IN THE MATTER OF THE UNDERCOVER POLICING INQUIRY

**SUPPLEMENTARY WRITTEN SUBMISSIONS ON BEHALF OF
THE DESIGNATED LAWYER OFFICERS
IN SUPPORT OF HN25, HN83 & HN302
RESTRICTION ORDER APPLICATIONS:**

ECHR, ARTICLES 2-3 & THE "REAL AND IMMEDIATE RISK" TEST

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1. Introduction

1.1 These submissions supplement and support the MPS / CL restriction order applications in respect of HN25, HN83 and HN302 and should be read together with the DL team's generic written submissions on anonymity dated 17 July 2017 and 6 November 2017.

1.2 In respect of each of the above, the MPS / CL have made applications to restrict real and cover names without expressly relying on ECHR, arts 2-3. It is submitted that the evidence submitted does engage arts 2-3 in each case and refusal of a restriction order would be incompatible with the Convention rights of the relevant individual thereunder.

2. Headline submission

2.1 In the context of arts 2-3, the "real and immediate risk" trigger test for the occurrence of the operational limb of the substantive, positive, protective obligations thereunder derives from *Osman v UK* (2000) 29 EHRR 245 (ECtHR), [115]-[116].

2.2 In this regard, there is no material difference between the tests applicable under art.2 and under art.3: see *Rabone v Pennine Care NHS Trust* [2012] UKSC 2, [2012] 2 AC 72, per Baroness Hale at [104] "the operational duties under both article 2 and article 3 are similar if not identical".

2.3 Whilst the first phase of the relevant Strasbourg jurisprudence tended to analyse the "reality" and "immediacy" of the relevant risk separately, it is submitted that *Renolde v France* (2009) 48 EHRR 42 (ECtHR) marked a turning point.

2.4 *Renolde* was concerned with the self-inflicted death by hanging in 2000 of Joselito Renolde, a 35 year old prisoner with a low IQ and relatively complex mental health disorders who was being held in segregation during pre-trial detention. In finding a breach of the positive substantive obligation under art.2, the Strasbourg Court attached weight to: the particular vulnerability of mentally ill persons ([84]); and Mr Renolde's "worrying" behaviour following an earlier suicide attempt, the fact he had been given unsupervised in-possession medication which he had not taken and his mention of suicide in a letter "which must have been monitored by the prison authorities" ([88]). It then identified a "real" risk to life with variable "immediacy" before going on to consider the reasonableness of the prison's conduct. It did not give further or separate consideration to whether the risk had been "immediate" at the point of Mr Renolde's death ([89]-[90]):

> *89. In the light of the above considerations, the Court concludes that from July 2, 2000 onwards, the authorities knew that Joselito Renolde was suffering from psychotic disorders capable of causing him to commit acts of self-harm. Although his condition and the immediacy of the risk of a fresh suicide attempt varied, the Court considers that that risk was real and that Joselito Renolde required careful monitoring in case of any sudden deterioration.*
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> *90. It remains to be determined whether the authorities did all that could reasonably be expected of them to avoid that risk.*

2.5 Since then, the Strasbourg Court has tended to adopt this analytical approach to the "real and immediate risk" test in such cases. In *Jasińska v Poland* (Application no. 28326/05) (unreported) dated 1 June 2010 (ECtHR), the ECtHR identified a real risk and then went on to look at the reasonableness of the precautions taken by the authorities in the light of the available information about the deceased's deteriorating mental health ([69]-[70]). The same approach, i.e. no separate consideration of whether the risk was "immediate", was taken in *Ketreb v France* (Application no. 38447/09) (unreported) dated 19 July 2012 (ECtHR), at [83]-[84]:

> *83. ...Quand bien même son état aurait-il été variable, rendant le risque d'une nouvelle tentative de suicide plus ou moins immédiat, il ressort de ce qui précède qu'un tel risque était réel et que Kamel Ketreb avait indéniablement besoin d'une surveillance étroite...*
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> *84. Il convient dès lors de déterminer si, au regard de ces éléments, les autorités ont fait tout ce que l'on pouvait raisonnablement attendre d'elles pour prévenir ce risque.*
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> *Unofficial translation*
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> *83. ...Even though his condition would have been variable, making the risk of further suicide attempts more or less immediate, it is clear from the foregoing that such a risk was real, and that Kamel Ketreb undeniably needed close supervision...*
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> *84. It is therefore appropriate to determine whether, in light of these factors, the authorities did everything that could reasonably be expected of them to prevent this risk.*

2.6 While the immediacy of the risk remains a relevant and important factor, it is submitted that it not now treated as a free-standing hurdle in the same way as in the earlier Strasbourg cases. See in particular *Rabone v Pennine Care NHS Trust* [2012] UKSC 2, [2012] 2 AC 72, per Lord Dyson at [37]:

> *37. I accept that it is more difficult to establish a breach of the operational duty than mere negligence. This is not least because, in order to prove negligence, it is sufficient to show that the risk of damage was reasonably foreseeable; it is not necessary to show that the risk was real and immediate. But to say that the test is a high one or more stringent than the test for negligence does not shed light on the meaning of "real and immediate" or on the question whether there was a real and immediate risk on the facts of any particular case.*

2.7 In *Rabone*, the Supreme Court found a breach of the positive substantive obligation under art.2. The deceased, Melanie Rabone, had been admitted to a mental hospital following a suicide attempt, was assessed as presenting a moderate to high risk of a further suicide attempt and then committed suicide after being given two days' home leave. The trial judge, Simon J, found that the risk that she would attempt suicide had been approximately 5% on 19 April (after Melanie left the hospital), increasing to 10% on 20 April and 20% on 21 April and that it was therefore "low to moderate (but nevertheless significant)" (see per Lord Dyson at [35]). Simon J considered that the risk was therefore "real" but not "immediate" for the purposes of art.2. However, the Court of Appeal and Supreme Court disagreed and concluded the risk was both "real and

immediate" ([35]). See per Lord Dyson at [38]-[41]:

> *38. It seems to me that the courts below were clearly right to say that the risk of Melanie's suicide was "real" in this case. On the evidence of Dr Caplan, it was a substantial or significant risk and not a remote or fanciful one. Dr Caplan and Dr Britto (the claimants' expert psychiatrist) agreed that all ordinarily competent and responsible psychiatrists would have regarded Melanie as being in need of protection against the risk of suicide. The risk was real enough for them to be of that opinion. I do not accept Miss Carss-Frisk's submission that there had to be a "likelihood or fairly high degree of risk". I have seen no support for this test in the Strasbourg jurisprudence.*
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> *39. As for whether the risk was "immediate", Miss Carss-Frisk submits that the Court of Appeal failed to take into account the fact that an "immediate" risk must be imminent. She derives the word "imminent" from what Lord Hope of Craighead said in Van Colle v Chief Constable of the Hertfordshire Police (Secretary of State for the Home Department intervening) [2009] AC 225, para 66. In In re Officer L [2007] 1 WLR 2135, para 20, Lord Carswell stated that an apt summary of the meaning of an "immediate" risk is one that is "present and continuing". In my view, one must guard against the dangers of using other words to explain the meaning of an ordinary word like "immediate". But I think that the phrase "present and continuing" captures the essence of its meaning. The idea is to focus on a risk which is present at the time of the alleged breach of duty and not a risk that will arise at some time in the future.*
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> *40. I think that this approach is supported by some of the Strasbourg jurisprudence. In Opuz v Turkey (2009) 50 EHRR 695, para 134 the court concluded that there was "a continuing threat to the health and safety of the victims" (emphasis added) and, therefore, that there was an immediate risk. In Renolde v France (2008) 48 EHRR 969 the deceased had attempted suicide 18 days before his death and thereafter continued to show signs of worrying behaviour, but made no further attempts at self-harm. The court said at para 89: "Although his condition and the immediacy of the risk of a fresh suicide attempt varied, the court considers that that risk was real and that [the deceased] required careful monitoring in case of any sudden deterioration." The risk of death was sufficiently immediate for the article 2 claim to succeed. It was not necessary for the risk to be apparent just before death.*
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> *41. In my view, the Court of Appeal were right to say that the risk of suicide in the present case was immediate when Melanie was allowed home on 19 April 2005. There was a real risk that she would take her life during the two-day period of home leave. That risk existed when she left the hospital and it continued (and increased) during the two-day period. That was sufficient to make the risk present and continuing and, therefore, immediate. The judge gave no reasons for reaching the opposite conclusion.*

2.8 The broad equivalence between negligence and breach of art.2 was again emphasised by Lord Dyson when he came to consider whether prior settlement of the negligence claim brought on behalf of Melanie Rabone's estate under the Law Reform (Miscellaneous Provisions) Act 1934 deprived her parents of "victim" status for the purposes of their free-standing art.2 claims under HRA, s.7 ([72]):

> *In the present case, the trust admitted that they had negligently caused Melanie's death and they paid compensation to reflect that admission. There is a considerable degree of overlap between the claim in negligence and the article 2 claim. The essential features of the case against the trust were that: (i) Melanie was a vulnerable patient in the care of the trust at the material time; (ii) she was known to be a suicide risk; (iii) the trust acted negligently in failing to take reasonable steps to protect her; and (iv) their negligence caused her death. In substance these features formed the basis of the claim in negligence and the claim for breach of the article 2 operational duty. Had it been necessary to decide the point, I would have held that the trust in substance acknowledged their breach of the article 2 duty.*

2.9 That a relatively moderate risk will suffice is also borne out by the separate strand of authorities on the circumstances in which the positive substantive obligation under art.2 may oblige courts to ensure the anonymity or protection of parties and witnesses where publicity about their identities or whereabouts might put them at risk (*In re Officer L* [2007] UKHL 36, [2007] 1 WLR 2135, per Lord Carswell at [19]; *In re Times Newspapers Ltd* [2008] EWCA Crim 2396, [2009] 1 WLR 1015, per Latham LJ at [16]-[18]; *Re C's Application* [2012] NICA 47; *Y v Higgins* [2013] NIQB 8; *R v Marine A* [2013] EWCA Crim 2367, [2014] 1 Cr App R 26). See in particular *Re C's Application* [2012] NICA 47:

(1) per Morgan LCJ at [26]:

> *if there is a risk to life from a well organised and resourced terrorist group which, objectively verified, is neither fanciful nor negligible that is a real risk for the purpose of the Osman test;*

(2) per Girvan LJ at [71] and [73]:

> *71. Those authorities, albeit in a different context, together with Lord Dyson's contrast between a fanciful risk and a*

significant risk lends support to the view that a real and immediate risk points to a risk which is neither fanciful nor trivial and which is present (or in a case such as the present will be present if a particular course of action is or is not taken). In a stable and law abiding society the risk of homicidal attacks on individual is fortunately rare and statistically will be a very uncommon occurrence. Before the state can be fairly criticised for failing to prevent a homicidal attack it is right that the circumstances must bring home to the state authorities that a person is under a threat of substance. In the French text of the judgment in Osman the term for a real risk is menace d'une manière reélle. In the context of Northern Ireland which has been subjected to decades of homicidal attacks on individuals by organised terrorists the threat to life has been real, though for the bulk of the population it is not a threat directed at them individually so that for most the risk is not present and continuing in the sense of immediate to them. For some, such as members of the police force, the level of threat has been and continues to be at a much higher level and it is much more immediate. It cannot be considered as anything close to fanciful and it is significant. The requirement to give evidence imposed on officers involved in this inquest will, according to the evidence, increase a present threat possibly significantly depending on the nature of the evidence and other unknown contingencies arising out of the inquest. The risk accordingly must qualify as real, continuous and present.

...

73. If Re Officer L were to be construed as authority for the proposition that the threshold for the engagement of the article 2 operative duty is "high" or "not easily reached" such a test of itself would not provide particularly clear guidance and would open the door to the kind of arguments which have been presented in this case. But as Lord Hope points out in Van Colle and as Lord Dyson confirms in Rabone Lord Carswell's remarks in L cannot be treated as a gloss on what Strasbourg actually meant by the phrase. They cannot be construed as stating the definitive test of what constitutes a real and immediate risk. The graduated response to risk of which Lady Hale speaks takes account of the nature and degree of the risk. A very high risk (for example where a person has received a clear and definite death threat) will call for a heightened and different response from the state authorities compared to a more generalised threat (for example where the individual is only one of a large group of people who might be affected by terrorist actions). The one situation will call for a quite different response from the other. In the latter situation it may be that no particular response is called for other than the ordinary enforcement of the criminal law and ordinary policing. The context of the risk will be of central importance. What article 2 in its operative duty context

requires is for the relevant authority to think through the implications of the risk which is ex hypothesi neither fanciful nor trivial so as to decide, what if anything should be done in the light of that risk.

2.10 In the light of the above authorities, and noting that the Strasbourg jurisprudence has moved into a second, softer phase, it is submitted that risks which can be described as follows should be characterised as "real and immediate" for the purposes of the arts 2-3 trigger test, and that "immediacy" should not be treated as a separate or particularly high additional hurdle:

(a) substantial or significant;

(b) present and continuing; and

(c) more than fanciful, remote or trivial.

3. HN25

3.1 Paragraphs 6-9 of the open MPS / CL application notice are headed "Section 19(3)(a) and Article 8" and set out (with reference to the risk assessment) a risk of physical harm. See further the impact statement dated 25 January 2018 which sets out HN25's concerns about physical harm, in particular paragraphs 9-10 and 23-24. It is submitted that arts 2-3 are engaged in addition to art.8.

4. HN83

4.1 Paragraphs 6-8 of the open MPS / CL application notice are headed "Section 19(3)(a) and Article 8" and set out (with reference to the risk assessment) a risk of physical harm. See further the impact statement dated 15 January 2018 which sets out HN83's concerns about physical harm, in particular paragraphs 8 and 11-16. It is submitted that art.3 is engaged in addition to art.8.

5. HN302

5.1 Paragraphs 6-9 of the open MPS / CL application notice are headed "Section 19(3)(a) and Article 8" and set out (with reference to the risk assessment) a risk of serious physical harm. See further the impact statement dated 29 January

2018 at paragraphs 5-6 and 21-22 which set out HN302's concerns about physical harm. It is submitted that arts 2-3 are engaged in addition to art.8.

OLIVER SANDERS QC

1 Crown Office Row, Temple

ROBERT McALLISTER

9 Gough Square, London

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