

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 N58 FOR
RESTRICTION ORDERS**

Introduction

1. N58 was an undercover police officer attached to the MPS SDS. N58 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 DI X of the MPS, [REDACTED]; and (ii) a short statement prepared by N58 setting out relevant personal information, including N58'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

4. The history of N58's deployment is set out at ¶ 1 to ¶ 4 of the risk assessment. N58 was [REDACTED] deployed to infiltrate [REDACTED]
[REDACTED]
[REDACTED] [cf. ¶ 4.9 of the risk assessment and page 1 ¶ 2 and 3 of N58's own statement].¹

¹ Please note that the paragraph numbers in this document refer to relevant paragraphs in the supporting material attached to the closed applications.

5. [REDACTED] [REDACTED]
[REDACTED]
[REDACTED] N58 has neither self-disclosed, nor been officially confirmed by the MPS or any other relevant body or court as being an undercover police officer.
6. N58 submits that the restriction orders *s/he* applies for are required for the reasons set out in the open and closed applications.
7. To state *his/her* position shortly, N58 has never volunteered information about either *his/her* identity or deployment to anyone outside of Special Branch, or other than to a person authorised to receive such information by *his/her* supervising officers. There is no information in the public domain that might tend to identify *him/her* has never been officially confirmed.
8. To deny N58 the continued protection of anonymity *s/he* has been afforded for [REDACTED] years would enable *him/her* to be identified. This would increase the very real risk to *his/her* safety and the safety of *his/her* family and others identified in the closed application and the supporting material. It would compromise the measures already taken by N58 individually, and the MPS to mitigate that risk [¶ 7 of the individual risk assessment].
9. 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 N58 and conceivably, other undercover officers [REDACTED]
[REDACTED]

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

[REDACTED]
[REDACTED]
[REDACTED]

N58's application for restriction orders under section 19(3)(a) of the 2005 Act

Convention Rights

11. N58 relies on those parts of the generic open application that set out the basis upon which this closed application is made. In short, N58 submits that the Chairman to the Inquiry is required by section 19(3)(a) of the 2005 Act to give effect to N58's ECHR rights.

Article 2

12. As set out in the generic open application at ¶ 12 and ¶ 38, N58 does not submit that at the time of making this 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. Nonetheless, whilst the risk of physical violence is assessed as low [risk assessment ¶ 6.8 and ¶ 6.9], the particular groups and individuals N58 infiltrated and reported on, [REDACTED], [REDACTED], [REDACTED] [risk assessment ¶ 6.7] and as such it is respectfully submitted that this issue should be kept under careful review.

Article 3

13. N58 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 N58 and *his/her* family of physical harm. The existence of that risk is demonstrated by the following factors:

- (1) [REDACTED]
[REDACTED]
[REDACTED]

[REDACTED]
[REDACTED]. The threat to N58 from such individuals is recognised in the risk assessment conducted by the MPS, albeit described as low [¶ 6.8 and 6.9].

(2) N58's own 'subjective' concerns (to the extent it is appropriate to describe them as such) are also primarily directed to the threat from [REDACTED]
[REDACTED] [personal statement page 1 ¶ 3]. 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].

(3) The objective basis upon which N58 grounds *his/her* legitimate fear of reprisal includes the fact that [REDACTED]
[REDACTED]
[REDACTED] and there is concern that if identified as an undercover officer individuals such as these could assume [REDACTED] was a result of contact with N58.

(4) This information is confirmed by the risk assessment at ¶ 6.6. Although the information is now *of some age* [REDACTED], and the risk assessed as low, it remains a matter of real concern to N58.

(5) [REDACTED]
[REDACTED]
[REDACTED], should this become public, can only increase the risk of physical retribution, for the reasons set out in the risk assessment at ¶ 6.8 and 6.9.

14. It is of note that the source, nature and level of threat of violence to N58 and *his/her* family has remained constant over many years.

Article 8

15. There cannot realistically be any doubt that Article 8 is engaged in N58's case. Refusal of the restriction orders and the subsequent disclosure of N58's identity would result in an interference with *his/her* Article 8 rights [¶ 53(1) of the generic open application].

16. The extent of the interference with *his/her* private life is set out in detail in the risk assessment and supporting material. *His/her* involvement in SDS [REDACTED]
[REDACTED]
[REDACTED]
[REDACTED].

17. Public and official confirmation of N58's deployment and role in the event that *his/her* application for restriction orders is refused is likely to lead to the kind of intrusion suffered by Bob Lambert, one of the two SDS officers whose identity was confirmed in the *DIL* litigation [see ¶ 6.11 of the individual risk assessment].

18. The risk assessment assesses the risk of psychological harm to be medium [¶ 6.12]. N58's fear of physical retribution is real: this 'subjective' fear is to be regarded in the context of the objective material set out in the preceding section of this application [generic open application ¶ 54].

19. Although properly a matter for legal submission in due course, N58 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 N58 to give *his/her* evidence in open session, or for *his/her* identity be disclosed [cf. ¶ 53(2) of the generic 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]. N58 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 N58's evidence in a manner that is consistent with his public duty and the Inquiry's terms of reference.

Common law/section 17 of the 2005 Act

20. Additionally, N58 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.
21. To avoid repetition, N58 relies on those parts of *his/her* individual open 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 N58 submits, fairness requires that *s/he* give evidence in closed session and continues to be afforded the protection of anonymity. In particular, N58 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 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. ¶ 63 of the generic open application].
22. Additionally, N58 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 N58 refers to the assurances given to N58 and other SDS officers at ¶ 4.5 to ¶ 4.6.
23. The circumstances of N58'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.
24. It is on the basis of such assurances of confidence, that N58 (and other SDS undercover officers) carried out their challenging, and on occasion, hazardous duties. It is also the basis upon which they organised their private and family lives. N58 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]

25. N58 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.

N58’s application for restriction orders under section 19(3)(b) of the 2005 Act

Risk of harm or damage

26. In support of this head of application, N58 pleads and relies on those matters and supporting material set out at ¶ 13, ¶ 14 and ¶ 22 of this document.

Conditions of confidentiality

27. In support of this head of application, N58 pleads and relies on those matters and supporting material set out at ¶ 23 to ¶ 26 of this document.
28. Additionally, N58 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

29. N58 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.

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11 March 2016