IN THE MATTER OF THE INQUIRIES ACT 2005
AND IN THE MATTER OF THE INQUIRY RULES 2006

THE PUBLIC INQUIRY INTO THE DEATH OF DAWN STURGESS

NOTE IN RESPECT OF CONFIDENTIALITY CLUBS ON BEHALF OF OPERATION VERBASCO

INTRODUCTION

1. At the OPEN hearing on 15 July 2022, Counsel for the family of Dawn Sturgess ("Family") submitted that the Chair should consider whether a confidentiality ring may be appropriate in respect of the names of Counter-Terrorism Policing ("CTP") and Government ("HMG") staff which may otherwise be protected from disclosure by a restriction order.

2. Following the CLOSED hearing, the Chair directed that Op Verbasco file an OPEN written response to that submission on behalf of the Family. The same direction was made in respect of HMG.

3. In this Note we respond to the Family's submission. We also address a related point, arising from §16 of our Note dated 27 June 2022.

CONFIDENTIALITY RING WOULD BE WRONG IN PRINCIPLE

4. The proposal advanced on behalf of the Family is that Counsel for the Family who hold security clearance at the level "Developed Vetting" ("DV") should be permitted access to the names of CTP and HMG staff in a secure environment, subject to conditions that they do not disclose those names to their lay or professional clients or to any other counsel on their team who do not hold DV. In contrast to the role of a Special Advocate ("SA"), the Family envisaged that, after being fixed with the knowledge of these names, Counsel would continue to act in the normal way for their clients and alongside the members of their team who do not hold DV. This amounts to what the authorities call a "confidentiality ring" (see e.g. *Competition and Markets Authority v Concordia International Rx (UK) Ltd* [2018] EWCA Civ 1881, [2019] 1 All ER 699).

5. There is clear and compelling authority that a confidentiality ring, such as might be used in litigation in relation to commercially sensitive information, ought not to be deployed as an alternative to a successful claim for public interest immunity ("PII"), certainly in cases of national security. The same reasons of principle apply with equal force in respect of restriction orders made pursuant to s19(3)(b) of the Inquiries Act 2005 because they are necessary in the public interest, and especially in the circumstances of the application made by Operation Verbasco, which is founded on a real risk of harm to national security.

6. In *Concordia International* King LJ, in a judgment with which Simon LJ and Dame Elizabeth Gloster agreed, made the following observations in respect of the use of confidentiality rings in claims for PII:

   a. It is a "*fundamental principle that once a court has held that material is protected by PII it cannot be disclosed, whether into a confidentiality ring or otherwise"* (§71).

   b. The use of a confidentiality ring in competition cases *"has no place in relation to material protected by PII for all the reasons articulated in Somerville v Scottish Ministers [2007] 1 WLR 2734 and R (AHK) v Secretary of State for the Home Department [2014] Imm AR 32"* (§74).

      i. In *Somerville*, the House of Lords considered a protocol under which senior counsel was permitted to inspect documents over which the Scottish Executive made a claim for PII. This was held to be *"wrong in principle"* and *"gave rise to very real practical difficulties"* (§152) leaving counsel *"in a very difficult situation where, as a result of reading the documents, he had information that he was not able to reveal to, or discuss with, his clients or instructing solicitors"* (§153).

      ii. In *AHK*, Ouseley J noted the following particular reasons why a confidentiality ring ought not to be employed:

         1. There is a risk of inadvertent disclosure (§23).

         2. There is a risk that, if disclosure takes places, the source of the disclosure is unknown and suspicion falls on the innocent (§24).

3. A confidentiality ring requires the tribunal to make the invidious assessment of who is "*safe*" to be in the ring (§25).[1]

4. It creates *"very serious"* problems between client and lawyer (§27).[2]

c. As to whether the use of SAs would represent an alternative option, such an appropriate case would be exceptional, never automatic and a course of last resort (§75).

7. That decision, in the context of PII, reads across entirely to the Op Verbasco application for a restriction order in respect of the names of CTP staff. That application is made primarily on the basis of national security (see OPEN submissions dated 31 May 2022 at §26). The same considerations apply as would in an application for PII.

8. We note that no submission has been made that SAs should be appointed in this case. That is no surprise, because SAs would add no value, there being nothing about an individual's name on which an advocate may wish to make submissions, and in any case CTI essentially fulfils that function in inquiry proceedings. Thus SAs would not help the Family, for two reasons:

[1] The fact that some members of the Family team presently enjoy DV does not detract from this point: (i) the issue is one of principle, rather than whether by happenstance some members of a legal team benefit from enhanced clearance, and (ii) it is unlikely that a confidentiality ring could be set up on the basis that one limited class of CPs may be admitted to it – more likely are further applications by other CPs.

[2] In this regard the approach taken in *R v Botmeh & Alami* [2001] EWCA Crim 2226, [2002] 1 WLR 531 is instructive. Giving the judgment of the Court (consisting of Rose, V-P; Hooper and Goldring JJ), the Vice-President noted at [26]:

> In the course of the hearing of this appeal we enquired of Mr Mansfield whether, if he were permitted to look at the matter in relation to which public immunity was claimed, he would be willing to give an undertaking not to disclose its contents to his lay clients. Having considered the matter overnight, consulted his professional body and taken his `clients' instructions, he declined to give such an undertaking. He gave six reasons: a substantial risk of undermining public confidence and the clients' confidence in the profession; the inability of counsel to perform his duty advising his clients as to their best interests; proper instructions from a client not in a position to appreciate the significance of the material would be precluded; counsel might receive material adverse to his clients about which he could not obtain proper instructions; counsel would have serious practical difficulties in conducting the case without accidentally disclosing confidential material; and, if the material could not be disclosed to counsel's instructing solicitors, the matter could be compounded because of the solicitor's unrivalled knowledge of the case and professional duty of disclosure to the lay clients. This approach has subsequently been endorsed in AG's Guidance on the Disclosure of Information in Criminal Proceedings (2000). In the light of these considerations, this court proceeded to examine the matter ex parte.

a. First, knowing the names of redacted officers is very unlikely to affect the Family's position (especially in circumstances where they are to be ciphered by Op Verbasco, and so connections between individuals within and between documents can be identified); and

b. Secondly, CTI will know the names of redacted officers and *"in most cases Counsel for the Inquiry are well able to carry out the role that special advocates would carry out"* (see the Ruling of Sir John Saunders, the Chairman of the Manchester Arena Inquiry, on an application for Special Advocates, 7 October 2021[3] at §9). In this case, CTI will be in a position to assess whether ciphers have been applied accurately and whether there is in fact any relevance in particular names.

9. A confidentiality ring would be unworkable in this case. The potential problems would be particularly acute because only some of the counsel team for the Family have DV. It would also unfairly expose the individuals with access to restricted names to increased risk of targeting.

OUR 27 JUNE 2022 NOTE – §16

10. At §16 of Operation Verbasco's OPEN Note (27 June 2022) in response to CTI's Note (10 June 2022), Operation Verbasco proposed giving proper consideration to whether it could facilitate access to specific individual names for Core Participants ("CPs") on receipt of a reasoned request, without the need for an application to the Chair, even though the names would be subject to a restriction order.

11. Operation Verbasco has reflected on this proposal following the OPEN and CLOSED hearings. While acknowledging it is arguing against its own proposal, it now considers that this proposal suffers from the same issues, set out above, as make a confidentiality ring both unprincipled and impractical in these proceedings.

12. As to matters of principle:

a. It wrongly moves the decision about the balancing exercise from the Chair to Operation Verbasco;

[3] See here.

b. It would mean differential access to information for different CPs who are not already privy to the CLOSED information; and

c. It would also, in all likelihood, involve permitting access to legal representatives but not to their clients.

13. As to matters of practicality, in addition to those above in respect of confidentiality rings generally, it is likely to apply to such a small category of individuals (those in respect of whom it cannot be determined from the ciphered material whether to apply to have them called as witnesses) that it would be disproportionate.

14. For those reasons, Operation Verbasco withdraws this proposal. Where there are individuals the identities of which a CP believes needs to be disclosed to them, based on their cipher, the appropriate course is an application to the Chair to vary any restriction order made. Operation Verbasco will of course give careful and individualised consideration to its response to any such applications that may be made.

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