

Monday, 20 November 2017

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(11.35 am)

I N D E X

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Opening remarks

THE CHAIR: There will be a delay of not less than two minutes between any words spoken or information given in the hearing room, and any communication or publication of these words or information using Twitter, other social media or any other means of communication.

For the avoidance of doubt, this delay applies to any words spoken or information given in the hearing

1 whether or not they form part of the evidence. There
2 shall be no communication or publication by any means of
3 any words spoken or information given which any person
4 has indicated should not have been revealed in public
5 until such time as the objection to its publication is
6 withdrawn or the chairman has ruled upon it.

7 Subject to any future order, including any
8 restriction order under section 19 of the 2005 Act, it
9 will be permissible to use Twitter and social media from
10 within the hearing room to report on any part of the
11 proceedings providing that any such use accords with
12 their restriction and does not involve photography or
13 filming or recording devices.

14 Mr Barr?

15 MR BARR: Sir, I appear this morning in relation to the
16 Rehabilitation of Offenders Act issue, with
17 Ms Gargitter, who sits to my right. To my left
18 Ms Kaufmann QC leads Ms Brander for the non-state
19 non-police core participants, who are represented. To
20 my right Ms Mannion and Mr Payter appear on behalf of
21 the Metropolitan Police Service. Immediately behind me,
22 Mr Sanders QC leads Mr McAllister and Ms Palmer for the
23 officers who are represented by the designated lawyers
24 team. To my extreme right Ms Woods appears on behalf of
25 the officers who are represented by Slater & Gordon. On

1 the third row, immediately behind me and slightly to the
2 right, Sir Robert Francis opposes of the National Police
3 Chiefs' Council, Mr Griffin appears on behalf of the
4 Home Office, Mr O'Connor on behalf of the National Crime
5 Agency, leading Mr O'Brien.

6 Sir, we have set out in our notes our understanding
7 of the position legally, and in those circumstances
8 I don't propose to repeat what we have committed to
9 writing rather we will leave it to others to have an
10 opportunity to address you on the issues which arise.

11 The advocates have been given a speaking order and
12 it falls to my learned friend Ms Kaufmann to address you
13 first.

14 THE CHAIR: Ms Kaufmann, before you get underway, can I just
15 obtain some paper please. My notebook unfortunately has
16 not been brought into the room.

17 Thank you.

18 Yes, Ms Kaufmann.

19 Submissions on behalf of the non-state, non-police core
20 participants by MS KAUFMANN

21 MS KAUFMANN: Sir, I, too, am not going to repeat what is in
22 our written submissions that you will have had an
23 opportunity to look at.

24 THE CHAIR: Yes, I have.

25 MS KAUFMANN: So I'm just going to take matters slightly

1 further forward and summarise to some extent what our
2 position is.

3 We have both a narrow and a wide basis upon which we
4 put the procedural issues in this case. You will have
5 seen that our concern is that where the question of
6 whether a spent conviction is to be admitted arises,
7 then we, the non-state core participants, are concerned
8 that insofar as those spent convictions concern any
9 particular individual, that individual should have
10 an opportunity to say something about the circumstances
11 of the particular offence before a decision is taken on
12 whether to admit it.

13 THE CHAIR: Is that submission made both on behalf of
14 non-state core participants and those who have not
15 participated at all in the Inquiry?

16 MS KAUFMANN: Who are not core participants as well?

17 It is, and I will come on to precisely how we submit
18 this might be managed.

19 So participation and an opportunity to make
20 representations to set out the circumstances of the
21 offence is what it is submitted is required. It is put
22 on both a narrow basis and on a broad basis.

23 The narrow basis is this, which is that whenever
24 a spent conviction arises in circumstances with which
25 this inquiry is concerned, that is whenever

1 an individual was convicted in the context of
2 an operation where there were undercover officers
3 operating and deployed, then that in and of itself gives
4 rise to a question mark in relation to those spent
5 convictions. It is necessary for there to be an
6 opportunity for the individual concerned to have an
7 opportunity to make representations.

8 That's not just in relation to whether or not the
9 issue is miscarriages, that is in relation to whether
10 the issue is do I rely upon this spent conviction for
11 the purposes of making a restriction order because it
12 indicates a risk of harm to a particular officer? Or
13 equally where the question for you is some way down the
14 line: was it proportionate to decide to deploy
15 undercover officers, obviously in this context it would
16 be for a future period in light of convictions that
17 arose which are now spent in the course of an already
18 extant deployment?

19 So in all those cases, we would submit that there is
20 a very compelling case for the court -- where there is
21 a question mark over convictions -- to ensure that there
22 is an opportunity to make representations.

23 But our broader submission subsumes that, and is to
24 the effect that whenever a spent conviction falls to be
25 considered for admissibility, an opportunity to make

1 representations as to the circumstances of that
2 conviction is necessary before a proper and informed
3 decision can be made by yourself as to whether or not to
4 admit it and to rely upon it, whether that be in
5 evidence as to the risk posed to a particular officer
6 for the purposes of their application for a restriction
7 order, or as to the proportionality, say, of a decision
8 to deploy undercover operations.

9 The reason for that is that in relation to risk
10 assessment and the restriction order as, sir, you have
11 recognised already, your task is to get to the truth.
12 In order to get to the truth it is absolutely central
13 that individuals who were affected by undercover
14 policing have an opportunity to know that they were the
15 victims of such in order to come forward and provide the
16 Inquiry with information as to what went on, so that it
17 is possible then in light of all the facts to establish
18 whether there was wrongdoing on the part of the
19 officers.

20 Any time an officer comes along and applies for
21 a restriction order on the basis of a risk to
22 themselves, as you have already indicated where the
23 issue is one of personal safety, risk to life or limb --
24 THE CHAIR: It can only be either safety or perhaps
25 harassment, it cannot be other considerations personal

1 to an officer.

2 MS KAUFMANN: We will come on to that at a later stage. But
3 you have already indicated personal safety, as in risk
4 to life or limb, is a key consideration and would, if
5 you are satisfied that an officer's personal safety is
6 at risk, be a basis upon which to refuse a restriction
7 order -- sorry, to grant a restriction order.

8 THE CHAIR: Grant.

9 MS KAUFMANN: Now that could mean that a cover name would
10 not be disclosed at all if there would be a risk of
11 a mosaic effect in relation to the cover name and the
12 real name. Because, of course, releasing the cover name
13 would not protect the officer in his real name if that
14 mosaic effect is liable to lead to their identification.

15 So the restriction order process, albeit part of the
16 process only, is absolutely a central part of the
17 process in terms of whether or not this Inquiry is
18 likely to get to the truth. Any aspect of that process
19 is also therefore critical.

20 So insofar as you are presented with evidence which
21 is being relied upon to substantiate an allegation that
22 there is a risk to the officer's safety, then it is
23 fundamental that that assessment is done on the basis of
24 all the available evidence. Insofar as that is a spent
25 conviction -- this doesn't just apply to spent

1 convictions, we will come on to this later in relation
2 to restriction orders more generally -- the
3 circumstances of that conviction are obviously central
4 to the question of future risk.

5 Insofar as those convictions affect individuals who
6 are core participants, then there is no question that
7 they should be given an opportunity to make
8 representations, subject to this: subject to that
9 opportunity effectively defeating the purpose of the
10 application because it would disclose the identity of
11 the officer. But we do not for a moment accept that
12 that is going to be the case in the generality of cases.

13 THE CHAIR: It will vary from case to case.

14 MS KAUFMANN: It will vary and it is a judgment which has to
15 be made on a case-by-case basis.

16 In relation to those individuals who are core
17 participants, there is absolutely no difficulty
18 whatsoever in giving them an opportunity, they are
19 known, they are identifiable. They can be written to in
20 private. There is no need to disclose their spent
21 conviction to anybody else, that is entirely a matter
22 for them.

23 Because we do respectfully submit that spent
24 convictions, there is no need to disclose the identity
25 of individuals who are the subject of spent convictions

1 when your Lordship takes them into account. So

2 anonymity can be respected --

3 THE CHAIR: Like Sir Christopher Pitchford, I would much

4 prefer to be called "Sir".

5 MS KAUFMANN: I try, but I called a female judge the other

6 day "my Lord", it is just really difficult, we get into

7 these terrible habits. I will try.

8 THE CHAIR: Do try, yes.

9 MS KAUFMANN: So there is no difficulty. You can respect

10 their anonymity and you can give them an opportunity to

11 make representations and should do if you are going to

12 have the best evidence on this critical issue.

13 Then, so far as non-core participants are concerned,

14 individuals who are said to present a risk albeit they

15 are not participating in these proceedings, then

16 obviously the situation is more difficult because it is

17 going to be more difficult to make contact with them,

18 but we nonetheless submit that efforts should be made to

19 make contact. That can be through liaising with the

20 police to find out where those individuals were last

21 located. There are also ways in which it might be

22 possible -- we have not worked out the logistics of this

23 but we will do and come back to the Inquiry about it.

24 There are ways in which it would be possible -- for

25 example, in relation to core participants who are groups

1 and who had a changing membership over the years, it
2 might be possible for liaison with those groups to
3 provide a mechanism if the Inquiry knows the group to
4 which an individual who has a spent conviction belonged,
5 it may be possible through liaison with the group to
6 actually identify the individual concerned. But those
7 sorts of logistics can be worked out.

8 THE CHAIR: That would involve disclosing by the Inquiry to
9 whoever is currently in or controlling the group, if it
10 is under control, the identity of those who may have --

11 MS KAUFMANN: Not necessarily --

12 THE CHAIR: -- nothing at present to do with them.

13 MS KAUFMANN: Not necessarily. That's why I am suggesting
14 that the logistics can be worked out. For example, it
15 could be that you were presented with names of
16 individuals so that you look along a list and are able
17 to check. That is one way, but that has its own
18 problems.

19 Or it could be that you simply anonymise the
20 convictions and you provide details of the particular
21 dates and circumstances that the police are saying gave
22 rise to those convictions. It might have been
23 a particular demonstration on a particular date and from
24 that then the group can contact the individual members
25 and see whether they can work it out. It is possible

1 and it is possible to do it and we would not suggest
2 doing it in any other way than that which maintains the
3 anonymity of the individuals concerned.

4 But the question of the logistics and the
5 practicalities is a separate question from the question
6 of whether as a matter of necessity to get to the truth
7 the Inquiry should be undertaking this exercise.

8 THE CHAIR: There, with respect, I disagree with you.

9 I said at the start of my remarks that I would not make
10 a procedural decision which would not fulfil the purpose
11 of the Inquiry of getting at the truth. I am not minded
12 to make decisions of a kind that satisfy legal purists
13 if it doesn't serve that end. In the course of the two
14 notes I produced about experience so far I was trying to
15 explain how very limited this issue is.

16 MS KAUFMANN: Well, precisely, my Lord. And that is an
17 incredibly important point. It is limited, but when it
18 arises it is still an issue that goes to your function
19 in getting to the truth.

20 Now, it may be that these cases are going to arise
21 incredibly rarely, but if and when they do they are
22 arising because you are making a judgment on
23 a prima facie basis that the admission of this spent
24 conviction is going to be necessary for you to assess
25 risk.

1 THE CHAIR: Forgive me. Can I take the example which I gave
2 in the first of the two notes that I produced, where
3 there is an unspent conviction for a relevant offence
4 and a series of spent convictions of a kind that are
5 potentially relevant.

6 Given the existence of the unspent conviction, what
7 real purpose would be served by investigating at this
8 stage -- not later on in the Inquiry but at this
9 stage -- the spent convictions?

10 MS KAUFMANN: That's precisely a reason why your Lordship
11 would decide "I don't need to rely upon it at all." If it
12 is not necessary -- we will come on to section 7(3) in
13 a moment.

14 THE CHAIR: I have given you the instance in which I have
15 relied upon it, where it arguably discloses a pattern of
16 conduct.

17 MS KAUFMANN: Exactly. But then you have to -- the question
18 is: what sort of pattern of conduct does it disclose?
19 That is when the circumstances relating to the older
20 convictions become relevant, because it may be that in
21 investigating the circumstances that pattern which you
22 assume is disclosed by the facts that you have is in
23 fact not disclosed, or other things might be said
24 about it.

25 That's particularly important where why you are

1 looking at it is precisely because there is a pattern of
2 conduct, then it is really important to understand the
3 whole history and the circumstances that arise.

4 So the starting point for you to look at any of
5 these spent convictions is that prima facie you think it
6 is necessary for you to take it into account to make
7 a risk assessment --

8 THE CHAIR: I have so far looked at a fair number of
9 individuals with spent convictions, which I have simply
10 put to one side. They are of no relevance. They simply
11 don't give rise to even a possible conclusion that there
12 might be a risk from that individual to the safety of
13 someone applying for a restriction order.

14 In those circumstances, it seems to me to be utterly
15 futile --

16 MS KAUFMANN: I agree --

17 THE CHAIR: You are --

18 MS KAUFMANN: I agree, my point is --

19 THE CHAIR: Hold on, your initial submission was that
20 I should, before reaching any view about these things,
21 give every person with a spent conviction where
22 reference is made to it to have the opportunity of
23 making submissions about it.

24 MS KAUFMANN: Sir, you are misunderstanding my point. My
25 point is there is an admissibility threshold which is

1 necessity, you don't rely upon it unless you think it is
2 necessary to do so. Before you get to that necessity
3 threshold we say there are two stages in the process
4 that you should take.

5 The first is you have all the information relating
6 to the spent conviction from the police and you look at
7 it and you say:

8 "Prima facie, in the context of everything else,
9 I think it will be necessary for me to rely upon this."

10 At that stage, you then say, "I need to go and take
11 ..."

12 THE CHAIR: Ah, I had misunderstood you --

13 MS KAUFMANN: Yes.

14 THE CHAIR: -- what you said, I thought expressly, was that
15 before I made any decision of any kind --

16 MS KAUFMANN: No.

17 THE CHAIR: -- everybody who's spent convictions were being
18 relied upon had to be given an opportunity of saying --

19 MS KAUFMANN: Absolutely not.

20 THE CHAIR: Fine. Then we are on a much narrower focus and
21 the difficulties of doing it become much smaller,
22 I agree.

23 MS KAUFMANN: Yes. My understanding was the difficulties
24 would be very small because you have already indicated
25 that you don't actually rely upon them in that many

1 instances and that obviously is an important
2 consideration: how practical is it?

3 Yes, just to make it absolutely clear, we are not
4 submitting if you are going to look at a conviction and
5 say that has no bearing whatsoever, a spent conviction,
6 we have nothing to say about that. It is where there is
7 a prima facie issue.

8 That is our position. Just on the statute and how
9 it applies, there was a question mark over whether or
10 not these were judicial proceedings for the purposes of
11 the Act. You will have seen our submission that they
12 are unquestionably judicial proceedings --

13 THE CHAIR: I think that is now common ground.

14 MS KAUFMANN: I'm grateful.

15 Can I just add one further thing to the mix, and
16 that is the Defamation Act, because it makes it
17 absolutely clear that these are judicial proceedings.

18 I'm sorry it is not in the bundle --

19 THE CHAIR: The most relevant authority never is. Thank you
20 very much. (Handed)

21 MS KAUFMANN: I have a copy.

22 The question is not whether or not the proceedings
23 are going to determine a right. The question is whether
24 they are going to determine questions affecting a right.

25 THE CHAIR: Yes.

1 MS KAUFMANN: If we turn in the Defamation Act -- this is
2 the 1996 Act amended by the 2013 Act. If we turn to
3 section 15 of the Act. So this is the Act that gives
4 rise to a right to bring proceedings if things which are
5 written or said about you that are untrue and published.

6 Section 15 deals with qualified privilege in certain
7 circumstances, and provides that a fair and accurate
8 report or copy of an extract from any adjudication
9 report, statement or notice issued by a body or officer
10 or other person designated for the purpose of this
11 paragraph, is --

12 THE CHAIR: There are two versions of section 15 --

13 MS KAUFMANN: There are two versions of it, I'm sorry.

14 THE CHAIR: -- and the current version is over the page.

15 MS KAUFMANN: I know why I'm looking at it wrongly, because
16 I am looking in the schedule. That is why. I'm sorry.

17 THE CHAIR: No, don't worry.

18 MS KAUFMANN: We need to go to page 4:

19 "The publication of any report or other statement
20 mentioned in schedule 1 to this Act is privileged unless
21 the publication is shown to be made with malice, subject
22 as follows ..."

23 That first subparagraph there has an effect on the
24 right to reputation. Because instead of being able to
25 sue because somebody has defamed you by writing about

1 you in terms that are untrue, full stop, qualified
2 privilege attaches to these particular statements such
3 that you can only sue where malice is established. So
4 that plainly affects the right to reputation.

5 If we look in schedule 3.1, paragraph 3. We can see
6 that section 15 applies to these proceedings.

7 THE CHAIR: Yes.

8 MS KAUFMANN: That is page 7:

9 "A fair and accurate report of proceedings in public
10 of a person appointed to hold a public inquiry by
11 a government or legislature anywhere in the world."

12 So let's imagine a situation in which your Lordship,
13 in drawing your conclusions and setting them out in your
14 Inquiry report makes findings about the conduct of
15 police officers, makes findings about the conduct of
16 some of the core participants which are untrue, are
17 actually inaccurate despite your best endeavours, then
18 section 15 means that they can only sue on the basis of
19 malice and so too in relation to any of the press that
20 report upon it.

21 So plainly these are proceedings that affect the
22 right to reputation because you will be determining
23 questions which then affect that right.

24 THE CHAIR: Yes. I don't doubt that the proceedings do
25 affect rights, but they are not in their substantive

1 part intended to determine rights.

2 MS KAUFMANN: Absolutely, no question.

3 THE CHAIR: They can't.

4 MS KAUFMANN: No question. But that is not what
5 section 4(6) is about, so section 7(3) does bite.

6 I don't think there is any dispute between us and
7 the Inquiry team about the test to be applied under
8 section 7(3). My understanding from Mr Barr is that it
9 is a test of strict necessity or necessity, and it is
10 a judgment, it is not a discretion and it must be the
11 case, therefore, that justice cannot be done without
12 admitting the spent conviction.

13 I have already made submissions on the manageability
14 of a process of relying upon spent convictions,
15 deploying section 7(3) in light of what you say,
16 my Lord, about the number of cases. Even if you were to
17 apply a section 7(3) test in relation to every spent
18 conviction that crosses your path and do so in
19 accordance with the procedure that we submit should
20 apply, that is a manageable process in our submission
21 and therefore resort should absolutely not be had, as
22 was suggested might be necessary by Mr Barr, to
23 section 7(4) and the possibility of --

24 THE CHAIR: As far as the restriction order applications go,
25 your submission is plainly right. There is no need for

1 legislation. The existing powers are sufficient.

2 I have explained how so far I have deployed them and

3 I think we are coming down actually to rather a narrow

4 question.

5 MS KAUFMANN: Yes.

6 THE CHAIR: As far as the wider purposes of the Inquiry go,

7 it is a rather different question and a much wider one.

8 MS KAUFMANN: We are being asked to address both at this

9 point in time.

10 THE CHAIR: Certainly, you are, yes. It has been organised

11 that way. But I would be grateful if when you do

12 address me if you can compartmentalise your submissions

13 into restriction orders and everything else.

14 MS KAUFMANN: So the wider question is proportionality,

15 that's the critical question --

16 THE CHAIR: Yes.

17 MS KAUFMANN: -- and it is very difficult to know what it is

18 that you are going to be presented with in terms of

19 spent convictions. But I can imagine there will be

20 quite a number of those.

21 THE CHAIR: You mean at the substantive phase of the

22 Inquiry? Yes.

23 MS KAUFMANN: When it comes to looking at proportionality in

24 relation to the decisions to deploy --

25 THE CHAIR: I would prefer to call it justification, but

1 I don't mind.

2 MS KAUFMANN: At that stage, when the issue is one of
3 justification, then of course it is likely that you will
4 be presented with more spent convictions to take into
5 account.

6 THE CHAIR: Certainly. Also I will have to look into them
7 at that stage, whether or not anybody consents. I'm
8 going to have to look into whether a spent conviction
9 incurred in the course of a deployment by an undercover
10 officer into the group where the events occurred which
11 gave rise to the conviction, whether or not that
12 possibly amounted to a miscarriage of justice.

13 MS KAUFMANN: Yes. In that situation -- so if we look at
14 the miscarriages of justice situation, in our submission
15 there can be absolutely no question that in order for
16 you to discharge that responsibility of looking into
17 whether there might have been a miscarriage of justice,
18 it is clearly going to be necessary for representations
19 to be made in relation to those convictions. And the
20 spent conviction is, as it were, the subject of your
21 Inquiry at that stage and so there can be no question of
22 admitting it. The question then is your job of finding
23 the truth about it. It necessarily has to be admitted
24 at that stage.

25 THE CHAIR: I agree, it necessarily has to be admitted, but

1 it may be prohibited if the strict argument is correct,
2 by the Rehabilitation of Offenders Act.

3 MS KAUFMANN: Well no, because in that situation
4 section 7(3) would mean that you necessarily have to
5 admit it.

6 THE CHAIR: That is if at that stage I am engaged in
7 considering the interests of justice. There is
8 a perfectly respectable view that a public inquiry of
9 this nature has two purposes, to find out the facts and
10 to express an opinion upon them.

11 It is not strictly a question of justice in the
12 sense that is traditionally understood, of determining
13 rights, of reaching conclusions about rights --

14 MS KAUFMANN: But, sir, at this stage when you are looking
15 at miscarriages you are part of a chain. So you are the
16 first stage. Your decision, having made your Inquiry and
17 looked into the truth, is going to be: do I refer this on
18 to the specialist panel that is looking at miscarriages?

19 That is an aspect of serving the interests of
20 justice, because if there has been a miscarriage of
21 justice it is plainly in the interests of justice that
22 it is brought to light and the conviction is overturned.
23 So in the broader sense there will be no question that
24 you at that stage will be serving the interests of
25 justice by admitting the spent conviction.

1 If an individual is subject to a conviction that
2 should not have occurred, that individual wants justice
3 in relation to it.

4 THE CHAIR: That is a good point. It doesn't, however,
5 arise when considering the justification for
6 deployments. But I accept what you say about that, in
7 first instance there the interests of justice are
8 engaged, I agree.

9 MS KAUFMANN: And in relation to proportionality, again the
10 interests of justice are engaged in the broad sense in
11 that one of the outcomes of this Inquiry will, we hope,
12 be to determine whether or not the undercover tool was
13 disproportionately used in circumstances where the
14 threats did not justify it.

15 If that is right, and if that finding is made or not
16 made, whatever the finding, the interests of justice
17 will have been served.

18 THE CHAIR: I agree with you wholeheartedly about one of the
19 purposes of the Inquiry. Whether or not deployments
20 which did occur were justified on
21 a deployment-by-deployment basis and perhaps more
22 generally, is a question I have to enquire into and do
23 my best to answer. But I query whether that raises
24 questions about the interests of justice.

25 I raise it merely as a query because my purpose in

1 suggesting that the law be amended to permit inquiries
2 to take these things into account was to deal with an
3 uncertainty not with a proposition that is certainly
4 established one way or the other.

5 MS KAUFMANN: My submission would be that you should read
6 interests of justice broadly, given the broad nature of
7 what judicial proceedings themselves are defined to be.

8 Judicial proceedings are not defined as proceedings
9 in which a right is determined, so you have to give
10 a broader reading to the interests of justice.

11 Secondly, if you then give a narrow reading to it
12 and resort to section 7(4) as a means by which to exempt
13 this inquiry from the constraints of section 7(3). Then
14 it leads to two difficulties.

15 Firstly, an exemption under section 7(4) is
16 an exemption for all purposes. It means that you can
17 side stepped the necessity test in section 7(3), and you
18 can just look at spent convictions for any purpose. And
19 we can see that if we look at the schedule to the order.

20 THE CHAIR: I agree that some limitation has to be placed
21 upon it. I would have thought a limitation of the
22 following kind, namely for the purposes of permitting
23 the Inquiry to fulfil its terms of reference, would
24 serve that purpose.

25 MS KAUFMANN: That would be one way, or to narrow it and

1 replicate the wording of section 7(3). To make sure
2 that you only admit it where it is necessary -- so use
3 the word "necessary", yes.

4 THE CHAIR: I quite agree it has to be in some way
5 constrained. The precise wording of it is ultimately
6 a matter for Parliament not for me. I would merely be
7 making a suggestion to the Ministry of Justice, that is
8 all I would be doing.

9 MS KAUFMANN: One would imagine they would listen very
10 carefully to you given that it is your request --

11 THE CHAIR: I would hope so and I would hope that they would
12 listen to it in the spirit in which it is intended,
13 namely to make the task of fulfilling the terms of
14 reference of public inquiries generally a little easier.

15 MS KAUFMANN: The second objection is if one looks at the
16 sorts of orders made contained in the order -- I don't
17 need to take you to them, sir -- it is quite clear that
18 these are all proceedings where in the nature of the
19 proceedings, in the nature of the issue that falls to be
20 determined, somebody's history whether it relates to
21 spent or unspent convictions is critical to the
22 determination. Because they are in a position of trust,
23 for example, or they are in a profession or whatever it
24 is. So there is a general exception that is made.

25 Secondly, those proceedings are also ones that

1 concern particular individuals. An individual in
2 a disciplinary context, in whatever context. It is
3 clearly not intended to cover a situation such as this,
4 which is again why I would submit that a broad reading
5 of "in the interests of justice" is what is appropriate
6 here, so that it can cover all the judicial proceedings
7 to which it applies, that is ones that do not determine
8 rights but look at more broader matters.

9 THE CHAIR: The more I listen to you. The more I think we
10 are on the same track. It is merely a means of arriving
11 at the destination.

12 MS KAUFMANN: I think that is right and I simply urge you to
13 arrive at that destination under section 7(3) and not
14 distort the intended use of section 7(4).

15 THE CHAIR: Yes.

16 Of more immediate concern is the restriction order
17 process.

18 MS KAUFMANN: Yes.

19 THE CHAIR: I think there we are getting at any rate
20 a closer understanding of the position of each other.
21 I have explained to you in the two notes the very
22 limited purposes for which spent convictions are used
23 and you explained to me that in those circumstances only
24 a very few need be looked at.

25 MS KAUFMANN: Yes, that is correct.

1 THE CHAIR: I make it clear now that I thought the breadth
2 of the original proposal in effect required me to
3 conduct an inquiry into the facts before I could start
4 conducting an inquiry into the facts, if you see what
5 I mean --

6 MS KAUFMANN: Yes.

7 THE CHAIR: But now we are focused on a much narrower
8 question, which is: where I am minded to take into
9 account a spent conviction, then I should give the person
10 who has incurred the spent conviction the opportunity of
11 making representations about it?

12 MS KAUFMANN: Yes.

13 Sir, those are my submissions in relation to the
14 rehabilitation of Offenders Act. Unless I can assist
15 you further?

16 THE CHAIR: Can I put to you difficulties that arise with
17 that. In the case of, I think, the groups of
18 individuals -- I'm trying to express this not too
19 clumsily, either the individuals or the groups to which
20 they belonged, that you are speaking on behalf of, there
21 is not too much of a problem generally. I will have to
22 think about it on a case-by-case basis but not too much
23 of a problem generally.

24 In the case of some of those who belong to groups
25 that you do not represent and none of the individuals

1 are core participants who you represent, then if they
2 fall into that category of group which posed and poses
3 a real risk to the safety of the individual undercover
4 officer, then even revealing the fact that spent
5 convictions of individuals who belonged to or were
6 associated with that group may trigger a risk which
7 doesn't previously exist and may jeopardise the making
8 of the restriction order itself.

9 I'm not just dealing with groups of the kind that
10 you represent. I'm dealing with, as I explained in my
11 opening statement, groups which pose a real risk to the
12 safety of officers. I simply don't see how I could do
13 it in those circumstances, or why I should do it.

14 MS KAUFMANN: We would not for a moment suggest you should
15 do it in those circumstances. If the disclosure of
16 a spent conviction is going to create the very risk that
17 the application for the restriction order is seeking to
18 avoid, then that is obviously a good reason for not
19 giving an opportunity.

20 What we are concerned to ensure is that where it
21 doesn't create the risk -- where there is no question
22 that that risk is created or where the evidence simply
23 does not make out the existence of such a risk, then an
24 opportunity should be given.

25 THE CHAIR: Yes. Does that submission arise even in cases

1 where, although I am minded to take the spent conviction
2 into account, typically in the circumstances described
3 in my first note, nevertheless I would still make the
4 restriction order even if I didn't?

5 MS KAUFMANN: In those circumstances, in my submission, what
6 you should do is simply not take them into account.
7 Because if you have enough evidence to make the
8 restriction order on without that spent conviction, then
9 it is not necessary, it doesn't meet the section 7(3)
10 test. So you would not even need to go there.

11 THE CHAIR: Logically that is right, but in human life
12 things are never as neat as that. When one makes
13 a decision, one takes into account all sorts of things
14 which can be explained by reasons, but not all of them
15 can be. And to say you must exclude -- let me put
16 a concrete example to you. This is a theoretical one,
17 and does not relate to any individual. I make this
18 absolutely clear, this is purely a theoretical example.

19 Suppose someone has been convicted during quite
20 a long history of convictions of a really serious
21 offence and has received a number of years of
22 imprisonment, well over the minimum threshold of four
23 years and has a string of lesser convictions from
24 everything from public order to quite serious violence
25 but not sufficient to attract a four year plus sentence,

1 and those convictions have been incurred over a large
2 number of years. Should I not be permitted to take
3 those into account as factors relevant to the making of
4 the order with or without giving an opportunity to the
5 individual to comment on every one of the string of
6 spent convictions?

7 MS KAUFMANN: No. You should in that situation give them an
8 opportunity to comment. That is our position --

9 THE CHAIR: Yes.

10 MS KAUFMANN: -- and it doesn't actually -- for the
11 restriction order purposes, which we will come on to
12 later, it doesn't matter whether they are spent or not.
13 They are should be given an opportunity to comment on
14 their convictions.

15 THE CHAIR: I know you are going to move on to the wider
16 pattern of information to take into account. As
17 I understand your submission will be not only 'should the
18 individual be given the opportunity of commenting on
19 spent convictions', but also on any other intelligence or
20 information which does not result in a conviction which
21 is being taken into account.

22 That potentially creates wider practical
23 difficulties and wider difficulties of principle. One
24 will be revealing information which is for the time
25 being at least confidential or even secret.

1 MS KAUFMANN: Well one would have to examine the basis upon
2 which it was confidential or secret for example. So one
3 would have to examine is disclosure of that information
4 going to disclose the individual who is the source of
5 the information, is that disclosure of the source going
6 to imperil that individual? All those questions have to
7 be taken into account.

8 THE CHAIR: Well not just those considerations, but it would
9 include those, yes, I agree.

10 MS KAUFMANN: Well there are a whole series of
11 considerations that have to be taken into account, but
12 the starting point is if you want to get to the truth,
13 you need accurate information, you do not want to be
14 imposing restriction orders where they are not
15 necessary.

16 THE CHAIR: I utterly agree.

17 In a case in which the decision is to publish the
18 cover name of an undercover officer. Not talking about
19 senior officers, at the moment, just undercover
20 officers.

21 Those officers have been deployed against a group
22 containing one or more individuals who have spent
23 convictions, which I'm minded to take into account.
24 Disclosure of the cover name will be probably all that
25 will result, unless there is a deceitful relationship

1 with others in the group.

2 In those circumstances, what is to be gained by
3 going back over the spent convictions or the other
4 information? Because there will be happening that which
5 I think the core participants want, which is the
6 disclosure of the identity of the individual who
7 interacted with them in the name in which they knew him
8 or her.

9 MS KAUFMANN: That begs the question of the outcome of
10 a dispute that continues to exist between the non-state
11 core participants and yourself, which is your minded to
12 decision in relation to real names.

13 You know that we do not agree with you about where
14 you have decided to draw the line --

15 THE CHAIR: Yes.

16 MS KAUFMANN: -- which is that you will not disclosure real
17 names, save in circumstances which remain unclear.
18 I think you just indicated there for example where
19 a woman has had an intimate deceitful relationship with
20 an officer, then maybe their real name will be
21 disclosed.

22 THE CHAIR: It is not a question of maybe. All other
23 considerations being equal, they will be disclosed.

24 MS KAUFMANN: They will be disclosed.

25 We will come on to this afterwards in relation to

1 restriction orders, but our position is there are more
2 reasons for the disclosure of real names or reasons that
3 you have not addressed and they include -- so there are
4 instrumental reasons which go to serving the purposes of
5 enabling you to discharge your function of getting to
6 the truth.

7 There are also very important reasons about public
8 confidence and --

9 THE CHAIR: Forgive me for interrupting, may I do so at the
10 moment. These are matters of general principle. If, as
11 a matter of general principle it is right that the real
12 names of undercover officers should be published unless
13 there is some compelling reason why they shouldn't, for
14 example a threat to their safety. Then your submissions
15 clearly have force and it would be necessary to look at
16 things like spent convictions.

17 But if I don't agree with you on the general
18 proposition and I am looking simply at individual cases
19 and in general cover names will be disclosed but not
20 real names, then in those cases where I do refuse
21 a restriction order in respect of cover name or none is
22 applied for, then I don't really see where this exercise
23 of considering spent convictions gets us.

24 MS KAUFMANN: That may well be right. But there is
25 a fundamental point that we need to debate and iron out,

1 which at the moment, sir, you are seemingly refusing to
2 engage in. Which is, are you right about the way you
3 have drawn the line and should we be given an
4 opportunity to actually persuade you that you are not
5 right about where you have drawn the line?

6 So Lord Justice Pitchford, 18 months ago in 2016,
7 issued his decision about the applicable principles.
8 This is the first time upon which those principles are
9 being applied to individual cases.

10 There remains debate and dispute amongst all the
11 parties as to what his judgment actually means, and
12 there remains a serious difference between some of us
13 and yourself about where the line has been drawn. And
14 we would seek to make submissions on exactly that, where
15 the line is drawn.

16 THE CHAIR: I entirely agree, and you are going to do that
17 when we get to restriction order applications. I hope
18 we will do it in relation to individual officers and use
19 concrete examples upon which to explore these questions
20 of principle. Fine.

21 But at the moment I'm only concerned with
22 restriction order applications. My question to you is,
23 I think, a reasonably straightforward one: in those
24 cases in which it is decided to publish the cover name,
25 then what does it matter that the restriction order in

1 respect of the real name may have been based in part
2 upon spent convictions?

3 MS KAUFMANN: So can I take it that your premise is you are
4 right about where you draw the line, you will not
5 disclose real names, save in the circumstances you have
6 identified, the narrow circumstances? So that all that
7 is going to happen in cases where to do so will not
8 involve a threat to the safety of the officer, is that
9 their cover name will be disclosed. In those
10 circumstances I agree, in those circumstances, but it
11 depends upon the premise being the correct one. So if
12 in fact you are not right in relation to real names then
13 it becomes incredibly important to look at.

14 THE CHAIR: I follow the submission --

15 MS KAUFMANN: Yes.

16 THE CHAIR: -- but I think what you are saying to me is if
17 I am right about the non-disclosure of real names and
18 the ordinary disclosure of cover names, then in cases in
19 which cover names are disclosed, the argument about the
20 Rehabilitation of Offenders Act doesn't matter.

21 MS KAUFMANN: No, because it doesn't form part of a risk
22 assessment that we need to be concerned with.

23 THE CHAIR: Yes.

24 MS KAUFMANN: Yes.

25 THE CHAIR: Right. What we are then coming down to,

1 I think, is the question of principle.

2 That is very helpful. I think it clarifies matters
3 greatly.

4 Good. Ms Payter?

5 MS MANNION: You have, I think, an error, sir, on your note.

6 THE CHAIR: Yes, I do. I'm very sorry, could you tell me
7 who you are, I do apologise.

8 MS MANNION: Amy Mannion, Ms Mannion.

9 THE CHAIR: Yes, you do not appear at all. Right.

10 Submissions on behalf of the Metropolitan Police Service by

11 MS MANNION

12 MS MANNION: Sir, thank you for the minded to note of

13 2 August. The Metropolitan Police Service agrees with
14 the proposals you have set out there.

15 As you know from the position statement, the
16 Metropolitan Police's position in respect of section
17 4(6) was that it was in all likelihood applicable, but
18 in common I think with Counsel to the Inquiry, we
19 recognised that it was not an issue which was clear cut
20 or easy. For that reason, to avoid any possible
21 uncertainty, it was and is the Metropolitan Police
22 Service's position that the Inquiry should seek an
23 amendment to the exceptions order.

24 THE CHAIR: Well, should propose to the Secretary of State
25 for Justice that she should present to Parliament --

1 which ultimately will decide -- a form of words which
2 would permit the Inquiry, in its substantive phase at
3 least, to take into account spent convictions.

4 MS MANNION: Indeed. And, sir, as I will mention in a
5 moment, those exact protections, sir, that you set out
6 will assist in ensuring that any amendment is
7 an appropriate one.

8 Sir, I propose then to address very briefly the
9 practical exercise of the section 7 power in respect of
10 restriction orders and then make a small number of
11 observations about the benefits that we foresee in --
12 for seeking an exception.

13 THE CHAIR: Yes.

14 MS MANNION: Firstly, in respect of section 7(3), of course
15 whatever approach the Inquiry adopts for the exercise of
16 the section 7 power, that approach must allow the
17 Inquiry to fulfil its terms of reference fully,
18 efficiently, without unnecessary costs and fairly.

19 It is the Metropolitan Police Service's position and
20 experience that spent convictions play a small but
21 important part in the risk assessment exercise. Sir, as
22 you indeed have observed in your 23 October note they
23 are relevant in a small number of cases, but our
24 submission is, when they are relevant they are important
25 and they are necessary. And it is right that the

1 Inquiry should be able to take them into account. That
2 is fairness requires that they are taken into account.

3 So there will be occasions --

4 THE CHAIR: If they disclose a real risk to the safety of
5 a former undercover officer, then fairness demands that
6 I take them into account.

7 The question which Ms Kaufmann raises is in those
8 circumstances does fairness and/or section 7(3) also
9 demand that the individual whose spent convictions are
10 in issue is given an opportunity to say something about
11 them.

12 MS MANNION: I'm grateful and I hear Ms Kaufmann today has
13 narrowed what we understood to be the very wide terms of
14 the suggestion, for which I am grateful --

15 THE CHAIR: Yes.

16 MS MANNION: -- but our position is that fairness does not
17 demand that engagement at this stage.

18 Firstly, that does not mean that the Metropolitan
19 Police suggests that you should accept uncritically any
20 evidence in relation to any matter that you receive in
21 a risk assessment, be that a conviction spent or unspent
22 or any other topic, and no doubt you will consider each
23 piece of evidence and give it whatever weight it
24 deserves --

25 THE CHAIR: For the purpose of civil litigation, which this

1 isn't, the 1967 Civil Evidence Act establishes that
2 a conviction is prima facie proof of the facts upon
3 which it was based.

4 MS MANNION: Yes, but that is slightly different from the
5 issue which as I understand it has been raised, which is
6 does the timing for example of a particular conviction
7 suggest it took place within the currency of an
8 undercover deployment, such that it might in fact be
9 masking some form of miscarriage.

10 Those matters, sir, you can be aware of or seek
11 information in respect of if you require, but we would
12 say that fairness does not require the rehabilitated
13 person be found and consulted at this stage for a proper
14 consideration of the evidence or a restriction order
15 application for five reasons.

16 Firstly, the size of the problem to address.

17 Secondly, because it is unlikely, we would submit, to
18 cause undue inhibition of your later and proper
19 investigation of your terms of reference.

20 That in any event any restriction order you make is
21 reviewable, it is not set in stone.

22 Fourthly, we would submit there is no prejudice at
23 this stage to the rehabilitated individual.

24 Fifthly -- and perhaps in this regard my submissions
25 are less than they were -- that the suggestion is

1 unworkable.

2 THE CHAIR: Yes, in its broadest exposition it certainly was
3 unworkable --

4 MS MANNION: Yes.

5 THE CHAIR: -- in the much more narrowly focused one now
6 postulated by Ms Kaufmann it may not be.

7 MS MANNION: It may not be, and, sir, I have heard it as
8 recently as you have. So it is hard to have formulated
9 all thoughts in respect of it.

10 My initial concern, though, is that it is not clear
11 how even the narrower version would work in respect of
12 an individual who cannot be contacted for whatever
13 reason, does that mean, sir, that --

14 THE CHAIR: Well, it can't work.

15 MS MANNION: -- you are allowed to take into account --

16 THE CHAIR: An individual who can't be contacted because it
17 puts the application and/or the safety of the officer at
18 risk, simply has to be taken into account if I think it
19 is right, even though the individual cannot be
20 contacted.

21 If an individual cannot be contacted because they
22 can't be found, then I don't see what else I can do,
23 other than if I am minded to properly to take them into
24 account.

25 I think that Ms Kaufmann's proposition only really

1 arises in relation to those individuals who can be
2 contacted.

3 MS MANNION: Yes, in respect of spent convictions. But
4 there is also the wider submission -- this is why I'm
5 not sure that it is genuinely narrowed -- in the wings
6 that even those who have unspent convictions should be
7 contacted or those who were the receipt of intelligence
8 reports, and certainly that wider exercise would
9 continue to be just as unworkable as this initial --

10 THE CHAIR: The wider exercise, I agree, has great
11 logistical difficulties.

12 The very narrow exercise which I think is the
13 absolute baseline of Ms Kaufmann's submissions doesn't
14 create quite the same difficulty.

15 MS MANNION: No, but the difficulty is that the principle
16 behind the submissions she makes apply, one might think,
17 with force in respect of spent and unspent convictions
18 and on that basis I would suggest that there is a danger
19 that it can creep into something which is not workable.
20 But, as I say, I have heard the narrowing as recently,
21 sir, as have you.

22 I will still nonetheless mention my other reasons
23 why in my submission it is nonetheless unfair at this
24 stage or fairness does not demand at this stage the
25 engagement of the rehabilitated person.

1 As I said first, the size of the problem -- if the
2 core concern is that absent consultation with the
3 rehabilitated person, the Inquiry might end up relying
4 upon a spent conviction which would prove to be unsafe
5 were it properly investigated at the pre-restriction
6 order stage. In my submission that is a scenario which
7 is unlikely to arise on the facts --

8 THE CHAIR: I don't actually see how it can be explored.

9 I think Ms Kaufmann's submission is more limited.
10 It is that the individual must be given the opportunity
11 of making representations about it. But once that has
12 happened, I think it would be very difficult fairly to
13 reach even a provisional conclusion about the safety or
14 otherwise of the spent conviction, on the basis of
15 submissions by the individual concerned what else
16 I might glean from the information that has been
17 provided to me, without actually conducting a sort of
18 mini trial, which would be a complete waste of effort.

19 MS MANNION: Exactly. Then one wonders what it actually is
20 doing to assist you, sir, in the restriction order phase
21 of the Inquiry. You have indicated that you would only
22 be considering spent convictions where there are unspent
23 convictions, and then only where they appear on the
24 evidence to show a pattern of conduct relevant to the
25 matter that you were determining and not otherwise.

1 So it would appear that a restriction order will
2 always be based on more than a spent conviction. There
3 will always be more in the public interest balance than
4 simply that.

5 THE CHAIR: So far that is unquestionably the case. The
6 more of these things I have looked at and the more
7 minded to decisions that I have published, the more
8 convinced I am that a case in which one or more spent
9 convictions is absolutely the critical factor which
10 justifies making a restriction order, or not making
11 a restriction order, simply won't arise. It has not
12 done so far, I would be astonished if it were to do so.

13 MS MANNION: No, sir, and certainly the approach you are
14 taking at this stage would highlight any such
15 application very clearly at an early stage and it may be
16 that that needs to be considered then. But in my
17 submission that is right and it is unlikely, if not
18 impossible, that a restriction order would be based
19 solely on a spent conviction.

20 In that context there are lesser grounds to need to
21 do the exploration at any early stage, because your
22 restriction order is not going to be tethered to one
23 conviction which may prove weak or wrong at some future
24 date if it were better investigated with all of the
25 limitations on any proper investigation you can

1 undertake.

2 So in my submission this is an even narrower problem
3 if not a non-existent problem, and one can that cannot
4 be resolved in any event by engagement with the
5 rehabilitated person.

6 It also, in my submission, won't cause difficulties
7 for you when you come to the substantive stage of the
8 Inquiry when you will be considering the terms of
9 reference in relation to miscarriage of justice. You
10 have already indicated that at that stage you would
11 consult where appropriate and subject to any restriction
12 and you will also at that stage, whether or not there is
13 a restriction or a number of restrictions in place, have
14 other sources from which to begin your investigation and
15 continue your investigation.

16 This is not an inquiry where you are likely to be
17 reliant solely on the account of an individual to
18 trigger an investigation of whether there has been
19 miscarriage or indeed whether there is proper
20 justification.

21 So at that substantive stage there will be a wider
22 basket of evidence and there will be the assistance of
23 consultation, where it is appropriate, to investigate
24 properly those terms of reference.

25 THE CHAIR: Sorry, you are losing me slightly.

1 Consultation, you are talking about consultation
2 before making a suggestion to the Secretary of State for
3 Justice that the secondary legislation is amended or
4 something else?

5 MS MANNION: No, sir, I'm making submissions that the
6 concern that is raised that you, sir, will not able to
7 properly investigate that term of reference in respect
8 of miscarriage in due course in the substantive phase,
9 if there is a restriction granted at this early stage
10 which was based on something that, but for using the
11 section 7 route and engaging with the rehabilitated
12 person, you might have discovered more.

13 THE CHAIR: Yes, I don't at the moment think that
14 consultation comes into it. It is inquiry into it.

15 MS MANNION: Inquiry, or indeed speaking with, to use the
16 most basic term, the rehabilitated person about their
17 account of the conviction.

18 THE CHAIR: Again, this is a purely theoretical example and
19 not tied to any particular set of facts.

20 Suppose that I hear from a core participant about
21 a particular event that gave rise to the conviction of
22 half a dozen people. And I don't hear from the
23 remaining five. And as a result of what I'm told by the
24 core participant I think something has gone badly wrong
25 in all cases, then I would, I think, be minded to refer

1 all six convictions to the panel which will look into
2 these things.

3 MS MANNION: That is exactly it. One perfect example of the
4 fact that you, sir, will not be required to only proceed
5 in your investigations on the basis of an account from
6 an individual. There will be much wider sources of
7 evidence. So the term of reference is also to enquire
8 into the disclosure of undercover police operations and
9 whether there was non-disclosure and whether that
10 non-disclosure could have led in any given case to
11 a miscarriage of justice.

12 So you will already be looking at the disclosure
13 picture in respect of a range of offences or a range of
14 convictions that will be driven by the conduct of the
15 deployment.

16 THE CHAIR: I think she is in principle right, which I had
17 not before, and so it shows the power of good advocacy
18 and good ideas, that it is within the interest of
19 justice test when I'm considering spent convictions and
20 therefore section 7(3), even though other aspects of the
21 Inquiry may not fall into section 7(3) comfortably, that
22 would.

23 MS MANNION: Yes, I can see the strength of that, yes.

24 Sir, my third basis for suggesting that fairness
25 doesn't demand engagement with the rehabilitated person

1 is that any restriction order made in respect of where
2 there has been a spent conviction can of course be
3 reviewed and if appropriate revised or removed if
4 anything came to light at a later stage which showed
5 that it was based on a risk which was not found to be
6 a true risk.

7 We would submit that the rehabilitated person would
8 not be prejudiced by not engaging at the restriction
9 order stage and for the same reason it would not be
10 a disproportionate interference with their rights under
11 article 8 of the Convention, because they are not the
12 subject of the restriction order decision, nothing about
13 their spent conviction would be published and this is
14 not a case of a person's spent conviction being made
15 public without their consent or being disclosed
16 unnecessarily.

17 Sir, finally -- as I submitted earlier -- we feared
18 that the process of engagement with the rehabilitated
19 person at the earliest stage would be unworkable. It
20 will certainly lead to some delay and, sir, we at the
21 very least ask that any decision you make -- and I know
22 that it will -- is one which is both fair and bears in
23 mind the need to avoid unnecessary cost and delay.

24 THE CHAIR: I hope that if nothing else was clear from what
25 I said, that I really am determined to avoid unnecessary

1 delay. Anything which serves only a theoretical rather
2 than a practical purpose is unlikely to be done by me.

3 MS MANNION: Indeed.

4 In short, sir, the Metropolitan Police Service's
5 position in respect of what fairness demands at this
6 early engagement stage is that there will be little or
7 no actual tangible benefiting for the decision making of
8 restriction order applications and there will be
9 a process which at the very least will cause delay and
10 may at its widest be unworkable and cause unnecessary
11 cost and, as I say, without benefit.

12 THE CHAIR: Can I just explore the practical side of it?

13 If I were to accede to Ms Kaufmann's suggestion --
14 I speak here from recollection rather than having gone
15 back and checked everything line by line -- then the
16 tiny handful of instances in which the possibility of
17 going and seeking the views of the individual or
18 individuals affected might arise, would arise in
19 relation to later rather than earlier deployments.

20 So it would not stop that which I want to do, which
21 is to get the Inquiry going substantively in relation to
22 early deployments, obtaining witness statements from
23 both officers and from those affected by the deployments
24 so that we would be in a position when the substantive
25 part of the hearing of the Inquiry actually starts to

1 get underway efficiently.

2 MS MANNION: No, it would slow down the decision making in
3 that individual application certainly --

4 THE CHAIR: It would be.

5 MS MANNION: -- and we would call that delay rather than
6 simply the time that it takes, because of my submission
7 that there is little or no actual benefit that will
8 derive from it.

9 THE CHAIR: The benefit is a separate point from the delay.
10 I am inclined to agree with you that I can't see at the
11 moment that there would be much practical benefit, even
12 though there might be a theoretical one.

13 MS MANNION: Sir, in respect of an invitation to the
14 Secretary of State for Justice to lay before Parliament
15 an amendment to the exceptions order.

16 Firstly, we agree that the narrower suggested
17 amendment proposed in the minded to is preferable, and,
18 sir, I hear the exchange with Ms Kaufmann today in
19 respect of the limits on the precise wording and that in
20 my respectful submission must be all to the good.

21 We do, nonetheless, submit that whilst the range and
22 volume of spent conviction material which may come in
23 the substantive phase of the Inquiry in respect of the
24 motivation for undercover operations, the justification
25 for undercover operations and in reviewing disclosure

1 under the miscarriage of justice term of reference, and
2 while I recognise that the Inquiry will be best placed
3 to assess what that volume of conviction material is.
4 It is on any view likely to be a matter which the
5 Inquiry is going to have to consider with regularity.

6 Given that in other forum where the receipt of
7 information about spent convictions is likely to occur
8 with regularity, for example in criminal proceedings,
9 are of a type which fall for exception within the Act in
10 any event, our submission is it can be inferred that
11 section 7(3) is designed for those circumstances when
12 a judicial authority is required to consider a spent
13 conviction in a non-routine manner when it is less
14 likely to be common and provides the judicial test for
15 its admission.

16 Bearing in mind the volume that this Inquiry is
17 likely to be dealing with, there are, in our submission,
18 very good practical reasons to seek an exemption,
19 because an inquiry on these terms is, we would submit,
20 the very sort of proceeding in which an exemption would
21 be appropriate.

22 THE CHAIR: It would be absurd to examine the justification
23 for a deployment into a group which habitually used
24 minor acts of disorder and violence to further its
25 ends -- it would be absurd that I would have to treat

1 them as all having no convictions at all for the very
2 acts which gave rise to the perceived need for the
3 deployment. It doesn't mean that to say that once the
4 convictions are in, the deployment is justified --

5 MS MANNION: No.

6 THE CHAIR: But it is absurd to say why do you deploy into
7 a group of people all of whom are of clean character and
8 have never posed a threat of disorder or disturbance to
9 anybody?

10 MS MANNION: I mean at that end of the spectrum it would
11 make the Inquiry's work entirely unworkable of course,
12 and we bear in mind the practical concerns raised by
13 Counsel to the Inquiry in their second note, it is at
14 paragraphs 25 and 26, as to the challenges which will
15 face the Inquiry in seeking witness statements and
16 evidence from individuals in circumstances where without
17 knowing what the full picture is they have to apply the
18 section 7(3) gateway. Those seem to us very proper
19 concerns for the effective management of the Inquiry so
20 that the Inquiry can receive the information upon which
21 it is to apply whether the test is met.

22 THE CHAIR: I would not be inquiring into what happened,
23 I would be inquiring into something else and I rather
24 doubt that that is why the Inquiry was set up.

25 MS MANNION: No, but, sir, our position is that it is not

1 a matter of lesser protection. It is a matter of
2 certainty and workability and the Inquiries Act provides
3 you with the tools to ensure that your application of
4 the exception is fair and avoids unnecessary cost and
5 the restriction order process allows you to protect the
6 privacy of any individual who is rehabilitated and their
7 concerns, and in my submission that can meet the
8 concerns that have been articulated.

9 THE CHAIR: I entirely agree. There is absolutely no reason
10 why anyone who in his or her youth incurred some
11 relatively minor public order convictions should have
12 that fact broadcast around the world. I would be
13 completely opposed to that if anyone were to suggest it.
14 But the fact that the group contained people who had got
15 such convictions is a different matter.

16 MS MANNION: Sir, against that background it is hard, in our
17 submission, to see the benefit of section 7(3) when with
18 that substantive phase of the Inquiry over an exception
19 given that the protections will remain just the same for
20 you, sir.

21 THE CHAIR: Thank you.

22 Sir Robert?

23 Submissions on behalf of the National Police Chiefs' Council

24 by SIR ROBERT FRANCIS

25 MR FRANCIS: Happily, sir, I can be very brief because we

1 adhere to our original submissions and in essence we
2 agree with what Counsel to the Inquiry and counsel to
3 the Metropolitan Police said as far as the general
4 matters are concerned.

5 Can I just add two things -- one thing really with
6 two bits to it -- in relation to the process of relying
7 on spent convictions or otherwise in relation to
8 anonymity applications.

9 The National Police Chiefs' Council at the moment is
10 beginning to get but has still limited experience in
11 relation to the risk assessment process with the
12 officers who were deployed by the National Public Order
13 Intelligence Unit.

14 THE CHAIR: It is just getting underway.

15 MR FRANCIS: Just getting underway.

16 Our experience to date in what we read, both in the
17 reports that are being submitted and in those that are
18 being prepared, is that inevitably spent convictions
19 play a part in the process of the risk assessment.
20 Whether in the end that is relied on either by the risk
21 assessor or in due course by you, sir, is a different
22 matter, but it is intrinsic as part of the process of
23 risk assessment that the matter of convictions, whether
24 spent or otherwise, will be taken into account.

25 Therefore we submit that it is pretty artificial to

1 suggest that these reports are submitted to you and in
2 some way or another you then are asked -- and your team
3 are asked -- to ignore what is said there about spent
4 convictions. Alternatively to have to go through
5 a line-by-line consideration as to whether they should
6 be taken into account or whether they shouldn't be.

7 There is a workability aspect which is not just
8 about numbers, it is about the quality of the process --

9 THE CHAIR: Forgive me, there is no difficulty at all about
10 a line-by-line approach to convictions which are
11 referred to in a risk assessment. The practical
12 difficulty arises if one has to do a lot more than
13 simply take them into account or not do so.

14 MR FRANCIS: Yes. In that regard, sir, what we would say is
15 this: the magic is in the word "risk". What you are
16 being asked to consider at that stage is the risk that
17 it is being suggested, either by the applicant or by the
18 risk assessor, arises out of a spent conviction, maybe
19 in combination with non-spent convictions but also maybe
20 in conjunction with other facts. That is the context in
21 which this is being looked at.

22 Along with Ms Mannion we would submit that the
23 benefit to you, the Inquiry and the public interest of
24 at that stage, hearing from a person whose spent
25 conviction it is, by definition the only reason for them

1 wishing to put forward submissions would be to say that
2 it was not really like that at all, would be in a sense
3 an artificial exercise for the very reason you mention,
4 which is that prima facie the conviction is evidence of
5 that of which the person was convicted. It would not be
6 for you at that stage to be determining whether that
7 conviction is correct or not, what you are looking at is
8 whether it gives rise to the risk that the applicant
9 says it gives rise to.

10 Therefore what the person with the conviction can
11 add is perhaps of limited --

12 THE CHAIR: On any view, when deciding whether or not to
13 make a restriction order which is in part to any extent
14 dependent upon a spent conviction, I would be bound to
15 be performing an exercise which is based on incomplete
16 material.

17 MR FRANCIS: Yes.

18 THE CHAIR: If I just rely on the conviction then I'm in
19 effect giving effect to the civil law provision in
20 the 1967 Act. If I then take into account submissions
21 that are made about it from the person subject to the
22 conviction, but stop there, then all I have is
23 a conviction and some submissions and how am I to tell
24 at that stage where the truth lies? Whether the
25 conviction is just or not just.

1 If I then invite further material from others who
2 have provided evidence which gave rise to the
3 conviction, then I am conducting a mini paper trial --

4 MR FRANCIS: Correct.

5 THE CHAIR: -- which is very unsatisfactory, bound to
6 produce an answer based on incomplete material which
7 would occur after quite a lot of legal and other effort
8 to assemble the information.

9 MR FRANCIS: Yes.

10 THE CHAIR: I simply can't, in a principled manner, make
11 a final determination of this sort of issue, except
12 perhaps at the end of the Inquiry when all the facts are
13 in.

14 MR FRANCIS: And, sir, neither do you need to. Because as
15 has been said more than once, the restriction orders you
16 make are not irreversible and should it turn out later
17 down the line with more information coming in, that actually
18 the spent conviction has been misunderstood in some way
19 or another, which actually means it presents no risk at
20 all, and that is the determinative factor in why the
21 anonymity order is being made, then you can revise your
22 decision.

23 THE CHAIR: Yes. It is but another example of the ability
24 under section 20(4) of the Inquiries Act where
25 a decision made provisionally, even firmly, can be

1 reviewed and replaced by yet another decision in the
2 light of facts.

3 MR FRANCIS: There is also this issue, we would submit,
4 which is that in order to decide whether it was safe to
5 consult -- because it is accepted, as I understand it,
6 that there could be no consultation in cases where that
7 would give rise or enhance the very risk which the order
8 is seeking to --

9 THE CHAIR: Ms Kaufmann rightly disclaims that, and
10 I certainly do.

11 MR FRANCIS: Indeed.

12 In order to make that decision, it will actually
13 interest in your decision making process, I would suggest
14 yet another stage, which is to decide whether it is safe
15 to consult or whether it isn't, in relation to
16 a conviction which you have already decided you wish to
17 take into account, because it appears to be enhanced --
18 is relevant in some way or another to the risk to the
19 officer.

20 There becomes a degree of circularity, I would
21 suggest, about that, which either leads to no benefit at
22 all or it means that some additional consideration has
23 to be given, even before you had come to a decision
24 whether to consult. I think it perhaps illustrates the
25 very limited use to which that could be put, when placed

1 in the context of a decision which is reversible and
2 whereas you have already indicated it may well be there
3 are many other things that you take into account in
4 relation to the assessment of the risk to the officers.

5 Sir, that is really all we wish to say about that.

6 When it comes to the use of spent convictions for
7 the substantive part of the Inquiry, clearly different
8 considerations apply. Sir, we would respectfully agree
9 that when it comes to assessing the justification of
10 a deployment, if the evidence shows that those deciding
11 on the deployment relied in some way or another on
12 a spent conviction, then it is inevitable that that is
13 relevant material you are going to have to consider,
14 whether or not they were justified in so doing.

15 THE CHAIR: Under the Rehabilitation of Offenders Act

16 I could only do so if it served the interests of
17 justice. I have raised the general query about whether
18 or not enquiring into facts of that kind does give rise
19 to a question of justice.

20 MR FRANCIS: So there is clearly at the very least

21 uncertainty about that. And there is an uncertainty
22 about a number of the positions that we have all taken,
23 which is why we in particular perhaps have agreed that
24 this is a matter for an application to the Secretary of
25 State, because the last thing this Inquiry needs is an

1 uncertainty about the basis upon which it is proceeding,
2 which will cause delay after delay after delay in terms
3 of satellite applications and so on.

4 If it helps -- I just put this forward with some
5 diffidence however -- we would submit that the
6 investigation of facts by a public inquiry set up for
7 that purpose is a matter of justice.

8 Maybe it is somewhat circular to say this, but we
9 would submit that although the Inquiry is not delivering
10 just items in the sense of a determination of liability,
11 criminal or civil, what it is delivering is a report on
12 what happened and the lessons to be learned. That in
13 law is what it is set up to do. It is set up to do that
14 because there is some reason in the public interest that
15 that should happen and in this case the government has
16 decided it is in the public interest to investigate
17 these matters and that is a form of justice.

18 It has been apparent perhaps today, the reason there
19 is a public inquiry is that these matters are ventilated
20 in public. That in itself is a matter of justice which
21 you have a responsibility to fulfil.

22 So justice in the wider sense, if one starts off
23 with the proposition that you are a judicial authority,
24 seems to me, if we may say so, that one follows from the
25 other.

1 THE CHAIR: Right, well --

2 MR FRANCIS: But that I absolutely accept is not a matter of
3 legal certainty and therefore we agree with those who
4 think that section 7(4) should be applied.

5 THE CHAIR: Thank you.

6 It is almost 1 o'clock now. The shorthand writers
7 and everybody else need a break. I'm going to rise
8 until 2.00.

9 Then, Mr O'Connor, I know you are not going to be
10 very long, but would you mind waiting until 2.00?

11 MR O'CONNOR: Not at all, sir.

12 THE CHAIR: Very well, until 2 o'clock.

13 (12.58 pm)

14 (The short adjournment)

15 (2.00 pm)

16 THE CHAIR: Mr O'Connor.

17 Submissions on behalf of the National Crime Agency by

18 MR O'CONNOR

19 MR O'CONNOR: Sir, on the first question, that is the
20 question of whether those subject to spent convictions
21 should be approached if their convictions are to be
22 relied on for the purposes of restriction orders, our
23 principal concern was the question of the risk that
24 might be created by doing just that, but that problem is
25 avoided by the way Ms Kaufmann has put the matter this

1 morning.

2 THE CHAIR: Yes.

3 MR O'CONNOR: So really we submit where that leaves one is
4 that in a case where there is no such risk, first, and
5 second it is possible for the Inquiry to approach that
6 individual because their whereabouts are known, really
7 the question for the Inquiry then is little more than
8 a question of case management. Is it going to be
9 a useful or proportionate task to undertake? We don't
10 suggest there are any principled reasons why the Inquiry
11 should not seek submissions at that point. The question
12 is likely to turn on the facts of the individual case as
13 to whether the Inquiry takes a view that anything
14 substantially is to be gained by that exercise.

15 I don't repeat them, but we say many of the points
16 made by Ms Mannion and Sir Robert Francis before lunch
17 will be of weight at that stage.

18 That is all I wanted to say about the first point.

19 On the second point, the question of secondary
20 legislation, I don't have anything to add to the points
21 we made in writing earlier this year.

22 THE CHAIR: Thank you very much.

23 MR O'CONNOR: I'm grateful.

24 THE CHAIR: Mr Griffin?

25 MR GRIFFIN: Sir, I have no submissions.

1 THE CHAIR: Ms Kaufmann, there is not a formal batting order
2 here when someone opens they have a right of response,
3 but I will give you a right of responding to the
4 submissions that have been made.

5 There is one particular point I would like your
6 assistance on.

7 MS KAUFMANN: Yes, sir.

8 THE CHAIR: I will mention that now, if that helps.

9 MS KAUFMANN: Yes, that would.

10 THE CHAIR: It is this.

11 Suppose that I accept your argument that in relation
12 to a very small number of individuals it is in principle
13 permissible and may even be arguably required that
14 I should approach them to give them the opportunity of
15 making submissions before taking into account a spent
16 conviction of theirs, what would happen, I anticipate,
17 is that they would make a paper submission about it and
18 say either, "I have nothing to say about it", or,
19 alternatively, "These were the circumstances which gave
20 rise to the conviction, and they did involve the person
21 who is now known to be [because some are known to be] an
22 undercover officer", or, alternatively, "They may well
23 have involved an undercover officer and I was prompted
24 into doing this, that and the other by him or her, would
25 you please therefore ask yourself the question of

1 whether the conviction is a just one?"

2 Now, if we get to that stage and stop there, I have
3 a conviction, presumably either on the basis of a guilty
4 plea or on the basis of contested evidence which has
5 resulted in a conviction, and I have submissions made
6 about it which may call into question the propriety of
7 the conviction. What am I then to do?

8 Submissions in reply on behalf of the non-state, non-police
9 core participants by MS KAUFMANN

10 MS KAUFMANN: So can I just clarify, are those the only
11 circumstances you are considering receiving
12 representations? That is contrary to our primary
13 submission which is that you should receive submissions
14 in relation to all spent convictions not simply ones
15 that arose in relation to a particular operation, that
16 is question one.

17 THE CHAIR: In relation to -- sorry, you mean in relation to
18 an individual? I thought you had either retreated from
19 or clarified your earlier stance.

20 MS KAUFMANN: Yes.

21 THE CHAIR: So that what you were suggesting that I should
22 do is that in those cases where it was safe to do so,
23 and where the individual was known or capable rapidly of
24 being discovered and I was minded to take into account
25 the spent convictions of that person, that I should give

1 them the opportunity of making representations about it.
2 I have described, I think, the sort of things that might
3 be said. There may well be others.

4 MS KAUFMANN: That is one instance. So another instance
5 might be this is not a conviction that arises in the
6 context of any undercover operations but what the
7 purpose of giving an opportunity to make representations
8 is so that the individual can outline the circumstances
9 in which the offence occurred. That can inform your
10 assessment of what inferences can be drawn as to risk
11 having taken into account that explanation of the
12 circumstances.

13 Then there is a subset of conviction, which are
14 those convictions which arose in the course of
15 undercover operations, and that is a subset. If
16 an individual made recommendations at this stage when
17 you are considering for example restriction orders, and
18 said, "Actually, one of the reasons for you to not take
19 account of this conviction is that actually it arose in
20 these circumstances" and there is a question mark
21 about it, then what we would suggest is in those
22 circumstances you ought not to be relying upon it
23 because you have not yet done the investigation that is
24 part of your substantive inquiry into whether or not
25 that conviction can be safely relied upon.

1 So it would be wholly wrong to rely upon it at the
2 restriction order stage but having had notification that
3 there is a potential question mark over it, that in
4 itself would be reason not to rely upon it.

5 So there are two separate sorts of representations
6 that could be made.

7 THE CHAIR: I had not fully understood that before. I now
8 do. You have made it perfectly clear.

9 But that may result in a decision that is not fair
10 to the officer. We are I think in the theoretical
11 territory here -- I think we have never really left
12 that -- but let's assume that the question arises and
13 I receive representations which say in relation to,
14 let's say, two convictions, well, (1) I was goaded into
15 doing it by someone who may well have been an undercover
16 officer and if I was, ignore it. And the other is that
17 this had nothing to do with this deployment and although
18 I was convicted of this offence it didn't amount to very
19 much as you can tell by the sentence, or something like
20 that.

21 The latter is fairly easy to comprehend.

22 The former raises problems because it raises factual
23 problems. As it happens in the instance I have given
24 which go to the heart of the Inquiry. I simply can't
25 resolve that at that stage, I don't think.

1 MS KAUFMANN: But that's precisely why, given that you can't
2 resolve it at that stage, you shouldn't take account of
3 it. Because if you rely upon it you are resolving it
4 against the individual -- the individual whose
5 convictions it is -- in circumstances where a proper
6 doubt has been raised about it which is the very purpose
7 of this Inquiry to investigate.

8 You have a choice at that stage. You either say,
9 "I have to put it aside because I simply cannot, in
10 fairness to anybody, rely upon it", or "If I really feel
11 that this spent conviction is a proper and safe
12 conviction, it is something that this officer must be
13 able to rely upon", then you would have to extend the
14 process and would you have to make some sort of
15 resolution.

16 THE CHAIR: How?

17 MS KAUFMANN: If you can't do it, then in my submission you
18 can't rely upon it at that stage.

19 THE CHAIR: Of course it is possible to resolve a question
20 of fact by having a miniature trial.

21 MS KAUFMANN: Yes, that is what you would have to do. You
22 would have to end up having evidence about it. I mean
23 I have no idea, sir, whether this is going to arise
24 given what you were suggesting earlier it seems unlikely
25 that you were going to be presented with such

1 a situation where a spent conviction is going to be so
2 decisive of the risk for a particular officer. But if
3 it did, then those are our submissions.

4 You either put it aside on the basis it cannot
5 possibly fairly be resolved at this stage, or you are
6 going to have to have a mini trial. From what you have
7 been suggesting, it would be very, very rare indeed that
8 you would be confronted with that situation.

9 THE CHAIR: Yes. I have been at pains to make it clear that
10 I think the issue of spent convictions in relation to
11 restriction orders is a very small order issue. But
12 thank you for that, that makes it clear.

13 Is there anything else you want to say in response?

14 MS KAUFMANN: Yes. The only other thing I would say is
15 I heard it said or suggested that there would be no
16 point in taking representations from those affected by
17 convictions or those subject to convictions, because you
18 would just be presented with two conflicting pieces of
19 information.

20 1, in my submission you can't actually gainsay what
21 you are going to be presented with or how persuasive it
22 is going to be.

23 2, the fact that you may be in that difficulty is
24 not a reason not to receive the evidence, because
25 otherwise it is just a foregone conclusion, you simply

1 rely upon what you are presented with, however
2 inaccurate that might be or however incomplete it might
3 be. So you should always have as much evidence as you
4 can.

5 THE CHAIR: We are back to the basic problem, there,
6 I think, of having to conduct an inquiry into the facts
7 so as to permit an inquiry into the facts to be
8 conducted. It is ultimately a pointless exercise.

9 MS KAUFMANN: In our submission it is not pointless, because
10 until you have received the information you don't know
11 how it will assist you.

12 THE CHAIR: "Impracticable" is perhaps a better choice of
13 words.

14 MS KAUFMANN: It is a difficult one. Unquestionably it is
15 a difficult one.

16 THE CHAIR: I understand the position, thank you very much.

17 We are now going to move on to restriction orders.

18 I understand there is to be something of a change of
19 counsel and in any event this desk needs to be set up so
20 that I have the right documents in front of me.

21 I will rise to permit that to happen.

22 Forgive me, Mr Barr, I didn't ask you if there was
23 anything you wanted to say publicly?

24 MR BARR: No, there isn't.

25 THE CHAIR: Fine. Thank you.

1 (2.13 pm)

2 (The hearing on the Rehabilitation of Offenders Act 1974

3 concluded)

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