

Neutral Citation No: [2023] NICoroner 16

Ref: HUD12304

*Judgment: approved by the court for handing down
(subject to editorial corrections)**

ICOS No:

Delivered: 20/10/2023

IN THE CORONER'S COURT IN NORTHERN IRELAND

BEFORE THE CORONER
MR JUSTICE HUDDLESTON

IN THE MATTER OF AN INQUEST INTO THE DEATHS OF
DANIEL DOHERTY AND WILLIAM FLEMING

RULING ON APPLICATION BY CERTAIN WITNESSES
TO GIVE EVIDENCE REMOTELY

Introduction

[1] Applications for special measures in the form of having the ability to give evidence to this inquest from a remote facility through electronic means have been received from the following Special Military Unit ("SMU") witnesses F, G, I, J, P, Q, R and T. The applications follow applications for Anonymity and Screening that have been advanced in relation to them as part of the PII Applications in this case. These applications build on those earlier applications. I have given a ruling on PII and a ruling on applications for anonymity and screening by certain witnesses - see [2023] NICoroner 4 and 5. The present applications for special measures to give evidence via live link have been circulated to the properly interested persons (PIPs) and have been objected to in writing by those who represent the next of kin (NOK).

[2] I have yet to receive witness statements from Soldiers F and G. Although I have received a witness statement from Soldier T, his solicitor has asked that he is excused from giving evidence and medical evidence is being sought in that regard. I will therefore reserve my decision on the applications from these former soldiers until a later date.

[3] As I understand it Soldier H is to attend the Inquest in person to give evidence. The position in respect of any other witnesses (i.e. those other than those in respect of which applications are dealt with in this ruling) will be kept under review.

[4] Subject to those considerations each of the applications referred to above are grounded on the following:

(i) A general statement of the legal principles - which I do not rehearse;

- (ii) Submissions made on behalf of the soldiers – individually in relation to F, G and Q and a joint submission in relation to I, J, P, R (and later adopted by T).

[5] I also have had regard to the information that has been submitted in support of the PII Applications where relevant, namely the Ministerial Certificates dated 5 March 2023 and 15 April 2023 signed by the Secretary of State for Defence and the sensitive schedules thereto.

Consideration

[6] I do not, in this ruling, rehearse again but rely on the legal principles and my consideration of them in the previous Rulings given in this inquest ([2023] NICoroner 4 and 5) insofar as relevant to this ruling. Broadly, in those earlier Rulings in relation to the balancing exercise which I had to conduct I felt that overall non-disclosure of the names of those witnesses was to be preferred and so granted anonymity & screening. As I said then I was adopting a precautionary approach as per *Re Jordan's Applications* [2014] NIQB 11. I have adopted that same approach in relation to these new applications as I consider the questions of security under consideration to also apply to these specific applications.

[7] There are very broad common law powers available to a Coroner to regulate the proceedings before them (see, for example, Mrs Justice Keegan's findings in the Ballymurphy inquests ([2021] NICoroner 6 at paras [26] and [27]) and the McElhone inquest ([2021] NICoroner 1 at para [9])). In addition, in certain circumstances, Article 2 ECHR and section 6 of the Human Rights Act 1998 may require the grant of special measures, although I have already granted anonymity and screening to Soldiers I, J, P, Q and R. Third, the participation in court proceedings in Northern Ireland by live link may be directed by a court in accordance with section 57 and Schedule 27 to the Coronavirus Act 2020 (the "2020 Act") if the court considers it is in the interests of justice to make such a direction.

[8] This latter piece of legislation is scheduled to expire on 24 September 2023 (i.e. before the scheduled date for the reconvening of this inquest) but is likely to be renewed. Regardless of its specific provisions regarding remote hearings I am satisfied that as coroner I have the requisite powers to make this determination for the management of the proceedings before me.

[9] Turning to the specific question of giving evidence remotely via live link, those who represent the NOK acknowledge that the Coroners (Practice and Procedure) Rules (Northern Ireland) 1963 (the 'Rules') do not expressly make provision for the giving of evidence electronically and cite the provisions in the English and Welsh Rules – the Coroners (Inquests) Rules 2013 – which do, albeit with certain caveats. Whilst the analogy is helpful it goes without saying that it is not actually binding upon this Inquest or my determination of the issue before me. In that context what other Inquests do on this point is informative and possibly persuasive but ultimately is not binding upon me in relation to the present applications.

[10] The specific question that I must address is what is appropriate in the interests of justice in this case in light of all of the circumstances. I have considered that question in relation to each application before me.

[11] It will be clear from my earlier Rulings, that I have accepted for each of the witnesses to which the applications relate, that there is an identifiable security risk –

one that is more than fanciful. I also made it clear that on questions of security I am adopting a precautionary approach as per *Re Jordan's Applications* [2014] NIQB 11 (at para [118]). I adopt that same approach in relation to these applications.

[12] On the specific question as to what is in the interests of justice in the context of this Inquest, I am of the view that the additional facility of giving remote evidence should be allowed. I have come to this conclusion for the following reasons:

- (a) There are self-evidently the security issues which attend these witnesses - security issues which are confirmed by the PII certificates and closed sensitive schedules which I have seen. I believe that, consistent with those concerns, evidence can as conveniently be dealt with through its provision via live link. That I feel is both proportionate and reasonable in the circumstances and serves to address those security issues.
- (b) In most cases the witnesses who are rostered to give evidence to this Inquest are now of advanced years and generally have issues which impact upon their individual overall ability to travel - particularly when one takes into account their security concerns.
- (c) Whilst physical attendance is generally to be preferred (as the Lady Chief Justice's recent Guidance on Physical (In-Person), Remote and Hybrid Attendance (15 May 2023) makes clear) equally, as the Pandemic proved, we can still operate the courts on a remote basis and, as the Guidance also makes clear, each case should be considered on its facts. One of those facts to be taken into account is the physical location of the party to give evidence - i.e. whether they reside in the jurisdiction or not.
- (d) In that specific regard, the 2020 Act (section 57) empowers courts - including inquests such as this - to hear evidence remotely - putting on a statutory basis the very question which is at the heart of this application, namely, the question of what is in the interests of justice in all of the circumstances.

[13] On that issue one's biggest concern - a point which the NOK make clear in their submissions - is that everyone should have a proper opportunity to gauge the demeanour of the witnesses who are called to give evidence. In the context of what is an investigatory process, such as is the case here, however, I am satisfied that the witnesses can properly and adequately be tested on their evidence to the Inquest through the questioning process to which they will be subjected by both Coroner's counsel and those that represent the other parties to this inquest and that doing so over a live link will not be a disproportionate impediment on the Inquest.

[14] I am satisfied from my experience to date, in relation to those witnesses that have already been heard remotely (where *ex tempore* permission was sought and granted) (namely Soldiers M, L and O), that this is an effective and proportionate approach to this issue. It obviates the need for further security measures to be considered and, in my considered view, satisfies the test of what is in the interests of justice overall.

[15] I do not agree with the NOK that such an approach is an impingement on open justice. Indeed, there is substantial jurisprudence from which to draw which confirms that it need not be - both locally (see the ruling of Humphreys J in the *Coagh Inquest* [2022] NICoroner 8) but also from the England and Wales Court of

Appeal in cases such as *R(SS) v SSHD* [2018] EWCA Civ 1391. These cases carefully have considered whether the question of taking evidence remotely is truly an impediment to the finding of truth – which is after all the fundamental role of this Inquest. As Leggatt LJ put it in *R(SS) v SSHD* [2018] EWCA Civ 1391 at para 36, demeanour per se is not necessarily a guide to truthfulness. It is far more important for the person who is questioning a witness to have the opportunity to draw out inconsistencies in the evidence. That, I feel, they can still do in a case such as this which relies in a large part on questioning in relation to contemporaneous documents and what witnesses recall of events almost 40 years ago. I do not think that that process is affected in this case to such a degree that it tips the balance in favour of me requiring personal attendance of the various witnesses.

[16] Accordingly, my ruling is to grant the applications that the witnesses known as Soldiers I, J, P Q and R, be allowed to give their evidence remotely. As noted above, I will deal with the applications made by Soldiers F, G and T at a later date. For the avoidance of any doubt, my view is not swayed in any way by the continuation (or otherwise) of the 2020 Act. My view would be the same even if it is not renewed.

[17] My consequential directions are:

- (a) That an independent person – ideally a CSNI representative or someone else approved by me for the purpose – be present at each remote location to both assist and monitor the provision of evidence;
- (b) That not less than 30 minutes before the witness is required to give evidence there is a test of both the visual and audio quality of the live link;
- (c) That the witness has available to him/her at the remote location a full set of the Inquest materials in electronic form. I have separately issued a ruling on witness bundles and their use which reflects greater detail around this; and
- (d) The public and media have access to enable them to hear the evidence. They will not, as a result of these rulings (when taken collectively), know the identity of the witness or be able to see him or her. In that regard, even though it should not happen other than inadvertently, I remind everyone that it is an offence to make an unauthorised recording or an unauthorised transmission of an image of, or sound made by, any person while that person is participating in court proceedings through a live video link (section 102C(2) of the Judicature (Northern Ireland) Act 1978 as inserted by Schedule 27 to the 2020 Act).

[18] If required, I will hear the parties as to any further consequential directions.