

IN THE MATTER OF THE INQUIRIES ACT 2005
AND IN THE MATTER OF THE INQUIRY RULES 2006

THE UNDERCOVER POLICING INQUIRY

**OPEN APPLICATION ON BEHALF OF MARCO
JACOBS EN1 FOR RESTRICTION ORDERS**

Introduction

1. Marco Jacobs is the name by which the applicant was known whilst an undercover police officer attached to the NPOIU. The applicant applies to the Inquiry Chairman for restriction orders in the terms set out in the attached draft order.
2. Also attached in support of this closed application is (i) an objective risk assessment prepared by DS Z with enclosures ('the risk assessment'); and (ii) a short statement prepared by the applicant setting out relevant personal information, including the applicant's 'subjective' fears should his identity be disclosed; (iii) a medical report dated 19 July 2016.
3. This document organises the information contained in both the above documents so as to fit the rubric of the generic open application, and makes limited submissions on the basis of that information, applying the relevant legal test. It is not intended as a skeleton argument.

Background

4. The history of the applicant's deployment is set out at ¶ 2.1 to ¶ 2.2 and ¶ 4.3 to ¶ 4.10 of the risk assessment. The objective of the applicant's deployment was to gather intelligence on a number of loosely affiliated left-wing, climate change and anarchist groups and individuals who may have been involved in planning violent protests targeted at the G8 Summit to be held in Scotland in 2005. To that end, he was deployed to infiltrate the Brighton Dissent Group in Sussex in 2004, and subsequently similar groups, including the Cardiff Activist Network in Cardiff. In the years of his

deployment (2004 to 2009) the applicant attended a number of protests in the UK and elsewhere in Europe [cf. ¶ 4.4 risk assessment].

5. [REDACTED]
[REDACTED]
[REDACTED]
[REDACTED] The applicant has not self-disclosed, but it is understood he has recently been officially confirmed [REDACTED] as having been an undercover police officer.

6. Accordingly, although the applicant is in a different position from other former undercover police officers who have been granted Core Participant status whose deployment remains entirely secret, the applicant maintains that the restriction orders he applies for are required for the reasons set out in the open and closed applications.

7. To state his position shortly, the applicant accepts that official confirmation of his undercover identity and/or disclosure of the details of his deployment during the Inquiry is unlikely to materially increase the risk of harm to him set out in the risk assessment given the volume and detail of information already in the public domain about his undercover deployment and identity.

8. His application is therefore for only such restrictions as are necessary to ensure that details of his true identity do not enter the public domain and as are set out in the attached draft order.

9. Mr Jacob's application for restriction orders is to be distinguished from [REDACTED] [REDACTED] the other Core Participant undercover police officers in one important respect: [REDACTED]
[REDACTED]
[REDACTED]
[REDACTED]
[REDACTED] would significantly increase the risk that his true identity and current whereabouts would enter the public domain.

The application for restriction orders under section 19(3)(a) of the 2005 Act

Convention Rights

10. The applicant relies on those parts of the generic open application that set out the basis upon which this individual closed application is made. In short, the applicant submits that the Chairman to the Inquiry is required by section 19(3)(a) of the 2005 Act to give effect to his ECHR rights.

Article 2

11. As set out in the generic open application at ¶ 12 and ¶ 38, the applicant does not submit that at the time of making this application there is a sufficient, objectively justified basis for finding that there is a real and immediate risk to his life so as to engage Article 2. Nonetheless, given what is described in the risk assessment (at ¶ 2.8 and ¶ 6.1 to ¶ 6.2), namely a high risk of physical assault to the applicant by former associates of his it is respectfully submitted that this issue should be kept under careful review.

Article 3

12. The applicant submits that on the basis of the risk assessment, there is an objectively well-founded basis for concluding that there is a real and immediate risk to him and his family of physical harm should his identity be revealed. The ██████ risk assessment has carefully considered the applicant's own 'subjective' concerns (to the extent it is appropriate to describe them as such) and assessed the groups and individuals concerned [¶ 6.1 and ¶ 6.4 to ¶ 6.5]. The author of the report has concluded that based on the available information and intelligence, that although the groups concerned (many of which are no longer active) do not pose a threat of violence to the applicant should his anonymity application be refused by the Inquiry Chair, individuals formerly associated with such groups do pose a threat. The applicant was closely associated with a number of target individuals, and has observed their conduct over a period of several years.

13. His own assessment of their propensity to commit a violent act of “revenge” [cf. personal statement, page 2 (unmarked) paragraph 2] is not irrelevant to the exercise of deciding whether a real and immediate risk is present [¶ 33 of the generic open application]. To an extent, his ‘subjective’ view is supported by recent disclosure made direct to the Inquiry by [REDACTED], which included details of the antecedents of [REDACTED], one of the individuals identified in this passage of his personal statement.
14. Moreover, the additional information (and conjecture) that has entered the public domain since 2011 [REDACTED] can only increase the risk of physical retribution, for the reasons set out in the risk assessment at ¶ 6.1.
15. It is of note that as a consequence of recommendations made in previous risk assessments the applicant and his family were re-located [REDACTED]. This relocation represented a traumatic upheaval in the applicant’s life [¶ 7 risk assessment]. This relocation and the other measures taken by the applicant of his own accord are further factors to be weighed in the balance when considering whether there is a real and immediate risk of harm.

Article 8

16. As with the majority of the former undercover police officers who apply for restriction orders, there cannot realistically be any doubt that Article 8 is engaged in the applicant’s case. Refusal of the restriction orders and the subsequent disclosure of the applicant’s identity would result in an interference with his Article 8 rights [¶ 53(1) of the generic open application].
17. The extent of the interference with his private life is set out in detail in the risk assessment and supporting material. He is one of the more high profile former undercover officers alleged to have been engaged in two, albeit relatively short-term sexual relationships whilst using his covert identity.

18. As mentioned above, the applicant has, as a consequence of recommendations made in previous risk assessments, been obliged to re-locate in the past [¶ 7 risk assessment]. The applicant recalls that *“this was an extremely traumatic period for my family and one which I do not wish to repeat under any circumstances. The impact of that time remains with me on a daily basis”*. The pressures associated with the public exposure [REDACTED] has caused great strain and obliged the applicant to move away from members of his immediate family, *including an elderly, unwell relative*. [see ¶ 7 risk assessment].
19. Although the applicant’s personal statement only mentions the issue in passing (it is also referred to at ¶ 2 and ¶ 6.3 of the risk assessment), it is highly likely that the ongoing public exposure and consequent vilification, in addition to the prospect of a real and immediate risk of physical retribution to himself and his family has caused, and is likely to continue to cause, considerable psychological harm to the applicant. The author of the [REDACTED] risk assessment describes the applicant’s *“extreme anxiety”* at the prospect of his identity being revealed during the Inquiry. His fear of physical retribution is real: this ‘subjective’ fear is to be regarded in the context of the objective material set out in the preceding section of this application [generic open application ¶ 54].
20. This feature of the applicant’s risk assessment receives support from an independent source: in the medical report of 19 July 2016. The author of the report, a consultant clinical and forensic psychologist who has been concerned with the applicant’s treatment for several years, notes in his concluding remarks that *“should circumstances change and [Mr Jacobs] anonymity were to be compromised for the purpose of the court process, I am of the professional opinion that this would have a significant traumatising effect on him and his perception of his safety in the community as a retired Police Officer. This would also impact on his apparent personal belief system in terms of his responsibility to protect his family and friends in this regard also. Obviously this would have immense and devastating implications for his mental health and well being.”*
21. Although properly a matter for legal submission in due course, the applicant would submit that there is no necessity for the serious and inevitable interference in his private life – in other words, it is not necessary for the applicant’s true identity to be disclosed

[cf. ¶ 53(2) of the generic open application]. The “requisite necessity” is not established for the purposes of Article 8.2 in inquisitorial as opposed to adversarial proceedings where the Article 6 rights of others are at issue: see Counsel’s Note to the Inquiry ¶ 68 quoting from the judgment of Lord Justice Girvan in *Re A and others’ Application for Judicial Review (Nelson Witnesses)* [2009] NICA 6 at ¶ 33]. The applicant would submit that the interference would not be proportionate in circumstances where his evidence could be given in full in open session with appropriate measures put in place to protect his true identity as set out in the draft order, and where the Chairman of the Inquiry can record, report and make recommendation on the applicant’s evidence in a manner that is consistent with his public duty and the Inquiry’s terms of reference.

Common law/section 17 of the 2005 Act

22. Additionally, the applicant contends that the common law principles of fairness require the Chairman to the Inquiry to grant the application for restriction orders made, in accordance with section 17 and 19(3)(a) of the 2005 Act.

23. To avoid repetition, the applicant relies on those parts of the closed application as set out above, and in the generic open application at ¶ 66 to 70 that are relevant to the Chairman’s assessment of whether, as the applicant submits, fairness requires that he continues to be afforded the protection of anonymity. In particular, the applicant relies on the ██████████ risk assessment and his own statement which he submits establish an objectively well-founded basis that there would be a high risk of physical retribution should his real identity be disclosed, together with evidence of his own subjective fears, which are based on objectively established information [cf. ¶ 61 of the generic open application].

24. Additionally, the applicant relies on the assurances he was given by supervising officers that his anonymity would be protected. The ██████████ risk assessment refers to the nature of these assurances at ¶ 4.2. In his personal statement the applicant declares: *“had a commitment to lifelong protection of [my] identity not been made, I would not have commenced this type of work and my partner would have asked that I took no further part in the process”* [page 1, last paragraph, personal statement].

25. The circumstances of the applicant's case, in common with other undercover police officers, are capable of being distinguished from other public servants, police officers and soldiers, who do not conduct their public duties using an assumed, fictitious identity. They are not routinely afforded the protection of anonymity as a necessary precondition of their employment in a particular role. They are not given assurances that their anonymity will be maintained for their lifetimes, nor that they must not reveal their status or identity to anyone whilst engaged in their performance of those public duties.

26. It is on the basis of such assurances of confidence, that the applicant (and other SDS and NPOIU undercover officers) carried out their challenging, and on occasion, hazardous duties. It is also the basis upon which they organised their private and family lives. The applicant legitimately expects that his anonymity will continue to be protected and relies on those passages of Counsel to the Inquiry's Note where relevant authority is cited in support of this proposition [¶ 89]. As counsel for the MPS put it in their open submissions on restriction orders: "it is therefore entirely accurate to characterise the decision of the Inquiry as not whether to grant protection, but whether to take it away" [¶ IV.2]

27. The applicant respectfully submits that the assurances given are a compelling feature of his case, which should be afforded appropriate recognition in the exercise in deciding where the balance of fairness lies.

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Risk of harm or damage

28. In support of this head of application, the applicant pleads and relies on those matters and supporting material set out at ¶ 13 to ¶ 15 and ¶ 20 of this document.

Conditions of confidentiality

29. In support of this head of application, the applicant pleads and relies on those matters and supporting material set out at ¶ 24 to ¶ 27 of this document.

30. Additionally, the applicant adopts the submissions made by the MPS in their submissions to the Inquiry on restriction orders set out at ¶ V.34 to ¶ V.39.

Conclusion

31. The applicant respectfully submits that should the restriction orders he applies for be refused there will arise a real and immediate risk of harm to him and his family; that there will be an unjustified and disproportionate interference with his private life and the private life of his family. Further, the balance of fairness demands that he be afforded the protections asked for.

SLATER & GORDON LLP

31st October 2016