

IN THE MATTER OF THE PUBLIC INQUIRY INTO UNDERCOVER POLICING

OPEN APPLICATION FOR A RESTRICTION ORDER (ANONYMITY) RE: HN71 SUBMITTED ON BEHALF OF THE DESIGNATED LAWYERS

1. The following abbreviations are used herein:
 - “DL” the Designated Lawyers Team i.e. Mark Spanton and Anna Peacock within the MPS Directorate of Legal Services acting in their capacities as such;
 - “IA” Inquiries Act 2005
 - “SDS” Special Operations Squad / Special Demonstration Squad.

Restriction Order Sought

2. The DL apply for a restriction order over the real and cover names of ‘HN71’ to last indefinitely in the following terms:
 - a. No direct or indirect disclosure of HN71’s real name (including any description or image capable of identifying HN71) beyond the Chairman and the Inquiry team; and
 - b. No direct or indirect disclosure of HN71’s cover identity (including any description or image capable of identifying HN71 beyond the Chairman and the Inquiry team).
3. The DL reserve the right to make further submission as to the effective operation of this Restriction Order during the course of the Inquiry.

Legal Basis for the Application

4. The Application is made pursuant to:
 - a. Section 17(3) of the Inquiries Act 2005: the duty to act with fairness in the procedure of an inquiry;
 - b. Section 19(3)(a) of the Inquiries Act 2005 and the following Articles of the ECHR: Article 2 (the right to life), Article 3 (the freedom from torture or cruel, inhuman or degrading treatment or punishment) and Article 8 (the right to respect for private life); and

- c. Section 19(3)(b) read together with section 19(4)(b) - (d) of the Inquiries Act 2005: the order sought is conducive to the Inquiry fulfilling its terms of reference and/or necessary in the public interest, having regard in particular to the matters mentioned in subsection (4).
5. The applicable legal principles have been comprehensively set out in the Chairman's *Restriction Order: Legal Principles and Approach Ruling* ("the Principles Ruling") of 3 May 2016. Regard has also been had to later rulings and *Minded to notes*.

Supporting evidence

6. This open application is supplemented by supplemental closed grounds and an expert medical report that are not to be disseminated beyond the Chairman and the Inquiry team.
7. The DL reserve the right to serve further evidence, by way of specific risk based assessment, if the Inquiry is *Minded to grant a Restriction Order* narrower in scope than that sought. The DL reserve the right to make further submissions as to the effective operation of any Restriction Order during the course of the Inquiry.

Reasons

Section 19(3)(a) and Articles 2, 3 and 8

8. A restriction order protecting HN71's real and cover identity is required in order for the Inquiry to meet its duty under the Human Rights Act 1998 not to act in a way that is incompatible with a Convention right. The Convention rights in issue are Articles 2, 3 and 8.
9. In light of the contents of the supplementary closed grounds and *Impact Statement* there is a real and immediate risk of death, and of torture or cruel, inhuman or degrading treatment or punishment should HN71's real or cover identity be disclosed.
10. Further, disclosure of HN71's real name would also amount to a disproportionate interference with HN71's right to respect for private and family life. The

evidential basis for this is contained within the Impact Statement and the expert medical report.

11. The Closed Schedule and Impact Statement support the conclusion that nothing short of a Restriction Order over real and cover name is appropriate because there is a real likelihood that publication of HN71's cover name would lead to disclosure or discovery of HN71's real name. Even if the Chairman is not persuaded that the connection would be made, the risk of physical harm to HN71 is too high to warrant that chance being taken.

Section 19(3)(b) and section 19(4)

12. The Chairman is invited to find that a Restriction Order protecting HN71's real and cover identity is conducive to the Inquiry fulfilling its Terms of Reference or is necessary in the public interest having regard in particular to the factors set out at s.19(4) of the Act, read together with the Chairman's approach at paragraph 152 of the Principles Ruling:

"... when considering whether to make an order restricting disclosure of any relevant particular piece of information on public interest grounds I will be required to:

- (1) identify the public interest in non disclosure;*
- (2) assess the risk and level of harm to the public interest that would follow disclosure of that information;*
- (3) identify the public interest in disclosure;*
- (4) assess the risk and level of harm to the public interest that would follow non-disclosure of that information;*
- (5) make in respect of that information a fact sensitive assessment of the position at which the public interest balance should rest.*

Public interest in non-disclosure of real or cover identity

13. The likely sources and the level of risk of physical harm to HN71 in the event of disclosure of HN71's real identity (or should publication of HN71's cover identity lead to the establishment of real identity) are set out within the Impact Statement and Closed Schedule to this application. There is a clear public interest in avoiding harm to HN71 even if the Chairman does not consider the level of harm to meet the high threshold of Article 2 or 3 ECHR.

14. Further, it is in the public interest for HN71's real and cover identities to be restricted on the basis that this would avoid a disproportionate interference with HN71's right to private and family life. The evidential basis for this is the Impact Statement and the expert medical report. That public interest is particularly acute given the sources and level of harm identified in the Closed Schedule.
15. There is a clear public interest in avoiding the risk of harm to others. This is further addressed in the supplementary closed grounds.
16. HN71 has respected the confidentiality of his/her work and has relied on his/her anonymity as a source of protection and security.

The public interest in disclosure of real and cover identity

17. It is appreciated that the general presumption in favour of openness is a factor that weighs against the making of a Restriction Order in HN71's case, particularly as this application extends over both real and cover names.
18. There is no identifiable public interest in the disclosure of HN71's real identity in circumstances where he or she would not have been known to his or her associates by his or her real identity and the Inquiry's ability to fulfil its Terms of Reference would not be furthered by disclosure of HN71's real name.
19. It is acknowledged that the Chairman's ability to explore aspects of HN71's deployment in public may be restricted where HN71's cover name is also restricted because of the potential that the details of his or her deployment would result in identification of his or her cover and/or real name. The Chairman will have to weigh carefully the public interest in disclosure of HN71's cover name against the risks identified above. Further submissions are made in the closed grounds.

Where the public interest balance lies

20. The MPS has considered the Chairman's Principles Ruling and has had particular regard to the presumption of openness in the Inquiry.

21. However, it is plain that any details given publicly about HN71's deployment would risk his/her identity becoming known. Consequently, HN71 would be at real and immediate (or at the very least serious) risk of death or serious physical injury as a result of recriminatory action. Whether the orders sought are granted on a public interest basis, a human rights basis or both, it is respectfully submitted that they are appropriate and necessary, and conducive to the Inquiry's Terms of Reference.

22. The Chairman is invited to conclude that the public interest favours non-disclosure for the following reasons in particular:
 - a. The public interest in avoiding harm to HN71 and his/her family is sufficient to demand restriction of real and cover identities.

 - b. The public interest in avoiding harm to others (identified in the supplementary closed grounds) is sufficient to demand restriction of HN71's real and cover identities.

23. In all the circumstances, the DL makes this application for a Restriction Order over HN71's real and cover names in order to avoid a real and immediate risk of death and/or cruel inhuman or degrading treatment or punishment of HN71, and a disproportionate interference with HN71's right to respect for private and family life.

24. It is also submitted that the application of common law and statutory (section 17(3), Inquiries Act 2005) principles of fairness require that the real and cover identities of HN71 are restricted. The same factors highlighted above support that conclusion.

DESIGNATED LAWYERS

17 November 2017