Neutral Citation Number: [2019] EWHC 426 (Admin)

Case No: CO/3208/2018

IN THE HIGH COURT OF JUSTICE
QUEEN'S BENCH DIVISION
ADMINISTRATIVE COURT

Royal Courts of Justice
Strand, London, WC2A 2LL

Date: 1 March 2019

Before :

THE HONOURABLE MR JUSTICE SUPPERSTONE

- -

Between :

THE QUEEN (on the application of **(1) PATRICIA ARMANI DA SILVA** **(2) JOHN BURKE-MONERVILLE** **(3) JESSICA (A Pseudonym))**	**Claimants**
- and -	
SIR JOHN MITTING **(Sitting as Chairman of the Undercover Policing Inquiry)**	**Defendant**
- and -	
(1) COMMISSIONER OF POLICE OF THE METROPOLIS **(2) DESIGNATED LAWYER OFFICERS** **(3) NATIONAL POLICE CHIEFS' COUNCIL** **(4) NATIONAL CRIME AGENCY** **(5) PETER FRANCIS** **(6) INQUIRY CORE PARTICIPANTS IN CATEGORY (M)** **(7) 11 OFFICERS known as EN33, EN36, EN39, EN40, EN41, EN43, EN47, EN288, EN507, EN808, EN1001**	**Interested Parties**

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Phillippa Kaufmann QC and Ruth Brander
(instructed by **Birnberg Peirce**) for the **Claimants**
David Barr QC, Kate Wilkinson and Steven Gray
(instructed by **Solicitor to the Undercover Policing Inquiry**) for the **Defendant**
Jonathan Hall QC, Amy Mannion and Rosalind Earis
(instructed by **Metropolitan Police**) for **Commissioner of Police of the Metropolis**
Oliver Sanders QC, Robert McAllister and Claire Palmer
(instructed by **The Designated Lawyers (UCPI)**) for the **Designated Lawyer Officers**

Sir Robert Francis QC and Cecily White (instructed by the **National Police Chiefs' Council**)
Richard O'Brien (instructed by **Legal Dept of the NCA)** for the **National Crime Agency**
Maya Sikand (instructed by **Leigh Day)** for **Peter Francis**
Alan Payne and Aaron Moss (instructed by force legal services) for **EN507**
Jeremy Johnson QC (instructed by **Clyde & Co LLP**)
for **EN33, EN36, EN40, EN41, EN288 and EN1001**
Matthew Holdcroft (direct access) **for EN47**

Hearing dates: 22 January 2019 (OPEN), 25 January 2019 (CLOSED)

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Approved Judgment

Mr Justice Supperstone :

Introduction

1. By a claim form filed on 13 August 2018 the Claimants, who are core participants in the Undercover Policing Inquiry ("the Inquiry"), challenge a number of decisions contained in the ruling of Sir John Mitting, the Chairman of the Inquiry, made on 30 July 2018, to grant restriction orders under s.19 of the Inquiries Act 2005 ("the 2005 Act") prohibiting disclosure of the "cover names" of 10 former undercover police officers from the, now disbanded, "Special Demonstration Squad" ("SDS"), a policing unit within the Metropolitan Police Service ("MPS").

2. Permission to apply for judicial review was refused on the papers by Lang J on 15 October 2018.

3. On 23 October 2018 the Claimants filed a notice renewing their application for permission.

4. On 13 November 2018 the Claimants filed an application notice seeking to amend the claim form and the statement of facts and grounds to include a challenge (i) to the Chairman's ruling of 30 October 2018 restricting the publication of the cover names of 12 former undercover officers in the National Public Order Intelligence Unit ("NPOIU"), and its predecessor/successor units, and (ii) his ruling of 8 November 2018 restricting the cover name of HN4, a former undercover officer in the SDS. The application notice was accompanied by an amended claim form and an amended perfected statement of facts and grounds.

5. On 4 December 2018 at an oral hearing I granted the Claimants permission to amend the claim in the terms of the amended perfected statement of facts and grounds, and I gave directions with regard to the hearing of the application for permission to apply for judicial review on the amended claim.

6. On 22 January 2019 I heard the permission application at an "OPEN" hearing.

7. Mr Peter Francis, a former police officer who was recruited to the SDS in 1993 and was deployed undercover for 4 years, supports the Claimants' application for permission.

8. Ms Phillippa Kaufmann QC and Ms Ruth Brander appeared for the Claimants; Mr David Barr QC, Ms Kate Wilkinson and Mr Steven Gray for the Defendant; Mr Jonathan Hall QC, Ms Amy Mannion and Ms Rosalind Earis for the MPS; Mr Oliver Sanders QC, Mr Robert McAllister and Ms Claire Palmer for the Designated Lawyer Officers; Sir Robert Francis QC and Ms Cecily White for the National Police Chiefs' Council; Mr Richard O'Brien for the National Crime Agency; Ms Maya Sikand for Mr Peter Francis; Mr Alan Payne and Mr Aaron Moss for one officer (EN507); Mr Jeremy Johnson QC for 6 officers (EN33, EN36, EN40, EN41, EN288 and EN1001), and Mr Matthew Holdcroft for one officer (EN47).

9. On 25 January 2019 I held a "CLOSED" hearing in accordance with Annex A to my Order dated 8 October 2018 and paragraph 9 of my Order dated 4 December 2018. The purpose of the hearing was for me to clarify some points that I had on the CLOSED documents.

Factual Background

10. On 6 March 2014 the then Secretary of State for the Home Department ("the Secretary of State"), the Rt. Hon. Theresa May MP, in a statement to Parliament, announcing the findings of the Stephen Lawrence Independent Review by Mark Ellison QC, announced that there would be a judge-led statutory inquiry into undercover policing and the operation of the SDS.

11. By written statement to the House of Commons on 12 March 2015 the Secretary of State stated that she had decided to establish the inquiry under the 2005 Act, and that it would be chaired by the Rt. Hon. Lord Justice Pitchford.

12. The Terms of Reference for the Inquiry, as announced by the Secretary of State on 16 July 2015, are:

> "*Purpose*
>
> 1. To inquire into and report on undercover police operations conducted by English and Welsh police forces in England and Wales since 1968 and, in particular, to:
>
> - Investigate the role and the contribution made by undercover policing towards the prevention and detection of crimes;
> - Examine the motivation for, and the scope of, undercover police operations in practice and their effect upon individuals in particular and the public in general;
> - Ascertain the state of awareness of undercover police operations of Her Majesty's government;
> - Identify and assess the adequacy of the:
>
> (i) justification, authorisation, operational governance and oversight of undercover policing;
>
> (ii) selection, training, management and care of undercover police officers;
>
> - Identify and assess the adequacy of the statutory, policy and judicial regulation of undercover policing.
>
> …
>
> *Scope*
>
> 4. The Inquiry's investigation will include, but not be limited to, whether and to what purpose, extent and effect undercover police operations have targeted political and social justice campaigners.
>
> 5. The Inquiry's investigation will include, but not be limited to, the undercover operations of the Special Demonstration Squad and the National Public Order Intelligence Unit.

> 6. For the purpose of the Inquiry, the term 'undercover police operations' means the use by a police force of a police officer as a covert human intelligence source (CHIS) within the meaning of s.26(8) of the Regulation of Investigatory Powers Act 2000, whether before or after the commencement of that Act. The terms 'undercover police officer', 'undercover policing', 'undercover police activity' should be construed accordingly. It includes operations conducted through online media. …"

13. Sir Christopher Pitchford, in his Opening Remarks to the Inquiry on 28 July 2015, having noted that "this Inquiry will investigate the evolution of undercover policing for all purposes, not just in the Metropolis but throughout England and Wales" (para 11), stated that the Inquiry will examine:

> "(i) the part undercover policing has had in, and the contribution it has made to, the prevention and detection of crime;
>
> (ii) the nature and scope of undercover police activities as they have been conducted in practice;
>
> (iii) the intended purpose of or motivation for undercover police activities;
>
> (iv) the role and knowledge of Her Majesty's Government, and in particular the Home Office, in undercover police activities;
>
> (v) the effect of undercover police activities upon individuals and the public;
>
> (vi) the stated justification for undercover policing both in general and in particular instances;
>
> (vii) the systems from time to time in place for the authorisation of undercover police operations, their governance and political oversight;
>
> (viii) the selection, training, management and care of undercover police officers; and
>
> (ix) the statutory, policy and judicial regulation of undercover policing." (Para 12)

14. Sir Christopher continued:

> "In the course of its investigation the Inquiry will need to examine any evidence of the targeting of individuals for their political views or participation in social justice campaigns." (Para 13)

15. On 3 May 2016 Sir Christopher gave a ruling addressing the legal principles and approach ("Restriction Orders: Legal Principles and Approach Ruling") that must be applied to the process of making decisions under s.19 of the 2005 Act, namely as to whether and, if so, in what terms the public disclosure of evidence, documents and

information received by the Inquiry should be restricted. I shall refer to this as "the Ruling".

16. On 25 July 2017 Sir John Mitting took over as Chairman upon Sir Christopher's retirement due to ill health. In his Opening Statement to the Inquiry on 20 November 2017 Sir John referred to the last sentence of para 17 of Sir Christopher's opening remarks, where Sir Christopher said, "The Inquiry's priority is to discover the truth". Sir John continued:

> "That is my priority. It is only by discovering the truth that I can fulfil the terms of reference of the Inquiry. I am determined to do so. In making procedural decisions about the conduct of the Inquiry I will do nothing which I can legitimately avoid which makes fulfilment of that intention more difficult. I will also make no decision whose purpose is not to fulfil that aim." (Para 3).

17. At paragraph 9 of his Opening Statement, Sir John said:

> "(i) In every case in which it can be done without disproportionate damage to the public interest or harm to the individual concerned, the cover name of a deployed undercover officer will be published. Publication may prompt valuable evidence from those outside the police about the deployment – whether it was justified; what happened during it; whether the officer so conducted him or herself as to harm the legitimate interests of others. Unless the cover name is published the full picture about a deployment may never be revealed."

18. In May 2018 Sir John published the Inquiry's "Strategic Review". In the Foreword Sir John wrote:

> "(i) The Inquiry is at a crossroads. Its preliminary stages will soon be complete.
>
> …
>
> (iii) It is not only the Inquiry which is at a crossroads. If, as has been reported, some non-state core participants are undecided whether or not to continue to participate in the Inquiry, the time for decision will soon arrive. The strategic review sets out how the Inquiry will attempt to find out what happened and why on the assumption that non-state core participants do participate. I do not intend to use coercive powers to make them do so. If they do not, the Inquiry will get as close to the truth as it can without them. There is abundant material in the police files, in the public domain and in the unpublished records of the Herne and Elter investigations. Every former Special Demonstration Squad and National Public Order Intelligence Unit officer able to do so will be required to provide a detailed written statement. The restriction order process has led to officers providing a fuller and in some cases, franker, account of their time undercover than has previously been avowed. I have every reason to believe that the

> need to give evidence on oath to the Inquiry will lead to further revelations. The absence of evidence from significant non-state witnesses will of course be regrettable and would mean that the foundations for the findings of fact which I would make would be less extensive than would be the case with it; but it would not undermine the purpose of the Inquiry. What would be lost would be a full account of what happened to them."

19. In Part 1 of the Strategic Review, at paragraph 8, it is noted:

> "The Inquiry is investigating undercover policing from 1968, including serious and widespread concerns about undercover policing and the behaviour of some police officers. They include:
>
> - Women discovering that, unbeknown to them at the time, their partners were in fact serving undercover police officers;
> - Children born as a result of such relationships;
> - Undercover police officers have reported on family justice campaigns and social and environmental campaigners.
> - There had been reporting on political activism, and the activities of some politicians;
> - There was concern that undercover police officers had reported on trade union activity and may have played a role in the blacklisting of workers;
> - The identities of deceased children were used by some undercover police officers to help build false personas;
> - Concerns that there may have been miscarriages of justice;
> - Allegations that officers may have committed serious crimes while undercover."

20. At the time of the Strategic Review the Inquiry had 207 core participants. This figure includes a number of groups and organisations that have been awarded core participant status. The number of individuals involved as core participants is considerably higher.

Legislative Framework

21. The 2005 Act, s.1(1) states that a Minister may cause an inquiry to be held under this Act in relation to a case where it appears to him that (a) particular events have caused, or are capable of causing, public concern, or (b) there is public concern that particular events may have occurred. (S.43(1) defines "event" to include "any conduct or omission").

22. S.5 provides, so far as is material:

> "**Setting-up date and terms of reference**

> (5) Functions conferred by this Act on an inquiry panel, or a member of an inquiry panel, are exercisable only within the inquiry's terms of reference.
>
> (6) In this Act 'terms of reference', in relation to an inquiry under this Act, means—
>
> (a) the matters to which the inquiry relates;
>
> (b) any particular matters as to which the inquiry panel is to determine the facts;
>
> (c) whether the inquiry panel is to make recommendations;
>
> (d) any other matters relating to the scope of the inquiry that the Minister may specify."

23. S.14 headed "End of inquiry" states, so far as is material:

> "(1) for the purposes of this Act an inquiry comes to an end—
>
> (a) on the date, after the delivery of the report of the inquiry, on which the chairman notifies the Minister that the inquiry has fulfilled its terms of reference, or
>
> (b) on any earlier date specified in a notice given to the chairman by the Minister." (See also s.43(2)).

24. S.17 headed "Evidence and procedure" provides, so far as is material:

> "(3) In making any decision as to the procedure or conduct of an inquiry, the chairman must act with fairness and with regard also to the need to avoid any unnecessary cost (whether to public funds or to witnesses or others)."

25. S.19 provides, so far as is material:

> "**Restrictions on public access etc**
>
> (1) Restrictions may, in accordance with this section, be imposed on— …
>
> (b) disclosure or publication of any evidence or documents given, produced or provided to an inquiry. …
>
> (3) A restriction notice or restriction order must specify any such restrictions—
>
> (a) as are required by any statutory provision, enforceable EU obligation or rule of law, or
>
> (b) as the Minister or chairman considers to be conducive to the inquiry fulfilling its terms of reference or to be necessary

in the public interest, having regard in particular to the matters mentioned in sub-section (4).

(4) Those matters are—

(a) the extent to which any restriction on attendance, disclosure or publication might inhibit the allaying of public concern;

(b) any risk of harm or damage that could be avoided or reduced by any such restriction;

(c) any conditions as to confidentiality subject to which a person acquired information that he is to give, or has given, to the inquiry;

(d) the extent to which not imposing any particular restriction would be likely—

(i) to cause delay or impair the efficiency or effectiveness of the inquiry, …

(5) In sub-section (4)(b) 'harm or damage' includes in particular—

(a) death or injury…"

26. S.24 provides, so far as is material:

"**Submission of reports**

(1) The chairman of an inquiry must deliver a report to the Minister setting out—

(a) the facts determined by the inquiry panel;

(b) the recommendations of the panel (where the terms of reference required it to make recommendations).

The report may also contain anything else that the panel considers to be relevant to the terms of reference (including any recommendations the panel see fit to make despite not being required to do so by the terms of reference).

…

(5) If the inquiry panel is unable to produce a unanimous report, the report must reasonably reflect the points of disagreement."

27. S.25 headed "Publication of reports" provides, so far as is material:

"(1) It is the duty of the Minister or the Chairman if sub-section (2) applies to arrange for reports of an inquiry to be published.
…

> (3) Subject to sub-section (4), a report of an inquiry must be published in full.
>
> (4) The person whose duty it is to arrange for a report to be published may withhold material in the report from publication to such extent— …
>
> > (b) as the person considers to be necessary in the public interest, having regard in particular to the matters mentioned in sub-section (5).
>
> (5) Those matters are—
>
> > (a) the extent to which withholding material may inhibit the allaying of public concern;
> >
> > (b) any risk of harm or damage that could be avoided or reduced by withholding any material;
> >
> > (c) any conditions as to confidentiality subject to which a person acquired information that is given to the inquiry."

28. S.38 provides, so far as is material:

> "**Time limit for applying for judicial review**
>
> (1) An application for judicial review of a decision made—
>
> > (a) by the Minister in relation to an inquiry, or
> >
> > (b) by a member of an inquiry panel,
>
> must be brought within 14 days after the day on which the applicant became aware of the decision, unless that time limit is extended by the court."

The Inquiry Rules 2006

29. Rule 12 of the Inquiry Rules 2006 ("the Rules") ("*Disclosure of potentially restricted evidence*") provides:

> "(1) In this rule—
>
> (a) 'potentially restricted evidence' means any evidence which is in the possession of the inquiry panel, or any member of the inquiry panel, and which is the subject of a relevant application which has not been determined or withdrawn;
>
> (b) 'relevant application' means an application which is
>
> … (ii) made by any person that the Chairman exercises discretion under section 19(2)(b) of the Act; or …
>
> and which entails the withholding of evidence from the public.

> (2) Subject to paragraph (3), potentially restricted evidence is subject to the same restrictions as it would be subject to if the order sought in the relevant application had been made.
>
> (3) Where the conditions in paragraph (4) are satisfied, the Chairman may disclose the potentially restricted evidence to a person who would not otherwise be permitted to see it.
>
> (4) The conditions are that—
>
> (a) the Chairman considers that disclosure to an individual is necessary for the determination of the application; and
>
> (b) the Chairman has afforded the opportunity to—
>
> (i) the person providing or producing the evidence to the inquiry panel;
>
> or
>
> (ii) any other person making the relevant application,
>
> to make representations regarding whether disclosure to that individual should be permitted.
>
> (5) Any person who is shown potentially restricted evidence pursuant to paragraph (3) shall owe an obligation of confidence to the person who provided or produced the evidence to the inquiry.
>
> (6) A breach of the obligation referred to in paragraph (5) is actionable at the suit of the person to whom the obligation is owed, subject to the defences applying to actions for breach of confidence."

The "Restriction Orders: Legal Principles and Approach Ruling" of Sir Christopher Pitchford

30. Part 6 of the Ruling headed "Conclusions and Summary of Findings" provides a summary of the factors relevant to the s.19(3)(b) public interest balance that includes, so far as is material, the following:

> "A.1. Decisions whether to make a restriction order under section 19 of the Inquiries Act 2005 that depend on a balance of the public interest will be made under section 19(3)(b) taking account of relevant public interest factors whether they are specifically mentioned in section 19(4) or (5) or not.
>
> A.2. The principal competing public interest factors for consideration under section 19(3)(b) of the Inquiries Act 2005 are:

(1) the need to allay public concern about the subject matter, process, impartiality and fairness of the Inquiry; and

(2) the need to avoid or reduce a risk of harm to serving and former police officers and the need to avoid or reduce a risk of damage to effective policing.

A.3. The principal means available to the Inquiry to allay public concern in its subject matter, process, impartiality and fairness is public accessibility to its proceedings that will in one or more of the following respects:

(1) facilitate the investigative process;

(2) respect the different interests of witnesses and encourage effective participation;

(3) inform the public and the media about its proceedings;

(4) permit public debate about matters of national interest;

(5) achieve public accountability for police services; and

(6) provide transparency for the conclusions and recommendations of the Inquiry.

A.4. The main risk factors for harm to police officers and damage to effective policing is disclosure of (i) the true identity of present or former undercover police officers whether directly or indirectly and (ii) the operational techniques of undercover police operations.

A.5. In assessing whether a risk of harm would be avoided or reduced by making a restriction order under section 19(3)(b) of the Inquiries Act 2005, the term 'harm' will be construed widely so as to embrace interference with private life. However, the greater the risk and the more severe the harm the weightier will be the public interest in taking steps to avoid or reduce it.

…

A.9. The practical consequences of a restriction order to the fairness of the Inquiry's proceedings and the Inquiry's ability to fulfil its terms of reference will be significant considerations. When all other components of the public interest are directly opposed and evenly weighted the Inquiry's duty of fairness to its participants may be a decisive factor.

A.10. Where the risk of harm considered in a public interest assessment is interference with an individual's right of respect for private and family life, a separate Article 8 assessment will be made under section 19(3)(a) of the Inquiries Act 2005.

> A.11. The starting point is that no restriction order will be made, in the public interest of openness in the Inquiry and its proceedings, unless it is necessary in the countervailing public interest of the protection of individuals from harm and/or effective policing.
>
> A.12. It is not possible to state at the level of principle or generality where the public interest balance will rest. The Chairman will approach evaluation on a case by case basis according to the nature and quality of evidence received in support of the application."

The Decisions Challenged

(1) The ruling of 30 July 2018

31. Sir John ruled in respect of the 10 SDS officers that neither their real name nor cover name be published. In summary, the reasons given by Sir John for his decisions in the individual cases are as follows:

    i) HN8 – publication of the cover name would give rise to a real risk of interference in the two aspects of the private life of HN8 identified in paragraph 1 of "Minded to" note 8, namely physical integrity and the ability to perform socially useful and remunerative work. The risk to physical integrity, which is real, is contingent; it arises either from members or associates of the group infiltrated. In those circumstances, the interference in the rights of HN8 under Article 8 ECHR would be neither proportionate nor justified. It would also not be in the public interest to run them. The reasons for this view are explained in the closed note which accompanied the "Minded to" note.

    ii) HN9 – Dr Busuttil, a very experienced consultant psychiatrist, expressed the opinion that HN9 was suffering from a chronic prolonged adjustment disorder. He was of the view that should his or her real or cover name be disclosed, HN9 would be at high risk of developing a severe depressive episode, and that the risk of suicide "will be extremely high". Nothing Sir John knew about the nature of the deployment of HN9 or his or her personal circumstances could justify running that risk. To do so might infringe HN9's rights under Article 2 ECHR and would infringe those under Article 8. The reasons for the ruling are set out in paragraphs 3 and 4 of "Minded to" note 8 and in the closed accompanying note.

    iii) HN21 – HN21 has suffered recurrent episodes of severe depression since deployment. In the opinion of Dr Busuttil publication of the real or cover name of HN21 would give rise to a high risk of recurrence. Dr Busuttil noted in his report dated 24 April 2018 that HN21's health had deteriorated since he was last seen by him in March 2017. Dr Busuttil was of the view that he was now suffering a mild to moderately severe depressive episode and another long-term condition. Sir John accepted the opinion of Dr Busuttil that if his cover name were to be disclosed his psychiatric symptoms are likely to worsen and render the treatment recommended less likely to succeed. The Chairman considered the evidence of HN21 about his deployment and service in the SDS and police service after it ended to be of significant interest to the Inquiry. In his ruling Sir John stated:

> "18. It is submitted that the making of a restriction order in respect of the cover name of HN21 will encourage him 'to be economical with the truth'. I am alert to this possibility. I have every reason to believe that, despite the health conditions from which he suffers, he ought to be capable of giving detailed evidence about his deployment. Further, it is likely that at least some contemporaneous intelligence reports produced by him or founded on his reports exist and can be retrieved and published without undermining HN21's anonymity. Members of the group will not know who HN21 was but they will be afforded the opportunity to come forward and give evidence as to the accuracy of the reporting and the activities of the group. In this way I hope to obtain evidence about justification from both the officer and those in the target group.
>
> 19. There is no perfect solution to the problem of how to protect the health of HN21 and to ensure that the Inquiry has all of the evidence which it needs to permit it to get to the truth about his deployment. The course which I will adopt is, in my view, the least bad solution. If, and only if, experience shows it to be unworkable, I will have to revisit it."

The reasons for this ruling are set out in paragraph 2 of "Minded to" note 5, in paragraphs 1-4 of the closed note which accompanies it, and in paragraphs 4 and 5 of "Minded to" note 9.

iv) HN53 – For the reasons explained in paragraph 9 of "Minded to" note 9, and in the closed note which accompanied it, neither the real nor cover name of HN53 can be published, in the interest of his/her safety and because it would cause significant damage to the public interest. HN53 was second in operational command of the SDS from 1998-2005. His/her evidence is of significant importance to the Inquiry and must be given in public, albeit with protective measures taken, to protect his/her identity. S/he was also deployed as an undercover officer in the 1980s, in circumstances which are also of interest to the Inquiry. Articles 2 and 3 ECHR may not be engaged, because the risk is contingent, not immediate, but Article 8 is. Publication of his/her real or cover name would not be justified under Article 8(2).

v) HN86 – He was the Detective Chief Inspector in operational charge of the SDS for a period during the 1990s. Dr Jagmohan Singh, consultant psychiatrist, has diagnosed him as having a condition of "panic disorder" and/or "generalised anxiety disorder". He is of the opinion that HN86 will find any direct engagement with the Inquiry "extremely stressful" and disclosure of his real or cover name will destabilise his mental health further. HN86 does not live in the UK. However, he is willing to provide evidence to the Inquiry, provided that proper steps are taken to protect his health and welfare, including the making of a restriction order in respect of his real and cover name. Sir John considered this to be "a price worth paying to secure his evidence". Not imposing a restriction on publication of his real or cover name would impair the effectiveness of the Inquiry under s.19(4)(d) of the 2005 Act. There is a real need to obtain evidence from him about his management of the SDS. What occurred during his deployment is of lesser importance.

vi) HN87 – The reasons for the decision are set out in a closed note.

vii) HN91 – HN91 is a serving police officer, performing a valuable and sensitive role. If the cover name were to be published, there is a high risk that his/her real identity would be disclosed, in which event, s/he could not continue to perform current duties. It would not be in the public interest that this should occur. Sir John did not simply accept HN91's "untested" assertion that during his/her deployment s/he entered into one relationship in the cover identity (only) "albeit not, [HN91] says, with a protester". If appropriate, Sir John said that he can and will ask for the account of the officer's relationship to be confirmed by the person identified – the officer's long-term partner. The reasons for the decision that neither his/her real nor cover name can be published are as stated and set out in paragraph 13 of "Minded to" note 11 and in the accompanying closed note.

viii) HN101 – HN101 was deployed in the 1990s. S/he does not live in the UK, but has declared a willingness to provide evidence in the form of a witness statement. Because s/he lives permanently abroad the Inquiry has no means of compelling him to provide or give evidence. The only means of obtaining worthwhile evidence from him/her is to make the restriction orders sought and to permit him/her to provide evidence by way of a witness statement. Members of the group into which s/he was deployed will be able to provide evidence about its activities, even if not about him/her personally. Experience, thus far, suggests that the publication of cover names has not produced a flow of information from those against whom officers were deployed. Sir John was therefore of the view that being asked to substitute the speculative chance that information might be forthcoming against the strong likelihood that the Inquiry will be provided with evidence of some value by him, the course he proposed to adopt would be more likely to get to the truth about his/her deployment.

ix) HN112 – HN112 joined the SDS in the last year of its existence. S/he worked in the back office and was not deployed. A restriction order was made in respect of his/her cover name for two purposes: to avoid any possible risk to his/her mental health; and to ensure that evidence, which may be of significant value to the Inquiry is not compromised by irrational anxiety on his/her part. Sir John accepted that there is no objective justification for his/her stated fears. However, he considered himself bound to have regard to subjective fears. In this case he gave effect to them because it does not impede fulfilment of the terms of reference for the reasons set out in paragraph 28 of "Minded to" note 6 and in the accompanying closed note, and in paragraph 4 of "Minded to" note 10.

x) HN355 – One of HN355's adult children (X) is mentally unstable. X is politically committed and active. Sir John accepted as true and unexaggerated HN355's belief that if X discovers the identity of the groups into which s/he was deployed it will damage gravely, or destroy the relationship between them, upon which X's ability to function as a normal adult depends. On that basis, the public interest in maximising the chance of obtaining evidence from those against whom HN355 was deployed is outweighed by the need to protect the personal integrity of X. The closed note identifies the material upon which Sir John concluded the welfare and physical integrity of X will be put at risk by the disclosure of the cover name of HN355.

(2) The ruling of 30 October 2018

32. At the outset of this ruling Sir John makes the following "General observations":

> "2. I have reconsidered each case, by reference to the open and closed material submitted by or on behalf of each individual, in the light of the submissions made on behalf of the non-police, non-state core participants dated 28 September 2018. … I am conscious of the need to ensure that a thorough investigation of the National Public Order Intelligence Unit can be and is undertaken, if possible, in public. The following issues must be addressed to permit that to be done: why, and for what purpose, the undercover unit of the National Public Order Intelligence Unit was set up; what instructions or guidance were given to its deployed officers; what the officers did during their deployment, including their interaction, appropriate or inappropriate, with members of target groups and others encountered during it; what their managers knew about their actions and did about them; what interactions there were between the National Public Order Intelligence Unit and private sector operators in the fields into which undercover officers were deployed and between both of them and non-state core participants; and what was done with intelligence gathered by undercover officers.
>
> 3. To that end, the Inquiry must investigate, in detail, each of the principal deployments undertaken by the National Public Order Intelligence Unit undercover unit. To permit it to get at the truth, it must examine publicly deployment into animal rights and environmental groups. The orders which I make will permit this to occur, notwithstanding that significant parts of the evidence concerning such deployments will either have to be given in closed session or by officers whose real and cover identity will not be disclosed by the Inquiry. I have not yet made rulings on applications which have been, or may be, made by managers. I acknowledge that the handling of evidence about such deployments and about what managers knew and did about them will pose considerable difficulties for the Inquiry. Those difficulties will be addressed before the evidence is given. They apply in the case of three officers – EN33, EN36 and EN42."

33. The Claimants do not challenge the decisions relating to EN38 and EN48.

34. The reasons for the decisions made in relation to the other 12 NPOIU officers involved in this challenge are, in summary, as follows:

    i) EN33 – The reasons are those set out in the ruling and "Minded to" note of 2 May 2018 ("the "Minded to" note") and in the accompanying closed note. Members and associates of a number of groups against whom EN33 was deployed posed a real risk to his/her safety and wellbeing which, to an extent which cannot be precisely quantified, persists. Sir John said in his ruling that he remained convinced that it would be neither proportionate nor justified to run that risk. In the "Minded to" note Sir John writes: "Although it would be desirable for members of the targeted groups to know the cover name of EN33,

so as to be in a position to provide and give evidence about the deployments, that is not possible without a disproportionate and unjustified interference with the right to respect for the private and family life of EN33".

ii) EN36 – The reasons for the decision are those set out in the "Minded to" note and accompanying closed note. EN36 is a serving police officer and has been deployed, undercover, in circumstances which give rise to a real threat to life and limb. It is at least arguable that Articles 2 and 3 ECHR are engaged. Even if they are not, Article 8 is and the risk of interference with an aspect of the right to private life – physical integrity – prohibits the taking of any step which might put it at risk.

iii) EN39 – The reasons for the decision are those set out in the "Minded to" note and accompanying closed note. EN39 is a serving officer who has been and can be deployed as an undercover officer since the closure of the NPOIU. It would not be in the public interest to publish anything which might reveal EN39's real or cover identity.

iv) EN40 – The reasons for this decision are set out in the "Minded to" note and in the accompanying closed note. EN40 is a serving police officer who performs undercover duties. Disclosure of the real or cover name would undermine the ability of EN40 to discharge those duties. It would not be in the public interest for that to occur. Further, disclosure of the real or cover name would, for reasons which are explained in the closed note, put the safety of EN40 at risk. The risk is such as to engage Articles 2 and 3 ECHR as well as the right to respect for private and family life under Article 8. In the "Minded to" note Sir John writes: "Although publication of the cover name of EN40 would be likely to prompt evidence from others who encountered EN40, because it would give rise to a real and immediate risk to life and limb, publication would be impermissible under Articles 2 and 3 and/or unjustified under Article 8(2)".

v) EN41 – The reasons for this decision are set out in the "Minded to" note and in the accompanying closed note. EN41 is a serving police officer who performs undercover duties. Publication of the cover name in the context of an NPOIU deployment would put his/her safety at risk from individuals associated with other deployments and would also undermine his/her ability to perform current undercover duties. This would not be in the public interest. Even if his/her rights would not be infringed because the risk is contingent, Art.8 would be engaged. Sir John stated in the "Minded to" note that "Although disclosure of the cover name would be likely to prompt evidence from others who may have encountered EN41, it would amount to a disproportionate interference with that right and would not be justified under Art.8(2)".

vi) EN42 – The reasons for this decision are set out in the "Minded to" note and in the accompanying closed note: EN42 is a serving police officer who continues to perform undercover duties. Some of the deployments have created a real risk to his/her safety. Further, disclosure of the real or cover name might imperil the safety of others and would be likely to impair the ability of EN42 to discharge undercover duties in the future. In the ruling Sir John comments: "The forced withdrawal of a significant number of experienced undercover officers, including EN42, would be likely to have an impact on policing which would not

be in the public interest. Therefore, even if the risk to the safety of EN42 could be run, it should not be".

vii) EN43 – The reasons for this decision are set out in the "Minded to" note and in the accompanying closed note. Sir John stated in the ruling (at para 40) that in the closed note he said that the decision which he was minded to make was subject to satisfactory resolution of two queries, and that they were satisfactorily resolved in a letter from the home force dated 26 June 2018. Publication of EN43's real name would create some risk to his/her safety. Publication of the cover name adopted by him/her during his/her secondment to the NPOIU would impair performance of current and future duties in the undercover field and may also put safety at risk. It would not be in the public interest to publish either. Further, publication would interfere with his/her Art.8 rights and would not be proportionate or justified under Art.8(2).

viii) EN47 – The reasons for this decision are set out in the "Minded to" note and in the accompanying closed note. Publication of the cover name adopted by EN47 during his/her secondment to the NPOIU would impair performance of current and future duties in the undercover field and may also put his/her safety at risk. The ruling (at para 42) states: "The forced withdrawal of EN47 from those duties would have an immediate impact on policing which would not be in the public interest. The public interest in their performance by EN47 outweighs any likely benefit to the public interest which might result from the publication of the National Public Order Intelligence Unit cover name".

ix) EN288 – The reasons for this decision are set out in the "Minded to" note and in the accompanying closed note. EN288 was deployed on a number of occasions as an undercover officer in circumstances which gave rise to a real risk to life and limb. The risk to life from one of them remains and may engage Article 2 ECHR. The risk to safety from at least one other deployment also remains. In the ruling Sir John said: "The threat of serious physical harm was and is reliably established". In the "Minded to" note Sir John writes: "Publication of a cover name might prompt evidence from members of the groups against which EN288 was deployed who do not pose a risk to life or limb; and the risk of identification of the real name of EN288 is not great. However, even running a small risk would amount to a disproportionate and unjustified interference in the right of EN288 to respect for an aspect of private life – physical integrity – and, if Article 2 is engaged, would infringe it".

x) EN507 – The reasons for this decision are set out in the "Minded to" note and in the accompanying closed note. EN507 is a serving police officer and has undertaken undercover operations which put safety at risk. Sir John did not accept that the public interest in the disclosure of the cover name of EN507 outweighs the public interest in the continued ability of the police force to deploy him/her in undercover operations of public value, for the reasons explained in the closed note.

xi) EN808 – EN808 made two closed witness statements as to the risk to his/her safety in the event of publication of his/her cover name. The nature and source of the risk is identified in a closed note.

xii) EN1001 – The reasons for this decision are set out in the "Minded to" note and the accompanying closed note: EN1001 was and is a serving police officer with

a provincial force. It is not in the public interest that the valuable duties performed by the unit of which EN1001 is part should be jeopardised by publication of his/her cover name, as they would be.

3. The ruling of 8 November 2018

35. This ruling included a decision that neither the real nor cover name of HN4 can be published. HN4 was deployed into two branches of one group in the late 1980s and early 1990s. He suffers from two medical conditions. Sir John accepted the opinion of Professor Fox, who prepared a report on HN4 dated 16 April 2018. Professor Fox's opinion on the effect of publication of the cover name was considered at a closed hearing. The publication of HN4's real name would be likely to have a severe and irreversible impact on one of his medical conditions. In "Minded to" note 11 (at para 3) Sir John wrote: "It is not necessary to permit the Inquiry to fulfil its terms of reference that the real name of HN4 should be published. In consequence, the interference in the right to respect for private and family life of HN4 which it would cause would not be justified under Article 8(2) [ECHR]". The ruling noted (at para 7) that "The manner in which the evidence of HN4 will be received is an issue which must be considered when the intelligence reports produced by HN4 and others have been examined. The restriction order made will contain a proviso that it will not prevent HN4 from giving public evidence about the deployment under a cypher".

Grounds of Challenge

36. The amended perfected statement of facts and grounds identify 4 grounds for judicial review in respect of the decisions under challenge:

    i) The decision to restrict cover names in each of the cases under challenge frustrates the purpose of the Inquiry (**Ground 1**).

    ii) Unfairness (**Ground 2**).

    iii) The Chairman has failed to apply, or has acted in a way which is contrary to the legal principles ruling (**Ground 3**).

    iv) In relation to HN87, the Chairman has failed to give any, or any adequate, reason for reaching his decision to restrict the cover name (**Ground 4**).

    I shall consider each ground in turn.

The Parties' Submissions and Discussion

Ground 1: The decision to restrict cover names in each of the cases under challenge frustrates the purpose of the Inquiry

37. The Claimants' case is that the decisions to restrict the cover names of SDS and NPOIU officers are unlawful because they frustrate the purpose of the Inquiry to get to the truth about undercover political policing and to do so in a way that commands public confidence.

38. The Claimants contend that Sir John erred in his approach to the weight to be attached to the need for openness. Their pleaded case (at para 142 of the amended perfected statement of facts and grounds) is that:

> "Underpinning all this ground of challenge is the Chair's conclusion, made explicit in the foreword to the Strategic Review… that '[*t*]*he absence of evidence from significant non-state witnesses would… mean that the foundation for the findings of fact which I could make would be less extensive than would be the case with it; but it would not undermine the purpose of the Inquiry. What would be lost would be a full account of what happened to them'*. … [H]is conclusion that the purpose of the Inquiry will not be undermined should it proceed without hearing from significant non-state witnesses is manifestly wrong and irrational."

39. Ms Kaufmann submits that all the decisions under challenge are infected by the same legal error, that is the misdirection by the Chairman as to the importance of openness when he came to decide how the balance should be struck between competing interests as to anonymity. Ms Kaufmann submits that the reason Sir John misdirected himself as to the importance of openness was because he failed to recognise the critical role that openness plays in the Inquiry if it is to achieve its terms of reference to allay public concern which gave rise to it, and by so misdirecting himself in relation to each balancing exercise he is frustrating the purpose of the Inquiry and committing an error of law.

40. In her submissions on 4 December 2018 Ms Kaufmann said that the Claimants' case was that Sir John had not given sufficient weight to the need for openness. In her oral submissions at this hearing (on 22 January 2019) she submits that he did not start with the proper appreciation of the need for openness.

41. This, Ms Kaufmann submits, can be demonstrated in a number of ways.

42. First, Ms Kaufmann submits that it follows from the terms of s.1 of the 2005 Act that the purpose of a public inquiry is to allay public concern about the matters to be inquired into. In exercising his powers under s.19(3) the Chairman must not act in such a way as to frustrate the purpose of the Inquiry. S.19(4) requires the Chairman to take into account the extent to which any restriction might inhibit the allaying of public concern. It was public concern that gave rise to the Inquiry in the first place. The only way in which the public can have confidence that the Inquiry can get to the truth is if evidence is also given by the victims of wrongdoing about what happened to them. With the restriction orders under challenge in place the Chairman will not be able to fulfil the Inquiry's Terms of Reference.

43. What Sir John said in the foreword to the Strategic Review at sub-paragraph (iii) (see para 18 above) is a fundamental misdirection. The fact that he considers he is able to allay public concern without hearing from non-state participants shows that he is conducting the balancing exercise without appreciating the need for openness.

44. Second, the Chairman is wrong to consider that the non-state core participants can have meaningful participation in respect of the evidence of officers who are the subject of restriction orders. On 27 June 2018, in response to the note from Ms Kaufmann and Ms Brander of 21 June 2018, Sir John wrote:

> "3. … current non-state core participants should, save in a small minority of cases, be provided with sufficient information about any officer who gathered information on them to enable them to

> provide evidence about what the officer did. In that way, the important evidence which non-state witnesses can give can be provided to the Inquiry, to assist it to fulfil its essential purpose of getting to the truth."

This again, Ms Kaufmann submits, demonstrates that the Chairman is conducting the balancing exercise without properly appreciating the need for openness.

45. The Claimants do not suggest that a cover name restriction order would never be justified, but in order to be so, they contend that it must be determined that the interests telling in favour of restriction outweigh the public interests identified at A3 of the legal principles ruling (see para 30 above). Ms Kaufmann submits that is not the balancing exercise that the Chairman conducted in the decisions under challenge. Rather, she submits, he has rejected the principle that public accessibility is the principal means of achieving the objectives of the Inquiry. That, she submits, is a fundamental departure from the legal principles ruling and frustrates the purpose of the Inquiry.

46. Third, approximately one-third of SDS cover names will be unknown. Two-thirds of those who sought cover name anonymity have been granted it. Two-thirds of NPOIU officers deployed as principal undercover officers will have their cover names withheld. That is of concern as those officers who have applied for total anonymity may have most to hide. The number of officers overall whose cover names are restricted is such that there cannot be meaningful public evidence about the deployment of a large number of officers. That in itself suggests that the Chairman misdirected himself as to the balancing exercise and the need for openness if the Terms of Reference are to be fulfilled.

47. Fourth, Ms Kaufmann submits that each of the individual decisions under challenge betrays a failure by the Chairman to recognise the fundamental importance of openness. She contends that the decisions in the individual cases evidence the error in the approach adopted by the Chairman. Ms Kaufmann submits that the case of HN4 is one of the cases that exemplify the error of approach of Sir John. Other cases include EN33, EN36 and EN42. In all these cases the Chairman accepted that the officers should give evidence in public, and yet anonymity orders were made. I do not accept this submission. Evidence can be given in public by officers anonymously without frustrating the Terms of Reference.

48. Ms Kaufmann submits that if a proper approach to openness had been adopted then one would have expected to see in the reasons given for individual decisions more searching scrutiny, for example in relation to medical evidence, than was given in individual cases. Ms Kaufmann suggests that HN21 is an example of a case where the Chairman was not sufficiently robust in his examination of medical evidence. In too many cases the evidence of officers who are well capable of lying is accepted, in particular in relation to mental illness. Mr Francis says that the Inquiry must remember that these former police officers have been trained to lie; it was a fundamental part of their job. Further, Ms Kaufmann submits there is at least an arguable issue as to whether (obviously depending on the facts of the individual case) interference with private and family life should trump the need for openness.

49. Ms Kaufmann confirmed that this first ground of challenge is to the approach adopted by the Chairman to the balancing exercise. It is contended that the failure to give proper weight to the need for openness infected all the decisions that were made. Those decisions were irrational. If the correct approach had been adopted then there would

have been different decisions. The individual decisions demonstrate, it is said, that the wrong approach was adopted. However, there is no separate rationality challenge to the individual decisions.

50. Mr Sanders takes issue with the Claimants as to the purpose of the Inquiry. He submits that the purpose of an inquiry is not "the allaying of public concern". S.1 of the 2005 Act does not say that it is.

51. Under s.1(1) a Minister may institute an inquiry where "it appears to him" that there is or could be "public concern" as a result of or about "events" (see para 21 above). The purpose of an inquiry, Mr Sanders submits, is fulfilment of its terms of reference (set out by the Minister under s.5) through submission and publication of a report: see ss.24-25 at paras 26-27 above.

52. I agree with Mr Sanders that allaying of public concern may be *a* purpose, benefit or incident of inquiries, but it is not correct to characterise this as *the* purpose.

53. The references in ss.19(4) and 25(5) to the allaying of public concern set out matters to which regard must be had when a minister or inquiry chairman is deciding whether (1) a restriction is conducive to an inquiry fulfilling its terms of reference or necessary in the public interest (s.19(3)(b) and (4)(a)); and (2) withholding material in an inquiry report from publication is necessary in the public interest (s.25(4)(b) and (5)(a)). The "public concern" referred to in those sections is "public concern" within the meaning given in s.1. I agree with Mr Sanders that it cannot mean allaying public concern about the likely efficiency or effectiveness of the inquiry itself. Ss.19 and 25 expressly allow restriction notices and restriction orders to be made despite the fact that this may inhibit the allaying of public concern. As Mr Sanders observes, one hopes that the proceedings of the Inquiry and the report at the end of it will allay public concern. However, they may not, but that cannot be a ground of challenge to a substantive decision in relation to the conduct of the Inquiry. That being so the real question is whether the Chairman has, in making restriction orders, failed to have regard to the extent to which any restriction "might inhibit the allaying of public concern" about undercover policing in England and Wales since 1968 (see Inquiry's Terms of Reference for its "purpose" at para 12 above) when considering whether it is necessary in the public interest.

54. It is not in issue that the applicable principles by which anonymity applications are to be determined are those set out in the legal principles ruling of Sir Christopher. In Sir John's first "Minded to" note, issued on 3 August 2017, he stated (at para 20) that he had applied the principles set out in the Ruling. It is the Claimants' case that even though he has purported to apply that ruling, the reality is that he has misdirected himself as to the consequences for the Inquiry of restriction of cover names, or has failed properly to address his mind to them.

55. I reject this submission. Having considered the OPEN and CLOSED reasons for the decisions, and the OPEN and CLOSED material, I am of the view that it is unarguable that the Chairman departed from the approach set out in the legal principles ruling by failing to give sufficient weight to the public interest of openness in the Inquiry. I agree with the observation of Lang J, refusing permission on the papers, that in reality the Claimants are expressing their disagreement with the balance struck by Sir John, which was an exercise of discretionary judgment by him. Each factor referred to in para 19(4) is a relevant consideration. However, the weight to be given to each factor is a matter for the decision maker. As Lord Brown observed in *Home Secretary v AP* [2011] 2 AC 1 at para 12:

> "The *weight* to be given to a relevant consideration is, of course, always a question of fact and entirely a matter for the decision maker – subject only to a challenge for irrationality…"

56. In considering whether the Chairman has adopted a wrong approach when applying the Ruling regard may be had, at least by way of background, to the following facts: (1) the terms of reference of the Inquiry are very broad, covering undercover police operations conducted by English and Welsh police forces in England and Wales over the last 50 years. It is not merely an inquiry into the conduct of the individual officers in the SDS and NPOIU whose cover names are protected by the restriction orders under challenge. (2) There has been no challenge to any of the restriction orders made in respect of SDS and NPOIU officers in the 9 earlier rulings made between August 2017 and June 2018. (3) The Inquiry has refused a significant number of restriction order applications made in connection with SDS cover names. (4) The restriction orders in relation to SDS officers challenged are an atypical group in that 6 of the 12 applications relied in part on medical expert evidence, the Inquiry dealing with the majority of such "medical" cases towards the end of the process.

57. The importance of openness was referred to and relied upon by the Chairman in refusing a number of restriction order applications in respect of cover names:

i) HN66 – "Minded to" note 5 dated 7 March 2018 at para 6: "There is a real risk that, if the names by which HN66 was known to those belonging to targeted groups are not published, the ability of the Inquiry to fulfil its terms of reference will be impaired, by the absence of potentially relevant evidence from them".

ii) HN78 – "Minded to" note 6 and ruling 4 dated 22 March 2018 at para 20: "The Inquiry must investigate deployments into these groups, including that of HN78, if it is to fulfil its terms of reference. It cannot do that adequately unless evidence is given about them publicly by those who were deployed. Further, members of the target groups must have the opportunity to give evidence about the deployment of HN78. To do that, they will need to know the cover name".

iii) HN80 – Again, "Minded to" note 6 and ruling 4 dated 22 March 2018 at para 23: "The deployment is of significant interest to the Inquiry because of its length and range and because, according to HN80, it involved a good deal of self-tasking. Publication of the cover name of HN80 may prompt information or evidence from those who encountered HN80 during the deployment".

58. On 22 March 2018 the Chairman refused to make a restriction order in respect of the cover name of HN3 (see "Minded to" note 6 and ruling 4). He said:

> "The cover name of HN3 will be published and will permit members of the target groups and others to provide information and give evidence about the deployments". (Para 1)

Similarly, in relation to the cover name of HN33, he said:

> "The publication of the cover name of HN33 is necessary to permit former members of the group to provide information and/or give evidence about the deployment. They pose no threat to the safety of HN33. There is a small risk that publication of the cover name would lead to the identification of the real name

> of HN33, which may give rise to unwelcome media attention. It would not give rise to anything worse. It is the price which must be paid to permit the Inquiry to conduct a full investigation into the deployment". (Para 3)

In respect of HN60, the Chairman said:

> "The cover name of HN60 will be published and will permit members of the target groups and others to provide information and give evidence about the deployments". (Para 8)

Similar reasoning led to the refusal of the application for a restriction order in respect of the cover name of HN65:

> "Publication of the cover name of HN65, together with the name of the group infiltrated, should prompt further information and evidence from members of the group, likely to be of value to the Inquiry". (Para 10)

The application for a restriction order in respect of the cover name of HN78 was also refused (para 20; and see para 57(ii) above).

59. In my view, the reasons given by the Chairman for refusing these applications for a restriction order in respect the cover names of a number of SDS officers is clear evidence that he appreciated that openness is an important factor to be taken into account when deciding whether to make a restriction order.

60. I agree with Mr Johnson that it is clear from the evidence that from the inception of the Inquiry Sir Christopher, and then Sir John, recognised there would be a real tension between on the one hand the need for openness and on the other the need to protect other public interests and the Convention rights of individual officers. Sir John has grappled with this tension when considering the individual cases. The emphasis that Sir John places on the need for openness is apparent from his opening statement (see para 9(i) at para 64 below). Thereafter, I am satisfied that he has only granted anonymity where he considers he is obliged by law to do so. One example of such a case that Mr Johnson refers to is that of EN33 (see para 34(i) above). This demonstrates, Mr Johnson submits, and I accept, that the Chairman explicitly had regard to the benefit of evidence being given in public and the benefit to the Inquiry of the revelation of his cover name. The same is so for EN36, EN40, EN41, EN288 and EN1001 (see para 34 above).

61. In "Minded to" note 3 of 15 November 2018, refusing the application for a restriction order in respect of the cover name of EN508, the Chairman said:

> "It is possible that publication of the cover name might prompt worthwhile evidence from those encountered by EN508. The limited interference with the right to respect for private and family life, if any, which publication of the cover name might cause, is justified by the need to take the opportunity to try to obtain such evidence". (Para 31)

Again, the need for openness is recognised and a proper balancing exercise was conducted.

62. In his ruling of 2 May 2017 (on applications by the MPS for an extension of time for the making of restriction order applications and for a change by the Inquiry to its approach to investigation) Sir Christopher said in part 4 of his ruling under the heading "Discussions and conclusions":

> "**Preliminary matters**
>
> 156. Three factors dominate my consideration of the present applications and my review of the progress of the Inquiry:
>
> (i) the scope of the terms of reference;
>
> (ii) the presumption of openness that arises from sections 18 and 19 of the Inquiries Act 2005; and
>
> (iii) the importance and complexity of the issues raised by the Inquiry's duty to consider the making of restriction orders under section 19 of the Inquiries Act 2005.
>
> 157. I think it appropriate to restate conclusions that I have previously reached and to which I adhere:
>
> …
>
> (iii) The responsibility of the Chairman is to reach the appropriate balance between the degree of public disclosure necessary to allay the concerns of the public and the non-disclosure necessary to protect individuals from harm and effective policing from damage."

63. The Counsel to the Inquiry's explanatory note which accompanied the "Minded to" note of 2 May 2018 states (at para 15): "The Inquiry has repeatedly set out its commitment to conducting the Inquiry as openly as it reasonably can". In support of this statement Counsel refers to Sir Christopher's statement at paragraph 18 of his opening remarks, dated 28 July 2015, and to paragraph 9(i) of Sir John's statement dated 20 November 2017. Earlier in the explanatory note (at para 8) express reference is made by Counsel to the Ruling.

64. In his Opening Statement to the Inquiry on 20 November 2017, Sir John said (at para 9(i)):

> "In every case in which it can be done without disproportionate damage to the public interest or harm to the individual concerned, the cover name of a deployed undercover officer will be published. Publication may prompt valuable evidence from those outside the police about the deployment – whether it was justified, what happened during it; whether the officer so conducted him or herself as to harm the legitimate interests of others. Unless the cover name is published the full picture about a deployment may never be revealed."

65. Ms Kaufmann criticised Sir John for what he said in his letter of 27 June 2018, especially at para 3 (see para 44 above). However, that letter must be read as a whole.

At para 6 he wrote: "It is self-evident that the task of the Inquiry in getting to the truth will be facilitated by the provision of information and evidence by non-state core participants and witnesses".

66. I also do not consider that Sir John's response in his letter of 27 June 2018 demonstrates that he did not appreciate the importance of openness. Sir John points out that in the Strategic Review he stated that if non-state witnesses do not give evidence "the Inquiry will get as close to the truth as it can without them". As he observes "It is self-evident that the task of the Inquiry in getting to the truth will be facilitated by the provision of information and evidence by non-state core participants and witnesses". If such information and evidence is provided it will assist the Chairman when he comes to consider the evidence of undercover officers, for example, in closed session. It may be that there will be hard cases where points cannot be explored because of an anonymity order, but it does not follow that such an order should not be made if, in a particular case, for example, there is expert medical evidence of a real risk of suicide if a cover name is revealed. Each case involves a balancing exercise which can only be conducted on a case-by-case basis.

67. I do not consider that an analysis of the statistics assists. Sir Robert Francis makes the point that a large number of NPOIU officers are still serving officers which differentiates them as a group from SDS officers. However, overall, broadly the position appears to be that one-third of cover names of SDS undercover officers and about two-thirds of NPOIU undercover officers have been the subject of restriction orders. What is more important is to look to see how the individual applications have been considered.

68. I do not accept that the extract from the Chairman's foreword to the Strategic Review relied upon by the Claimants (see para 18 above) demonstrates that he failed to appreciate the importance of openness. What is said in paragraph (iii) must be read in context. The context was that there had been a walkout by some non-state core participants from one of the open hearings. There was a threat by them to withdraw from the Inquiry unless it was conducted differently. The specific focus was therefore on the proposed non-participation by a group of non-state core participants. The Chairman was concerned with a different point to the one with which this challenge is concerned, namely whether the Inquiry was able to take evidence from individuals affected by a particular deployment. He was not dealing specifically with anonymity orders. He was addressing the non-participation of non-state participants after a walkout.

69. Mr Barr comments in relation to Ms Kaufmann's point on the Strategic Review that no inquiry can ever expect to obtain all theoretically available evidence, in particular when the terms of reference of the inquiry are as broad as they are in the present case. It may just not be possible to investigate every alleged act of misconduct.

70. Ms Sikand suggests that the Chairman's comments in relation to HN4 appear to be no more than lip service to the notion of openness. She submits that the ruling in relation to HN4 demonstrates the error in the Chairman's thinking, at least on the basis of the evidence given in OPEN. I do not accept this is so. I agree with Mr Sanders that it is no good speculating as to how the evidence in relation to HN4 will be given as the Chairman states in ruling 13 of 8 November 2018 (at para 7):

> "The manner in which the evidence of HN4 will be received is an issue which must be considered when intelligence reports

> produced by HN4 and others have been examined. The restriction order will contain a proviso that it will not prevent HN4 from giving public evidence about the deployment under a cypher. It is a matter for my judgment, not that of the risk assessor, whether and, if so, how this can be achieved".

71. The Inquiry will keep all matters under review. A restriction order may be revoked at any time. The Chairman made restriction orders on the basis that detailed public evidence is provided by an officer under his cipher, notwithstanding the risk this may lead to the identification of his cover name, as in the case of HN21 (see "Minded to" note 9 and Ruling 8 at para 5).

72. I consider the restriction orders under challenge at paragraphs 82 and 83 below. None of those decisions, individually or cumulatively, arguably frustrate the purpose of the Inquiry.

Grounds 2-4

73. Ms Kaufmann made no oral submissions in relation to these grounds. She relied on her written submissions dated 30 October 2018 prepared for the hearing on 4 December 2018 and on the Claimants' amended perfected statement of facts and grounds.

Ground 2: Unfairness

74. The Claimants contend that it was unfair to them that having been designated as core participants in the Inquiry the Chairman then took steps which excluded them from effective participation in the Inquiry, or an aspect of it, without having proper regard to the consequences.

75. In my view this submission really adds nothing to Ground 1. I consider it to be unarguable for the reasons I have given under Ground 1. The Ruling recognised the difficulties and disadvantages of withholding the identity of undercover officers from core participants in the Inquiry, and the public interest in effective participation by core participants, but nonetheless restriction orders may be necessary in the public interest in individual cases.

76. The Claimants further contend that the decisions were procedurally unfair as a result of the process by which they were reached. They complain that they had less than two weeks to consider the anonymity applications, that the documents that were disclosed were heavily redacted and/or gisted, and that in respect of all the decisions under challenge the level of redaction and gisting goes far beyond that required by Rule 12 of the Inquiry Rules 2006, or any other legal requirement.

77. I do not consider that it is arguable that the preparation time was insufficient. In my judgment, having read the CLOSED material, the redactions and gisting of the documentation were justified to protect the identities of the undercover police officers in respect of whom restriction orders were made.

Ground 3: The Chairman has failed to apply, or has acted in a way which is contrary to, the Ruling

78. The Claimants contend that the Chairman failed to apply the Ruling when making the 23 decisions.

79. At paragraph 172 of the amended perfected statement of facts and grounds the Claimants identify what they contend are inconsistencies between the Ruling and the Chairman's approach in the decisions under challenge:

> "a. as noted above in relation to ground 1, the Chairman has failed to have regard to the impact of the restriction order under consideration on the Inquiry's ability to allay public concern and the factors identified at A3 of the legal principles ruling;
>
> b. in relation to the assessment of restriction applications under s.19(3)(a) [of the 2005 Act], in particular on the basis of restriction being necessary in order to give effect to the Article 8 rights of the applicant and/or his/her family, the Chairman has failed to consider the public interest identified in A3 of the legal principles ruling and has therefore failed properly to address whether the interference that would be occasioned by disclosure is 'necessary' and proportionate – see C3(7) and (8);
>
> c. the Chairman has failed to have regard to the tendency of restriction orders to damage public confidence in the Inquiry's ability to get to the truth;
>
> d. the Chairman has failed to have regard to the fact that unpublished and untested evidence would tend to increase speculation about the reliability and impartiality of the Inquiry process;
>
> e. the Chairman has failed to have regard to the fact that it will be necessary to obtain evidence from non-state witnesses in order to make properly informed determinations in relation to many of the central issues in the Inquiry;
>
> f. the Chairman has failed to have regard to the fact that disclosure of cover names is necessary, where possible, to enable core participants, witnesses and the public to participate effectively in the Inquiry and to treat them with fairness;
>
> g. the Chairman has failed to have regard to the gravity of the subject matter expressed in the public concerns which gave rise to the Inquiry and the particular importance attached to openness in the context of allegations of wrongdoing on the part of the state;
>
> h. the Chairman has failed to have regard to the fact that the public interest threshold for restriction is not lower in a public inquiry than in litigation;
>
> Further,
>
> i. in determining whether the case for a restriction order is made out, the Chairman has failed to follow the steps identified in paragraph [152] of the legal principles ruling."

80. Ground 3 is in the main in reality another way of putting Ground 1. I refer to the reasons which I gave under Ground 1. I am entirely satisfied that Sir John (1) adopted the Ruling as the basis for his decision-making in each case, and (2) applied the principles and approach set out in the Ruling, in so far as they were applicable to the facts of the particular case.

81. As for the contention that he failed to follow the steps identified in paragraph [152] of the Ruling in determining whether the case for a restriction order is made out, I agree with Lang J that he was entitled to draft his decision as he wished, so long as in each case he directed his mind to the relevant issues and gave adequate reasoning for his decision. I am satisfied that he did.

The 23 Individual Decisions

82. Having read the OPEN and CLOSED material I have reached the conclusion in relation to each decision that it is unarguable that the Chairman has failed to apply, or has acted in a way which is contrary to the Ruling or that any of the decisions disclose any arguable error of law.

83. I am satisfied that the Chairman in each case considered the relevant factors. There was no need for him to incorporate the Ruling into each decision, or to refer to each of the relevant factors that he took into account. Unsurprisingly, appreciating the importance of openness, when granting an application for a restriction order in respect of a cover name, the Chairman focussed in his written reasons on the specific reason(s) for making the order.

(A) The SDS Officers

i) HN8 – The Chairman was entitled to find that the publication of his/her cover name would give rise to a real risk of serious interference with his/her physical integrity and seriously impair his/her ability to pursue his/her career. He concluded, as he was entitled to on the evidence, that it was not in the public interest to run those risks and not necessary in order to fulfil the Inquiry's terms of reference.

ii) HN9 – The Chairman accepted, as he was entitled to do, that there was a high risk of a severe depressive episode and a very high risk of suicide if his cover name was published. Having regard to the evidence of his deployment and his personal circumstances, the risk of infringing his rights under Articles 2 and 8 ECHR outweighed the public interest in publication.

iii) HN21 – The Chairman was entitled, following a CLOSED hearing and after careful consideration, to accept the consultant psychiatrist's opinion that if his/her cover name was disclosed, his/her psychiatric symptoms would be likely to worsen, and the recommended treatment would be less likely to be effective. The Chairman was entitled to grant the restriction order on the basis that HN21 would give evidence to the Inquiry, and at least some contemporaneous reports exist and can be published without undermining his/her anonymity.

iv) HN53 – On the basis of the CLOSED material the Chairman was entitled to accept the risk assessment that the impact of publication of HN53's cover name would put his/her safety, even life, at risk. Further, there would be significant damage to the public interest for reasons which cannot be disclosed.

v) HN86 – The Chairman was entitled to accept the evidence of the consultant psychiatrist. Further, in weighing up the competing public interest factors the Chairman was entitled to give particular weight to the public interest in obtaining the evidence about HN86's work in operational charge of the SDS and that s/he was willing to provide evidence to the Inquiry if his/her cover name was not disclosed.

vi) HN87 – On the CLOSED evidence before the Chairman I consider that he was entitled to make the restriction order.

vii) HN91 – The Chairman was entitled to conclude that because of HN91's current sensitive role in the police, there are significant risks associated with disclosure of his/her cover name. The nature of these risks is dealt with in the CLOSED material.

viii) HN101 – The Chairman was, in my view, entitled to rely upon the opinion of the psychologist, whose report is in the CLOSED material, concerning the effect of disclosure on HN101. The Chairman had proper regard to the public interest in receiving evidence from HN101 which, s/he living abroad, would only be provided if his/her cover name was not disclosed.

ix) HN112 – The Chairman was entitled on the CLOSED material and following a CLOSED hearing to accept the evidence of the consultant psychiatrist as to the significant risk to HN112's mental health if his identity (covert or real) is revealed, and also to conclude on the evidence that non-disclosure would not impede fulfilment of the terms of reference.

x) HN355 – Having regard to the CLOSED evidence concerning his/her adult child's circumstances I am satisfied that the Chairman was entitled to conclude that the interference with the Article 8 ECHR rights of HN355 and his/her adult child would be disproportionate and unjustified, and outweighed the public interest in disclosure of his/her cover name.

xi) HN4 – The Chairman was entitled to accept the expert psychiatric opinion and to consider that a restriction order should be made.

(B) The NPOIU Officers

xii) EN33 – On the basis of the CLOSED material evidence, the Chairman was entitled to conclude that publication of EN33's real and cover name would give rise to a real risk to EN33's safety and wellbeing and that a restriction order should be made in respect of the real and cover names of EN33 in the public interest.

xiii) EN36 – Having regard to the CLOSED material the Chairman was entitled to find that publication of EN36's real or cover name would give rise to a real risk to the safety of EN36. Further, it would not be in the public interest to do so.

xiv) EN39 – On the CLOSED material the Chairman was entitled to accept the detailed evidence of EN39 as to his/her deployments which give rise to a real risk of harm to his/her and his/her family's personal safety. Further, it would not be in the public interest to publish his/her real and cover names as s/he is a serving officer.

xv) EN40 – Having regard to the CLOSED material, which includes a risk assessment, the Chairman was entitled to conclude that EN40's life and safety would be at real risk if his/her real or cover names are disclosed. The full nature of those risks is only to be found in the CLOSED material.

xvi) EN41 – On the CLOSED material the Chairman was entitled to make a restriction order in respect of both real and cover names, having regard to a risk assessment that he was entitled to accept that EN41 would face a real risk of serious harm if such an order was not made.

xvii) EN42 – I am satisfied on the CLOSED material that the Chairman was entitled to make the order that he did on the basis of risk to EN42's safety and the risk of damage to the public interest. I am informed that in the light of fresh evidence the Chairman will be reviewing this order.

xviii) EN43 – EN43 is currently a serving police officer. Having given careful consideration to EN43's CLOSED evidence and the CLOSED material, the Chairman was entitled to accept the detailed account of deployments given by EN43. The Chairman was entitled to conclude that there would be some risk to EN43's safety, and it would not be in the public interest if his/her identity (covert or real) was to be made known.

xix) EN47 – On the basis of the CLOSED evidence the Chairman was entitled to accept the risk assessment that if either EN47's real or cover identity is revealed there is a real risk to the safety of EN47 and his/her family. Further, for reasons that cannot be disclosed, there is a real risk of significant damage to the public interest.

xx) EN288 – The statement in the "ruling of 30 October 2018" (at para 50) that "The threat of serious physical harm was and is reliably established" is fully supported by the CLOSED material. The Chairman was entitled to make the restriction order in respect of real and cover names, having regard to the CLOSED material.

xxi) EN507 – On the basis of the CLOSED material and by reason of his/her deployment for the NPOIU, the Chairman was entitled to find that publication of his/her cover name would create some risk to his/her safety. In addition, it is clear from the CLOSED material that such publication would not be in the public interest for reasons that cannot be disclosed.

xxii) EN808 – Having regard to the CLOSED material which includes statements by EN808 about his/her deployments, which the Chairman was entitled to accept, the Chairman was entitled to conclude that publication of EN808's identity would create an unacceptable risk to the safety of EN808, his/her family and others.

xxiii) EN1001 – The Chairman was entitled to accept EN1001's detailed account of his/her deployments. Having regard to the CLOSED material it is clear that disclosure of his/her identity in respect of both real and cover names would plainly not be in the public interest for reasons that cannot be disclosed.

Ground 4: In relation to HN87, failure by the Chairman to give any, or any adequate reason for reaching his decision to restrict the cover name

84. The Chairman has given no OPEN reasons for his decision to restrict the cover and real names of HN87. The Claimants contend that he should have done so. I have read the CLOSED material, including the reasons for the Chairman's decision. I am satisfied that they contain reasons which justify restricting publication of HN87's real and cover names.

85. I agree with Lang J that it is unarguable that there is an absolute duty to give reasons for a restriction order where to do so would defeat the object of the restriction order by disclosing highly sensitive and confidential information.

86. Having regard to the CLOSED material I consider that the Chairman is not required to give OPEN reasons for his decision.

Delay

87. The abridged time limit in s.38 of the 2005 Act exists to ensure the efficient conduct of an inquiry, and to allow work to progress. In *R (Associated Newspapers Ltd) v The Rt. Hon. Lord Justice Leveson (As Chairman of the Leveson Inquiry)* [2012] EWHC 57 (Admin), Toulson LJ said (at para 39): "Where there is an issue of principle which requires to be considered by the court, it is generally speaking best done at the earliest opportunity". I agree.

88. Mr Hall submits that the Claimants' challenge to the decisions made in the ruling of 30 July 2018 is out of time as it should have been made within the 14-day time limit in s.38(1) of the 2005 Act (see para 28 above). There had been 9 earlier decisions to restrict publication of names which are not the subject of this judicial review, despite the fact that it is the Claimants' submission that the Chairman's error of law infected all the decisions he made. Ms Kaufmann said that only became apparent when the Claimants read the Strategic Review (see para 18 above). However, Mr Hall submits, that being so, the Claimants should have challenged the first ruling after the publication of the Strategic Review by a claim form filed within 14 days of that decision. There was a ruling on 15 May 2018 (and subsequent rulings on 23 May and 6 June 2018). There was no justification, Mr Hall submits, for waiting until the ruling of 30 July 2018, in respect of which the claim form was filed on 13 August 2018.

89. Ms Kaufmann responds that whilst the position changed when the Claimants saw the Strategic Review, it was that document together with the Chairman's letter of 27 June 2018 in response to Ms Kaufmann and Ms Brander's note of 21 June 2018 and the ruling of 30 July 2018 that together demonstrated the error in the Chairman's approach.

90. I consider, having regard to the paucity of the evidence on which the Claimants rely in support of their contention that the Chairman adopted the wrong approach to restriction orders, that there was no delay in the bringing of this claim.

Conclusion

91. In my judgment, for the reasons I have given, none of the grounds of challenge are arguable. Accordingly, this application is refused.