

## IN THE MATTER OF THE UNDERCOVER POLICING INQUIRY

### OPEN APPLICATION FOR RESTRICTION ORDERS (ANONYMITY) IN RESPECT OF HN28'S REAL AND COVER NAMES SUBMITTED ON BEHALF OF THE DESIGNATED LAWYERS

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#### Restriction Orders Sought

1. The Designated Lawyer ("DL") makes this application for a restriction order granting anonymity to witness HN28 to last indefinitely. The terms sought at this stage are:
  - a. No direct or indirect disclosure of HN28's real identity (including any description or image capable of identifying HN28) beyond the Chairman or the Inquiry team;
  - b. No direct or indirect disclosure of HN28's cover identity (including any description or image capable of identifying HN28) beyond the Chairman or the Inquiry team.
  - c. The DL reserves the right to make further submissions as to operation of this Restriction Order during the Course of the Inquiry.

#### Documents in support

2. This Application Notice is submitted further to and should be read together with the following:
  - a. Closed schedule Re: HN28 submitted on behalf of the MPS Commissioner's Lawyer summarising HN28's deployment.
  - b. DL submissions on articles 2-3 dated 31.1.18.

3. The MPS Commissioner's Lawyer team is not making separate applications in relation to HN28's real or cover names but it is understood that it is supportive of this application.
4. No specific risk assessment for HN28 is currently available. HN28 has been asked to agree to submit this application without such an assessment. In the event that the Inquiry is minded to not grant this application on the basis of the evidence currently available it will be asked to provide reasons why it does not consider that any such further evidence would assist it in determining the application and/ or allow such further evidence as it considers necessary to be obtained prior to determining the application.

#### Legal Basis for Application

5. The real name aspect of this application is made on the following grounds:
  - a. Inquiries Act 2005, s17 (3) (fairness);
  - b. Inquiries Act 2005, s 19 (3) (a) 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 (respect for
  - c. Inquiries Act 2005, s 19 (3) (b) read with s 19 (4)(b) –(c) (fulfilment of the terms of reference and necessary in the public interest).
6. The applicable legal principles are as set out in the Chairman's Restriction Order: Legal Principles and Approach Ruling ("the principles ruling") of 3<sup>rd</sup> May 2016 read with later rulings and minded to notes.

#### **Section 17**

7. With respect to s.17 (3), the application of the statutory and common law principles of fairness require that the real identity and cover identity of HN28 is not disclosed. The considerations which apply are highlighted below.

***Section 19 (3) and the Human Rights Act 1998***

8. A Restriction Order protecting HN28's real and cover identities is required in order for the Inquiry to meet its duty under the Human Rights Act 1998 not to act in a way which 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 closed schedules and associated risks already known by the Inquiry through its consideration of risk in relation to other applications there is a real and immediate risk to life; or of torture or inhuman or degrading treatment or punishment should HN28's real or cover identity be disclosed.
10. Similarly, disclosure of HN28's real name would lead to a disproportionate interference with HN28's right to respect for private and family life.
11. In all of the circumstances it is submitted that anything short of a Restriction Order over real and cover name is appropriate because there is a real likelihood that publication of HN28's cover name could lead to disclosure of HN28's real name. Even if the chairman is not persuaded that the connection would be made, the physical risk to HN28 and others associated with HN28 is too high to warrant the chance being taken.

***Sections 19 (3) (b) and 19 (4)***

12. The Chairman is invited to find that a Restriction Order protecting HN28's real and cover identity is conducive to the Inquiry fulfilling its Terms of Reference or is necessary in the public interest having regard to the factors set out in 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".*

#### The public interest in non disclosure

13. The following points are pertinent to the assessment of the public interest:

- a. The likely sources and the level of risk of physical harm to HN28 in the event of disclosure of HN28's real identity (or should publication of HN28's cover name lead to the establishment of real identity) are reflected in the closed schedule prepared by the Commissioner's Lawyers in particular paragraphs 10-15 and 19-23. There is clear public interest in avoiding harm to HN28 even if the Chairman does not accept that the level of harm meets the threshold of Articles 2-3 ECHR.
- b. Further, it is in the public interest for HN28's real and cover identities to be restricted on the basis that this would avoid disproportionate interference with HN28's right to private and family life. That public interest is particularly acute given the sources and level of harm

identified at paragraph 19- 23 of the closed schedule prepared by the Commissioner's Lawyers.

- c. It is likely that there exist lateral risks as set out at paragraphs 17 and 20 of the closed schedule, as yet not specifically assessed.
- d. HN28 has respected the confidentiality of his / her work and has relied on his/ her anonymity as a source of protection.

The public interest in disclosure:

- 14. Whilst the general presumption in favour of openness weighs against the making of a restriction order, particularly as this application extends over real and cover names. However, the rationale for the presumption needs to be borne in mind.
- 15. There is no identifiable public interest in disclosure of HN28's real identity in circumstances where he or she would not have been known to his or her target group by his or her real name. The Inquiry's ability to fulfil its terms of reference would not be furthered by disclosure of HN28's real name.
- 16. It is acknowledged that the Chairman's ability to explore aspects of HN28's deployment in public may be restricted where HN28's cover name is also restricted because of the potential that details of his or her deployment would result in identification of his or her cover name and/or real name. The Chairman will have to weigh carefully the public interest in disclosure of HN28's cover name against the risks identified above and with reference to paragraphs 19- 23 of the closed schedule prepared by the Commissioner's Lawyers.

Where does the public interest balance lie?

17. Consideration has been given to the Chairman's Principles Ruling and in particular the regard that must be had to the presumption of openness in the Inquiry.
18. However, it is plain that any details given publicly about HN28's deployment would risk his or her identity becoming known. The consequence of this would be real and immediate (or at the very least serious) risk of death or serious physical injury. Whether the orders sought are granted on a public interest basis or on a human rights basis or both it is respectfully submitted that they are appropriate and necessary, and conducive to fulfilment of the Inquiries terms of reference.
19. The Chairman is invited to conclude that the public interest favours non-disclosure for the following reasons:
  - a. There is a public interest in avoiding harm to HN28 and his / her family which demands that restrictions over real and cover identities are put in place.
  - b. There is a public interest in avoiding harm to third parties which demands that restrictions over publication of real and cover identities are put in place.
20. This application for Restriction Orders over real and cover names represents a necessary step in avoiding real and immediate risk of interference with the

HN28's rights under Articles 2 and 3 ECHR and disproportionate interference with HN28's rights under Article 8 of the ECHR.

21. It is further submitted that the application of common law and statutory (section 17 (3) Inquiries Act 2005) principles of fairness require that real and cover identities of HN28 are restricted. The same factors highlighted above support that conclusion.

**THE DESIGNATED LAWYERS (UCPI)**

26<sup>th</sup> April 2018