

## IN THE UNDERCOVER POLICING INQUIRY

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### OPEN PRELIMINARY SUBMISSIONS ON BEHALF OF EN47 IN SUPPORT OF AN APPLICATION FOR A RESTRICTION ORDER

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#### **Introduction**

1. These preliminary submissions are made on behalf of EN47.
2. EN47 invites the Chairman to make a restriction order, providing for his/her anonymity in respect of both his/her real name and his/her cover name.

#### **Evidence in support**

3. The application is presently supported by two personal witness statements; one 'open' and one 'closed'. The closed statement is filed with these submissions on the understanding that neither it nor its contents will be made public. The closed statement provides as much detail as to the risk he/she and his/her family face as he/she can give now it is almost entirely a subjective assessment.
4. EN47 will rely on further evidence in support of the application for anonymity. In particular EN47 will rely on the evidence and risk assessment of the National Assessor who will be instructed by the National Police Chief's Council ('NPCC').
5. EN47 has not had any access to up to date intelligence and/or documentary evidence sufficient to file a detailed risk assessment in respect of the harm he/she believes he/she would face if

he/ she was not granted anonymity. EN47 believes that all relevant material must be considered - both by the Inquiry and those providing risk assessments before any final decision relating to anonymity is made.

### **Legal Framework**

6. The Chairman has already set out in a Ruling the legal approach to be adopted in applications for Restriction Orders ('the Ruling'). The authorities and legislation cited therein are not repeated here.

### **Submissions**

7. EN47 makes his/her application, relying on s. 19 (a) and (b) of the Inquiries Act 2005, as well as the Inquiry's statutory and common law duties of fairness.
8. The central thrust of EN47's submission is that exposure of his/her identity may give rise to a risk of physical harm and harassment to him/her and to his/her family. It will cause significant interference with their family and private life, due to the stress caused by the fear of harm/harassment, and the impact of any such harm/harassment.
9. A further consequence of his/her details being made public is that it will provide a further piece of the jigsaw of information concerning undercover officers, tactics, and assets. Disclosure of any of EN47's identity and role may provide information that could be used to identify other undercover officers deployed who may still be operationally deployed in roles that place them at an immediate risk of serious physical harm.

Section 19(3)(a) Inquiries Act 2005

10. EN47 notes that the Inquiry will consider Article 2 and Article 3 applications against the threshold test of an ‘objectively verified immediate risk of torture, or inhuman or degrading treatment’ (Ruling, paragraph 176).
11. In the absence of the NPCC risk assessment it is not possible to make sensible submissions as to either the existence or the extent of any Art. 2 or 3 risk to EN47. Accordingly, EN47, reserves his/her position in this regard.
12. The Inquiry has indicated that it will approach Article 8 applications by reference to (Ruling, paragraph 182):
  - a. The objective of the interference;
  - b. The rational connection between the measures and the objective;
  - c. Whether the measures go no further than necessary in pursuit of the objective; and
  - d. Whether a fair balance has been struck between the rights of the witness and the public interest.
13. Article 8 is plainly engaged in this case. The only question is the extent of the interference. There can be no doubt that a decision to make public EN47’s detailed would have a severe adverse impact on both his/her and his/her family’s private life, and in particular would cause them anxiety, fear and potential harm. In this regard, the following matters are of significance:
  - a. E 47 is still actively deployed.

- b. The risk of physical harm to EN47 has been assessed as HIGH.
  - c. The risk of psychological harm to EN47 has been assessed as HIGH.
  - d. The risk of action directed towards EN47 such as to interfere with my private and family life has been assessed as HIGH.
  - e. So far as he/she is aware EN47 has not been accused of any misconduct.
14. EN47 further relies on the following factors that further weigh in favour of his/her application being granted:
- a. The proceedings are inquisitorial (see *R v Davis* [2008] 1 AC 1128, the Ruling at paragraph 179).
  - b. An application for anonymity does not, at this stage, confer any obligation on the Inquiry to receive a witness's evidence in the absence of the public.
  - c. The proposed Order will not affect the nature or extent of the evidence which EN47 may give. In particular, the Order will not affect the ability of the Inquiry to answer questions relevant to the Terms of Reference.
  - d. Any Article 10 rights of the media to report on a witness's identity are clearly outweighed by the extent of interference with these Article 8 rights. Specifically, a witness's real name and cover name is of no relevance to the substance of the evidence which they give and which might be reported.

15. For these reasons, it is submitted that there is no necessity for such an interference with EN47's private life, or that of his/her family and that the Chairman should make a Restriction Order.

Section 19(3)(b) Inquiries Act 2005

16. EN47 makes his/her application on the following bases, each of which is in the public interest, as set out in the Ruling at paragraph 69:
  - a. The protection of him, and his/her family, from physical and psychological harm, including intrusion into their private and family lives;
  - b. A grant of anonymity may encourage other witnesses to come forward for this Inquiry; and
  - c. Prevention of knowledge of covert policing techniques reaching existing or future targets.
  - d. As a result of the role which EN47 has undertaken, and without knowing to what extent he/she will be involved in the Inquiry, it is necessary to protect his/her identity to mitigate a risk of harm, as set out above.
  - e. EN47 further submits that this Order would be conducive to the Inquiry fulfilling its Terms of Reference because he/she will be able to give detailed evidence without fear for him/herself and others. It is anticipated that this will improve the quality of the evidence he/she can give to the Inquiry. Furthermore, it is hoped that EN47 will be able to give as much of this evidence as possible in open hearings, should anonymity be granted.

Fairness- Section 17(3) Inquiries Act 2005 and Common Law

17. A Restriction Order for anonymity is necessary further to the statutory and common law duties of fairness.
18. Such an Order will reduce both the objective and subjective risks which EN47 will face should the Order not be made.
19. As cited in the Ruling at paragraph 210, it was made clear in *Re Officer L* [2007] UKHL 36, [2007] 1 WLR 2135 that a witness's subjective fears are relevant to the exercise of the Inquiry's common law duty of fairness. Such fears, whether or not objectively founded, are inextricably linked to the anxiety which EN47 and his/her family will suffer should the Order not be granted, and the effect that this will have on EN47's personal life.

**Conclusion**

20. It is submitted that in all the circumstances the Chairman should make a Restriction Order conferring anonymity upon EN47.

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