those targeted by HN123 are able to give their account of the extent of his involvement in order for that issue of significant public interest to be properly and fairly resolved.

HN333

26. The minded to note indicates that the Chairman is minded to grant a restriction order in relation to both real and cover names of this UCO on the basis of a "very small" risk that "if his cover name were to be associated with the valuable duties which he performed subsequent to his deployment, he would be of interest to those who might

pose such a threat". The MPS has only sought an RO in relation to HN333's real name. On the other hand, HN333's Designated Lawyers have made an application for restriction of both real and cover names.

27. It is submitted that there is no proper basis for a RO in respect of his cover name(s). First, the Chairman appears to have given great weight to the fact that there is no evidence of wrongdoing (to date). However, it is with the disclosure of his cover name(s) that any allegations of wrong doing may well be exposed. Second, the Chairman is of the view that there would be *no* risk to his personal safety or family if his cover name was disclosed but there is a "very small" risk if his cover name "were to be associated" with his subsequent duties, he would be "of interest" to those who "might" pose a threat. The MPS themselves do not consider that restriction of his cover name is justified. Balancing that very low and speculative risk against the public interest of openness in the Inquiry (and a proper investigation of his undercover deployment), it is difficult to see how the Chairman could properly come to the conclusion he has. It is submitted therefore that his cover name(s) should be released.

MAYA SIKAND

GARDEN COURT CHAMBERS

4 OCTOBER 2017