

IN THE MATTER OF THE UNDERCOVER POLICING INQUIRY

SUBMISSIONS ON BEHALF OF THE NON-POLICE, NON-STATE CORE PARTICIPANTS ON T1P1 RESTRICTION ORDERS

Introduction

1. These submissions on behalf of the Non-Police, Non-State Core Participants (“NPSCPs”) relate to the Restriction Orders (“ROs”) imposed in relation to certain witnesses whose evidence will be heard during Tranche 1, Phase 1 (“T1P1”).
2. The NPSCPs strongly opposed the making of the relevant ROs across various sets of submissions. The ROs were nevertheless made. The NPSCPs do not renege on their original submissions now or seek to undermine them in any way by making these submissions.
3. Nevertheless, it is right to point out that the ROs relating to T1P1 witnesses were determined at a time – 2017 and 2018 – when things were very different. At that time, the world had never even heard of Covid-19 and it was anticipated that the public would have the same access to this Inquiry by way of attendance at public hearings as they did to other inquiries prior to March 2020.
4. The situation we now find ourselves in due to the pandemic is that the only way to access the full experience of the hearings, specifically seeing and hearing the witnesses, is by attendance at the screening venue. The alternative is reading a transcript, whether in ‘real time’ (with a delay) or the published transcript. The key principle to be considered here is one of openness. Access to the hearings is of extreme importance to the NPSCPs and *all* interested members of the public.
5. The reasons given to the NPSCPs for the Inquiry’s unwillingness to more widely stream the T1P1 evidential hearings come down to one thing: the potential infringement of ROs. In other words, the potential for identification of witnesses for whom a RO is in place. Taking into account the bases upon which they were made, those same ROs must now be revisited, in the light of current circumstances. The NPSCPs say those ROs must be lifted.

The legal position in relation to the ROs

6. As early as 3 May 2016, the late Sir Christopher Pitchford published a detailed and comprehensive ruling on the Legal Principles and Approach to ROs. At [82], the then Chair said this:

“The process by which a statutory inquiry examines matters of public concern should, by virtue of the public dimension of its work, be as open as possible. Section 18(1) of the Inquiries Act 2005 makes provision for access by the public to the proceedings of the inquiry. This is the starting point. Subject to the terms of any restriction order or restriction notice made under section 19 of the Act the chairman must take reasonable steps to enable members of the public (i) to attend the inquiry or to see and hear a simultaneous transmission of its proceedings, and (ii) to obtain or view a record of evidence, including documents provided to the inquiry. The policy of the Act towards the openness of an inquiry’s proceedings is further revealed by the terms of section 19(4)(a). The premise behind the words “the extent to which any restriction...might inhibit the allaying of public concern” is that public proceedings will tend to contribute towards the allaying of public concern, while private proceedings will tend to inhibit that process. The whole point of an inquiry under the Inquiries Act 2005 is to allay the public concern that caused the Secretary of State to institute the inquiry using her powers under section 1.”

7. As stated above, the NPSCPs made detailed submissions on the relevant ROs on a number of occasions. The current Chair will be familiar with the legal principles as set out by the NPSCPs in their submissions.
8. However, it would assist to revisit in particular the Submissions on Behalf of the Non-Police, Non-State Core Participants Re The Chairman’s ‘Minded To’ Note dated 3 August 2017, where the legal principles are set out in some detail.

Submissions

General submissions

9. Overwhelmingly, the ROs relating to the T1P1 witnesses were made on the basis of Article 8 ECHR. Only one relates to any kind of risk and that risk is described as “*very small*”. Even that RO was made on the basis of Article 8 ECHR. None of the remaining ROs were made on the basis of anything even approaching the high threshold required for Articles 2 or 3 ECHR. Therefore,

the ROs in question were made almost exclusively for privacy reasons, rather than for reasons of security.

10. In an Inquiry that relates to gross interferences with the private and family lives of the NPSCPs, the very idea that any current or former undercover police officer or manager could seek to rely on Article 8 ECHR in order to obtain a RO is inherently problematic and difficult for them to stomach.
11. However, when it is “*security*” that dictates that the evidential hearings in T1P1 cannot be made more widely available to the NPSCPs, the media and the general public, when in fact the original rulings were made on the basis of privacy, the position is contradictory and irreconcilable.
12. It was the NPSCPs’ position during submissions that the ROs discussed further below did not need to be granted. However, the current circumstances represent such a substantial change that whatever the position when the relevant ROs were made, they fall to be reconsidered now.
13. As stated by the previous Chair, it is imperative to take “*reasonable steps to enable members of the public...to attend the inquiry or to see and hear a simultaneous transmission of its proceedings*”. The key words in that sentence are “*see and hear*”. As things stand, members of the public can only see and hear the transmission of the Inquiry’s proceedings if they are able and willing to attend the screening venue or if, exceptionally, they are granted live streaming at home.
14. The issues here are: fairness, access, equality and the Inquiry’s duties to the public. For various reasons relating to Covid-19, members of the public, including many of the NPSCPs, are unable or unwilling to attend the screening venue. Some are worried about their specific individual risks and/or risks to members of their families, whether due to protected characteristics or otherwise, and others are living in current or future local lockdown areas. The screening venue itself is in a local lockdown area. Others, justifiably, are simply in fear of the risks. Every single one of them expressed a wish to participate effectively in this Inquiry when they became CPs.
15. So far, only one NPSCP has been granted access to live streaming away from the screening venue and even then she is not being granted access to the T1P1 hearings. Even those NPSCPs who are giving evidence in T1P1 would have to attend the screening venue in order to hear evidence given about them. For those NPSCPs who are unable or unwilling to attend the screening venue for

very good reasons, they are denied access to the important simultaneous visual and audio transmission of the proceedings to which the previous Chair referred.

16. Given the subject matter of this Inquiry and the fact that the potential risk of contracting Covid-19 is death or very serious illness, the rights under Articles 2, 3 and 8 ECHR of members of the public, including the rights of the NPSCPs, are engaged. The rights under the Equality Act 2010 are engaged. All of those rights must now be weighed into the balance when considering the relevant ROs, along with the principle of openness and the rights under Article 10 ECHR of the media and others who might wish to report on this Inquiry.
17. The NPSCPs understand from the Chair and the Inquiry Team that the only thing standing in the way of live streaming away from the screening venue is the potential infringement of ROs. If the ROs are lifted, the “security” concerns insofar as they relate to T1P1 fall away too. The concern that one witness might say something that infringes a RO simply ceases to exist. In the alternative, if there remains a risk, it becomes so minimal that it can be dealt with by the same delay as will apply to the ‘real time’ transcript (which has been deemed sufficient to counter any security concerns in respect of the transcript).
18. Bearing in mind that the relevant ROs relate to **privacy**, the balance between the granting of ROs and the necessary openness that this Inquiry requires, is an entirely different one now than in 2017 and 2018, as explained further below.
19. The balance that must be struck now is in favour of openness and access to the hearings for the NPSCPs and other members of the public and their rights.

T1P1 NPSCP witnesses

20. Tariq Ali is the first live witness to give evidence in T1P1. On 26 October 2020, he confirmed via his RLR in writing that he would be “*happy for his evidence to be live-streamed to the general public, in the same manner as the Opening Statements are to be delivered*”.
21. Ernest Tate has never applied for a RO in relation to his identity or his evidence.

22. Dr Norman Temple confirmed in a recent telephone call with the Inquiry that he had no objection to his evidence being transmitted by any means. He objects to the requests for secrecy.
23. Accordingly, any concerns over the potential infringement of ROs are not for the benefit of any of the NPSCP witnesses in T1P1.

T1P1 Police/State Witnesses

24. There are just two out of 17 police/state witnesses in T1P1 in relation to whom there are no restrictions. This demonstrates the sheer number of ROs and the high levels of secrecy in this Inquiry.
25. It should be noted that even the unrestricted police/state witnesses, HN218 and HN328, for reasons unknown, appear on the public witness list only by cipher and not by their real names. HN328 will give live evidence. She is only ever referred to on the Inquiry website by cipher.
26. In relation to HN218, his evidence will be summarised. Only his cover name, Barry Morris, appears on the Inquiry website. HN218's real name, Barry Moss, has been in the public domain for some time now. HN218 played a key role in the development of the NPOIU, yet he has not been deemed to be at risk or to require privacy, which raises further questions about the need now for ROs for others.
27. The witnesses where a restriction order exists are discussed further below. In relation to each of them, it is necessary to deal with the question of openness and public access to the hearings in the context of the pandemic and the impact that it and the resulting arrangements for evidential hearings will have on the NPSCPs and members of the public in relation to T1P1.

HN45

28. The RO relating to HN45 restricts disclosure of his real name. The cover name is David Robertson. HN45's evidence will take the form of a summary.

29. As set out in the reasons in the Chair’s ‘Minded To’ Note dated 14 November 2017 at [12]-[13] when read with the Chair’s ruling dated 15 May 2018, the basis for HN45’s RO is that “*only immediate family members are aware of HN45’s deployment*” and that they are “*concerned about damage to HN45’s reputation*”. Furthermore, it is said that HN45 “*undertook the role of an undercover officer in the expectation that identity would not be revealed*”.
30. Looking at the reasons, the concerns about reputation are borne by the family of HN45, not HN45. The only matter that is attributed directly to HN45 is reliance on the expectation that his identity would not be revealed. There is no risk or threat identified in relation to HN45. Taking into account the increased need for openness and public access to the hearings, it is difficult to see how HN45 can be said to continue to meet the high threshold for a RO in the current circumstances.

HN322

31. HN322’s cover name has purportedly been lost. His real name is restricted. In T1P1, there will be only a summary of HN322’s evidence.
32. The reasons for HN322’s RO are set out in the Chair’s ruling dated 20 January 2018 at [19]. It is said that there would be “*No useful purpose*” in publishing his real name and that he is “*concerned about the impact which publication...would have on his family and on himself*”. Further, HN322 “*would like to spend his retirement in peace*”.
33. There is no particular impact identified for HN322 nor his family of publication of his real name. As set out in the NPSCP’s submissions dated 22 January 2018 at [31]-[33], the risk of interference with HN322’s private life was assessed as “*low (i.e. unlikely)*”. There is no reason to think that assessment has changed. When HN322’s RO is reassessed, particularly in the light of the current circumstances and the importance of openness and public access to the hearings, it is clear that one is no longer required.

HN326

34. HN326's cover name is Douglas Edwards. His real name is restricted. He will be a live witness in T1P1.
35. The Chair's reasons are set out in a ruling dated 5 December 2017 at [33]-[35]. It is said that HN326 has been "*careful to preserve his anonymity and is worried about the consequences of disclosure of his real name, in particular of media intrusion*". Further, it is said that HN326 "*suffers from conditions which may be exacerbated by worry*".
36. Many witnesses in various types of proceedings might be careful to preserve their anonymity. Many might be concerned about media intrusion. Without wishing to trivialise the conditions from which HN326 suffers, many conditions are exacerbated by worry. Indeed, many of those who were spied on suffer from such conditions. Especially in the current circumstances and the taking account of the importance of openness and public access to the hearings, HN326's RO should be revisited.

HN329

37. HN329's cover name is John Graham. His real name is restricted. He will be a live witness in T1P1.
38. The Chair's reasons for granting a RO are set out at [36]-[37] of a ruling dated 5 December 2017. As with other undercover officers in T1P1, the Chair found that HN329 did "*not wish his real name to be published to avoid interference in his private life and damage to his reputation*". However, the Chair also said, "*I acknowledge that the interference in the right to respect for private life...is not great*".
39. Given the wholly different impact that ROs now have on the openness of the Inquiry in the current circumstances, it is inconceivable that HN329's RO should remain. Pre-Covid-19, anyone who wished to could attend open in-person hearings and see and hear the evidence in real time. By contrast, ROs are now being relied on by the Inquiry as a basis to exclude from seeing and hearing the evidence all members of the public bar those who are willing or able to take the significant risk to their health of attending a central London venue.

HN330

40. HN330's cover name is Don De Freitas. His real name is restricted. His evidence in T1P1 will consist of a summary.
41. The Chair ruled on HN330's application for a RO in a ruling dated 5 December 2017 at [38]-[39]. It is said that HN330 "*would like to be left in peace*". Furthermore, the Chair said that "*the publication of the real name could serve no useful purpose*".
42. In the current circumstances, as with other officers, the publication of the real name could serve a very useful purpose: openness, in the context of a pandemic. The balance now ought to fall in favour of openness and public access to the hearings over HN330's expressed desire to be left in peace. There is no real evidence that his peace will in fact be disturbed in any event, which must be weighed against the very clear risk of harm to public trust and confidence if members of the public, including the NPSCPs, are not able to see and hear the evidence of witnesses.

HN333

43. HN333's cover name and real name are restricted. HN333's evidence in T1P1 is limited to a summary.
44. The reasons for the RO in favour of HN333 are set out at [40]-[43] of the Chair's ruling dated 5 December 2017. In contrast to those discussed above, a risk was identified in relation to HN333. However, that risk was acknowledged by the Chair to be "*very small*", following submissions by the NPSCPs to that effect. HN333 was also granted a RO on the basis that he had an expectation of "*lifetime confidentiality*" and an interference with his private life. The basis for restricting HN333's cover name was that it might lead to identification of his real name.
45. The current circumstances merit a reassessment of HN333's RO. A "*very small*" risk does not meet the necessarily high threshold nor the interference with HN333's private life, particularly in circumstances where members of the public, including NPSCPs are in effect prevented from seeing and hearing the evidence if they cannot attend the screening venue. The impact upon members of the public, including the NPSCPs, of not being able to see and hear the evidence is far more important than an individual's suggestion of "*lifetime confidentiality*". Neither the cover

name, nor HN333's real name should remain restricted. Openness and public access to the hearings should prevail.

HN334

46. HN334's cover name is Margaret White. Her real name is restricted. HN334's evidence will consist of a summary in T1P1.

47. As set out in the reasons in the Chair's 'Minded To' Note dated 14 November 2017 at [33] when read with the Chair's ruling dated 15 May 2018, the basis for HN334's RO is that she "*wishes to preserve her privacy and that of her family*". As with others, it is suggested that "*Publication of her real name would serve no useful purpose.*"

48. The wish of HN334 to preserve her privacy and that of her family is not in and of itself sufficient reason for a RO in the current circumstances. There has been no particular impact identified. Having regard to the context and openness and public access to the hearings, the RO must be reconsidered.

HN336

49. HN336's cover name is Dick Epps. His real name is restricted. His evidence will be heard live in T1P1.

50. The Chair determined HN336's application for a RO in a ruling dated 28 March 2018 at [19]. It should be noted that HN336 appeared in the TV programme "True Spies" under a pseudonym. Nevertheless, HN336 was granted a RO on the basis of an unjustified infringement of his rights under Article 8 ECHR.

51. As matters currently stand, the ability to see and hear HN336's evidence has been severely undermined. The vast majority of people with an interest in HN336's evidence will be limited to a transcript of his evidence, due to Covid-19. He therefore currently has, in some respects, more anonymity in this Inquiry than he did when he appeared on "True Spies". In the circumstances in which we now find ourselves, that seems illogical to the NPSCPs who have had their rights under

Article 8 ECHR infringed. In the light of those circumstances, the requirement for openness and public access to the hearings outweighs the potential infringement upon HN336's private life.

HN339

52. HN339's cover name is Stewart Goodman. His real name is restricted. HN339's evidence is limited to a summary in T1P1.

53. As set out in the reasons in the Chair's 'Minded To' Note dated 15 January 2018 at [6] when read with the Chair's ruling dated 15 May 2018, the basis for HN339's RO is that "*Publication of his real name ... is not necessary to permit the Inquiry to fulfil its terms of reference.*" Reliance is placed on Article 8 ECHR.

54. There are no particular concerns in relation to HN339 identified in the Chair's ruling. The balance is now against a RO in relation to HN339, when viewed against the need for the public to see and hear the evidence in this Inquiry in the current circumstances.

HN340

55. HN340's cover name is Alan Nixon. His real name is restricted. HN340's evidence will be live.

56. As set out in the reasons in the Chair's 'Minded To' Note dated 15 January 2018 at [7] when read with the Chair's ruling dated 30 July 2018, the basis for HN340's RO is identical to that of HN339.

57. As with HN339, taking into account the need for openness and public access to the hearings, the balance must now be against HN340's RO.

HN343

58. HN343's cover name is John Clinton. His real name is restricted. HN343's evidence in T1P1 will be by way of a summary.

59. The Chair's ruling in relation to HN343 is dated 28 March 2018. At [26] the Chair states:

“He is still economically active and has a legitimate concern, the cause of which cannot be stated in this ruling, that if oral evidence were to be given without steps being taken to conceal his identity, he would be the subject of unwelcome media interest which would interfere with his private and family life. It would also impair and might destroy his earning capacity.”

60. The ruling does not seek to address openness. HN343’s concerns about media interest and his earning capacity cannot override the requirement for openness and public access to the hearings, when weighed against the current circumstances and the rights of the NPSCPs and other members of the public.

HN345

61. HN345’s cover name is Peter Fredericks. His real name is restricted. He will be a live witness in T1P1.

62. The reasons for granting a RO to HN345 are set out at [9] and above of the Chair’s ruling dated 15 May 2018. It is said that HN345 is “*still working*” and that publication of his real name “*would risk impairing his current source of income*”.

63. As with HN343, the balance is now in favour of lifting the RO. HN345’s concerns about his source of income cannot override the requirement of openness and public access to the hearings and the obligations binding on the Chair in relation to the rights of members of the public, including the NPSCPs, in the current circumstances.

HN347

64. HN347’s cover name is Alex Sloan. His real name is restricted. He will be a live witness in T1P1.

65. The basis for HN347’s RO is set out at [27] in the Chair’s ruling dated 28 March 2018. It was said that:

“He has expressed concern about the physical safety of himself and his family if his real name were to be published and is concerned about the risk of media intrusion and the impact which this might have on his family. The first concern may be misplaced, but the second is not irrational...Publication of his real name would serve no useful purpose.”

66. In the case of HN347, the fact that his concerns about media intrusion and the impact on his family are not irrational is not a basis upon which the RO can continue to stand. As with other rulings, the premise that publication of the real name “*would serve no useful purpose*”, if ever sustainable, is plainly no longer, given that publication of the real name would serve the purpose of enabling the NPSCPs and members of the public to be able to see and hear the evidence. That is a purpose to which the Chair is *required* by s.18(1)(a) IA 2005 to attend. There has been no consideration of the question of openness, which must be considered now in these particular circumstances, along with the public’s access to the hearings.

HN348

67. HN348’s cover name is Sandra. Her real name is restricted. She will be a live witness in T1P1.

68. The Chair’s reasons in relation to HN348 are set out at [20] of a ruling dated 20 February 2018. As with other undercover officers, HN348 expressed concern about “*unwelcome media attention*” and “*perhaps, to damage to her reputation amongst her wider social circle*”.

69. The basis for HN348’s RO to remain is weak, especially when considered in the context of the current circumstances and the need for openness and public access to the hearings.

HN349

70. Both HN349’s real name and cover name are restricted. His evidence will be confined to a summary in T1P1.

71. The reasons are set out at [32] in the Chair’s ruling dated 22 March 2018 and at [6] and above in a separate ruling dated 15 May 2018. The basis for a RO in both rulings was “*unwanted media attention*”. HN349’s concerns for his safety and that of his family were found to be “*genuine*” but “*almost certainly misplaced*”.

72. As such, HN349’s RO also requires reconsideration. In the absence of any real concerns for safety, all that remains is HN349’s rights under Article 8 ECHR. In the circumstances, having regard to the need for openness and public access to the hearings, the RO must be lifted.

Conclusion

73. While the NPSCPs' original submissions were against the granting of any of the relevant ROs in the first place, the situation is so different now that each of the relevant ROs must now be revisited. The granting of ROs on the premise that publication of the real name would "*serve no useful purpose*" can plainly no longer stand in circumstances where the "*purpose*" that it would now serve is to allow members of the public and CPs to see and hear the evidence during a pandemic.
74. In these highly unusual circumstances, things are now materially different. The impact of the restriction orders is now seismic in terms of excluding the public and NPSCPs from seeing and hearing the evidence. That was not a consequence that was considered at the time the balance was originally struck. It is clear from the Chair's original reasons for granting these restriction orders that none was granted on the basis of any very great impact on the officer, but rather on the basis that the Chair did not consider that anything of any great significance would be gained by publication. That has now plainly changed. The ability to be able to see and hear the evidence is of great significance to the NPSCPs and the wider public. It is difficult to imagine what could be of more significance in a **public** inquiry. The only way now for the Inquiry to meet that purpose in relation to T1P1 and to meet its obligations in relation to the rights of the NPSCPs and the wider public is to lift the relevant ROs, taking into account the bases upon which they were originally made. It follows that if the relevant ROs are lifted, that there remains no bar to live streaming the entirety of T1P1 to the NPSCPs and the wider public.

UNA MORRIS
GARDEN COURT CHAMBERS
30 October 2020