The Rehabilitation of Offenders Act 1974 and its impact on the Inquiry's work

Ruling

1. I make the following rulings in respect of the three matters identified in paragraph one of my 'Minded to' note of 2 August 2017.

   (i) Evidence relating to a person's spent convictions and to circumstances ancillary thereto will be admitted under section 7(3) of the Rehabilitation of Offenders Act 1974 ("the 1974 Act") when considering an application for a restriction order under section 19(2)(b) of the Inquiries Act 2005 ("the 2005 Act") when I consider that justice cannot be done when determining the application except by admitting such evidence.

   (ii) I will not at that stage generally afford to the person whose convictions may be admitted in evidence for that limited purpose any opportunity to make representations about them. I will keep any restriction order based in part upon them under review as the Inquiry proceeds under section 20(4) of the 2005 Act.

   (iii) I will 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 ("the 1975 Order")

   > "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 for purposes necessary to the fulfilment of the terms of reference of the Inquiry."

   I will invite the Secretary of State for Justice so to designate this Inquiry.

Reasons

2. (i) is now uncontroversial. It is the test which I have applied in reaching provisional and final decisions on applications for restriction orders to date. I will continue to apply it.

3. As to (ii) the broad written submissions made by Ms Kaufmann QC and Ms Brander about the steps which must be taken before reliance could be placed upon a spent conviction for the purpose of deciding whether or not to make a restriction order were substantially narrowed in oral submissions. I believe that they recognise that the steps which they originally proposed would impose a large administrative burden on

the Inquiry, which would be difficult to discharge fully and would achieve little of practical value for those with spent convictions. I will therefore focus on their narrower oral submissions.

4. Ms Kaufmann's bottom line was that, in the case of every conviction which I was minded to take into account for the purpose of determining an application for a restriction order, I should ensure that the convicted person should have the relevant conviction identified to him or her, so as to permit representations to be made on his or her behalf. Such representations could include a challenge to the factual basis or safety of the conviction, but need not do so. They could, for example, include an assertion that the conviction was of no consequence. She accepted that, in cases in which disclosure of the conviction would create a risk to the safety of the applicant or would defeat the application process, no disclosure would be required at that stage.

5. As I explained in my notes to core participants about this issue of 23 October and 14 November 2017 spent convictions have, so far, played a small but necessary part in the assessment of risk to an individual officer and a minimal part overall. The number of cases in which it has played any part is small. The number of individuals with relevant spent convictions is small. I have no reason to believe that this picture will change significantly in the case of future applications. The practical burden imposed by Ms Kaufmann's narrower submissions would, therefore, not be unmanageable. The price to be paid would be some delay in a minority of cases.

6. Practical problems would, however, remain in the cases in which this exercise could be performed. If the convicted person challenged the factual basis for a conviction or its safety, I could not resolve the challenge without taking one or more of the following steps: obtaining the file, if it exists, from the Crown Prosecution Service; inviting the risk assessor to undertake further research into the background to the conviction; giving the applicant an opportunity to make representations about the issue; and in some cases, when the issue could not otherwise be resolved, hearing evidence about it. The burden imposed on the Inquiry in the small number of cases where this might be possible would be disproportionate to the end result to be obtained in what is a second order issue. More likely to occur is a situation in which the only material available will be the conviction, together with such facts about it as are recorded on the Police National Computer system and the written representations of the person convicted. How could I decide on that material where the truth lies? In cases in which the convicted person claims that the conviction is of no consequence because, for example, he or she has led a blameless life since, it might be necessary to compare that claim with intelligence about subsequent activity available to the risk assessor. In that event, disclosure of the intelligence might not be possible. These

are examples of the difficulties likely to arise in some cases. Surmounting them is unlikely, generally, to be a worthwhile exercise. The convicted person will have the opportunity to challenge or explain the conviction in the substantive phase of the Inquiry. On the basis of my experience so far, it is so unlikely as to be almost unthinkable that spent convictions would found a restriction order in respect of a name, when, without them, no such order would be made. If an exceptional case were to arise, I would adopt an exceptional course as the marginal change in wording between the ruling that I was minded to make and that which I do make permits.

7. As to (iii), Ms Kaufmann submitted that the Inquiry should be careful not to detract from the rights granted to convicted persons by the 1974 Act. She accepted, of course, that it would ultimately be for Parliament to decide whether or not to approve the proposed amendment to the 1975 Order by the positive resolution procedure. Nevertheless, she submitted that the Inquiry should not set in train a process which might result in those rights being curtailed by Parliament. During the course of the hearing, I put to her a form of wording for the proposed amendment which, subject to her basic argument that no amendment was required, I understood her to accept. The wording set out in (iii) encapsulates it.

8. Ms Kaufmann submitted that section 7(3) of the 1974 Act confers all the powers needed by the Inquiry to fulfil its terms of reference. Section 7(3) provides,

> "If at any stage in any proceedings before a judicial authority… the authority is satisfied… that 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, that authority may admit… the evidence in question…"

9. It is now common ground, and I accept, that the Inquiry is "a judicial authority". I also accept Ms Kaufmann's submission that in cases in which the Inquiry is investigating a possible miscarriage of justice it can admit evidence about a spent conviction, with or without the consent of the person convicted: in those circumstances, the Inquiry's investigation would be part of a process of which the end result would serve the interests of justice. In those circumstances, section 7(3) provides the means of fulfilling those interests.

10. There remains a problem which, in my view, could not be resolved satisfactorily without an amendment to the law. The purpose of the Inquiry is to get to the truth about undercover policing and to make recommendations about its future. On a natural reading, the words "justice cannot be done in the case" are not wide enough to encompass those purposes. There is an alternative view, but for my part I am not confident that it is correct. The Inquiry does need to examine the justification for

deployments. Justification may include the conduct of individuals associated with target groups which resulted in convictions which are now spent. To require justification to be assessed on the basis that they had not been convicted and had not undertaken the activity which gave rise to the conviction would be absurd. An Inquiry, such as this one, whose purpose includes getting to the historical truth cannot sensibly be required to base significant findings on a fiction. Accordingly, I propose to invite the Secretary of State to propose the amendment to Schedule 3 to the 2005 Order set out at (iii).

29 November 2017

Sir John Mitting
Chairman, Undercover Policing Inquiry