

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 N26 FOR
RESTRICTION ORDERS**

Introduction

1. N26 was an undercover police officer attached to the MPS SDS. N26 applies to the Inquiry Chairman for restriction orders in the terms set out in the attached draft order.
2. In support of *his/her* closed application is (i) an objective risk assessment prepared by DS Y of the MPS, [REDACTED] [REDACTED] ('the risk assessment'); and (ii) a short statement prepared by N26 setting out relevant personal information, including N26's 'subjective' fears should *his/her* identity be disclosed. Both documents are *gisted* and attached in support of this individual open application.
3. This individual open application 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

[REDACTED] The history of N26's deployment is set out at ¶ 1 to ¶ 4.18 of the risk assessment.¹ In summary, and of particular relevance to this application, N26 infiltrated [REDACTED]

¹ The paragraph references in this document are to the paragraph numbers in the supporting material attached to the closed application.

[REDACTED]

[REDACTED]

6. [REDACTED]
[REDACTED]
[REDACTED] N26 has
neither self-disclosed, nor been officially confirmed by the MPS or any other
relevant body or court as being an undercover police officer.

[REDACTED]

[REDACTED]

[REDACTED]

[REDACTED]

10. Moreover, to give evidence in open session would increase the risk that information that is currently not in the public domain would be revealed which might in turn increase the risks to others, including those who provided cover or support to N26 and conceivably, other undercover officers [REDACTED]

[REDACTED]

N26's application for restriction orders under section 19(3)(a) of the 2005 Act

Convention Rights

12. N26 relies on those parts of the generic open application that set out the basis upon which this individual open application is made. In short, N26 submits that the Chairman to the Inquiry is required by section 19(3)(a) of the 2005 Act to give effect to N26's ECHR rights.

Article 2

13. As set out in the generic open application at ¶ 12 and ¶ 38, N26 does not submit that at the time of making this individual open application there is a sufficient, objectively justified basis for finding that there is a real and immediate risk to *his/her* life so as to engage Article 2. The Chairman will see at page 6 (first paragraph of *his/her* statement) N26 notes that “*potentially, there would be a risk to his/her life not just injury*”. N26 recognises that *his/her* own subjective fears are of less value to the Chairman to the Inquiry than objective evidence of a real and immediate threat to *his/her* life, but nonetheless, given what is described in the risk assessment (at ¶ 6.2 to ¶ 6.15), namely that there is a high risk of physical assault to N26 by former members or associates of groups [REDACTED] [REDACTED] it is respectfully submitted that this issue should be kept under careful review.

Article 3

14. N26 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 N26, *his/her* partner and *his/her* immediate family, of physical harm. The existence of that risk is demonstrated by those factors summarised in the risk assessment at ¶ 6.15.

[REDACTED] This document does not repeat the analysis contained in the risk assessment at ¶6.1 to ¶ 6.15. Taken together with the analysis contained in the statement prepared by N26, this provides ample support for the proposition that there is a real risk of physical retribution should *his/her* identity be revealed. [REDACTED]

[REDACTED]

[REDACTED]

[REDACTED]

[REDACTED]

[REDACTED]

16. N26's own 'subjective' concerns (to the extent it is appropriate to describe them as such) are primarily directed to the threat from those [REDACTED] individuals. There is a measure of objective support for *his/her* fears: *he/she* has personal experience of the campaigns of harassment and physical intimidation and attacks carried out by members of [REDACTED] [REDACTED], which *he/she* sets out at pages 2 and 3 of *his/her* statement. Subjective concerns are not wholly irrelevant to the exercise of deciding whether a real and immediate risk is present [¶ 33 of the generic open application].

17. It is of note that the source, nature and level of threat of violence to N26 has remained constant over many years of risk assessments conducted by the MPS. [REDACTED]

[REDACTED]
[REDACTED]
[REDACTED]
[REDACTED]
[REDACTED]

18. Finally, the real and immediate risk of ill-treatment in an Article 3 context is not confined to physical harm [Counsel to the Inquiry's Note at ¶ 56 and generic open application ¶ 41]. [REDACTED]

[REDACTED]
[REDACTED]
[REDACTED]

Article 8

19. Article 8 is plainly engaged in N26's case. Refusal of the restriction orders and the subsequent disclosure of N26's identity would result in an interference with *his/her* Article 8 rights [¶ 53(1) of the generic open application].

█ The extent of the interference with *his/her* private life is set out in detail in the risk assessment and supporting material. █
█
█

█ The impact of public exposure on *his/her* private and family life would be immediate and catastrophic. Quite apart from the real and immediate risk of physical attack and harassment from former associates █
█
█
█

21. Public and official confirmation of N26's deployment and role in the event that *his/her* application for restriction orders is refused is likely to lead to serious intrusion: in turn, the real risk that that intrusion will have a deleterious impact on *his/her* mental health is obvious: ¶ 6.23 to ¶ 6.25. █
█
█

22. Although properly a matter for legal submission in due course, N26 would submit that there is no necessity for the serious and inevitable interference in *his/her* private life – in other words, it is not necessary for *him/her* to give *his/her* evidence in open session, or for *his/her* identity be disclosed [cf. ¶ 53(2) of the 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]. N26 would submit that the interference would not be proportionate in circumstances where *his/her* evidence could be given in full in closed session to the Chairman of the Inquiry who can record, report and make recommendation on N26's evidence in a manner that is consistent with his public duty and the Inquiry's terms of reference.

23. Additionally, N26 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.
24. To avoid repetition, N26 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 N26 submits, fairness requires that *s/he* give evidence in closed session and continues to be afforded the protection of anonymity. In particular, N26 relies on the MPS risk assessment and *his/her* own statement which *s/he* submits establish an objectively well-founded basis that there would be a high risk of physical retribution should *his/her* identity be disclosed, together with evidence of *his/her* own subjective fears, which are based on objectively established information [cf. ¶ 61 of the generic open application].
25. Additionally, N26 relies on the assurances *s/he* was given by supervising officers that *his/her* anonymity would be protected. The MPS Risk Assessment Briefing Note refers to the nature of these assurances at ¶ 1.5 and ¶ 1.7; the individual risk assessment for N26 refers to the assurances given to N26 and other SDS officers at ¶ 4.4 to ¶ 4.7. In *his/her* own statement, N26 reiterates the importance to *him/her* of the assurances given: "*I was also promised by MPSB/DS anonymity for life...If that promise had not been in existence I simply would not have participated in any UC activities...*" [N26 statement, page 1].
26. The circumstances of N26's case, in common with other SDS 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.

27. It is on the basis of such assurances of confidence, that N26 (and other SDS undercover officers) carried out their challenging, and on occasion, hazardous duties. It is was also the basis upon which they organised their private and family lives. N26 legitimately expects that *his/her* 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]

28. N26 respectfully submits that the assurances given are a compelling feature of *his/her* case, which should be afforded appropriate recognition in the exercise in deciding where the balance of fairness lies.

N26's application for restriction orders under section 19(3)(b) of the 2005 Act

Risk of harm or damage

29. In support of this head of application, N26 pleads and relies on those matters and supporting material set out at ¶ 14 to ¶ 22 and ¶ 25 of this document.

Conditions of confidentiality

30. In support of this head of application, N26 pleads and relies on those matters and supporting material set out at ¶ 25 to ¶ 28 of this document.

31. Additionally, N26 adopts the submissions made by the MPS in their submissions to the Inquiry on restriction orders set out at ¶ V.32 to ¶ V.39.

Conclusion

32. N26 respectfully submits that should the restriction orders *s/he* applies for be refused there will arise a real and immediate risk of harm to *him/her* and *his/her* family; that there will be an unjustified and disproportionate interference with *his/her* private life and the private life of *his/her* family. Further, the balance of fairness demands that *s/he* be afforded the protections asked for.

SLATER & GORDON LLP

14 March 2016