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IN THE HIGH COURT OF JUSTICE IN NORTHERN IRELAND

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KING'S BENCH DIVISION

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IN THE MATTER OF THE INQUESTS TOUCHING THE DEATHS OF MICHAEL JAMES RYAN, ANTHONY PATRICK DORIS AND LAURENCE McNALLY

AND IN THE MATTER OF 'SOLDIER F', A PERSON SERVED WITH A SUBPOENA IN AID OF AN INFERIOR COURT

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Bobbie-Leigh Herdman (instructed by the Legacy Investigation Unit) for the Applicant
Mark Mulholland KC and Michael Egan (instructed by McCartan Turkington Breen, Solicitors) for the Respondent

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SCOFFIELD J

Introduction

[1] The coroner hearing an inquest into the deaths of Michael James Ryan, Anthony Patrick Doris and Laurence McNally on 3 June 1991 has asked the court to transmit a certificate of default to the Court of Session in Edinburgh in relation to the failure of 'Soldier F' to appear in answer to a writ of subpoena requiring him to attend and give evidence in those proceedings. The significance of such a certificate of default being issued is that it is then a matter for the court in the jurisdiction in which the subpoena was served to determine whether (and, if so, how) the recipient should be punished for the default. Soldier F accepts that he was in default of a subpoena which was validly served; but nonetheless invites the court, in the exercise of its discretion, not to issue and transmit a certificate to that effect.

[2] The coroner (Humphreys J, sitting as a coroner) was represented by Ms Herdman; and Soldier F was represented by Mr Mulholland KC and Mr Egan. I am grateful to all counsel for their helpful written and oral submissions.

Factual background

[3] For present purposes it is unnecessary to set out in any great detail the factual background to this application. The following brief summary will suffice. The inquest referred to above, known as 'the Coagh Inquest', is in its final stages. It relates the deaths of three individuals in Coagh in the course of an Army operation in June 1991. Soldier F was a member of the special military unit which conducted the arrest operation which resulted in the deaths. He was involved in the planning of the operation and discharged his weapon in the course of it. The operation was designed to apprehend an IRA team who (intelligence suggested) were intending to kill a particular individual. The army mounted an operation which involved them lying in wait to intercept the terrorists. The incident gained notoriety and has been suggested to indicate a "shoot to kill" approach on the part of the security forces, rather than a genuine attempt to arrest and detain. Soldier F has provided a witness statement to the coroner but would not attend voluntarily to give evidence in the course of the inquest.

[4] He was subsequently served with a subpoena ad testificandum dated 30 June 2023 requiring him to attend and give evidence at Laganside Courthouse in Belfast on 31 July 2023. Two judges of the High Court have considered the issue of compelling soldier F to give evidence at the inquest in recent times. Rooney J ordered that the writ of subpoena should issue in special form for service outside the jurisdiction. McBride J later dismissed an application to set aside the subpoena, grounded on Soldier F's health issues, on 27 July 2023. This determination was not appealed.

[5] Soldier F then consulted with his legal representatives. His solicitors wrote to the coroner on 28 July 2023 advising that he did not intend to comply with the subpoena. He did not do so. The coroner then, by means of correspondence of 16 August 2023, requested that the High Court issue and transmit a certificate of default to the Court of session in Edinburgh in respect of soldier F's failure to answer the subpoena. This came before me as the duty judge during that week of the long vacation. On its face, the application appeared to be a straightforward one. The coroner's application was grounded on affidavit evidence addressing both the personal service of the subpoena on the respondent and his failure to attend or appear at the relevant court sitting. However, I provided Soldier F's representatives with an opportunity to make submissions should they wish. That resulted in an indication that they wished to contest the application and a short hearing was convened for that purpose on 8 September 2023.

[6] As noted above, the inquest is at a very advanced stage. Closing written submissions have been provided on behalf of the properly interested persons, including Soldier F. However, the coroner has not yet delivered any findings.

[7] Each of the next of kin of the deceased have, in their submissions to the coroner, alleged criminality on the part of soldiers involved in the Coagh operation,

including Soldier F. These include allegations of criminal negligence, unlawful discharge of weapons and planning and executing a 'shoot to kill' operation. In light of this, although Soldier F denies any criminal conduct alleged against him, he is concerned that the coroner may in due course submit a written report in respect of him to the Director of Public Prosecutions for Northern Ireland (DPP) pursuant to section 35(3) of the Justice (Northern Ireland) Act 2002 ("the 2002 Act"). This is commonly described to as a coroner 'referring' someone to the DPP. Where this occurs, the DPP may conclude that criminal proceedings should be commenced, if the evidential and public interest tests are met; or may request the Chief Constable of the Police Service of Northern Ireland to conduct further investigations.

Relevant statutory provisions

[8] Section 67 of the Judicature (Northern Ireland) Act 1978 provides for the issue of subpoenas to be served in other parts of the United Kingdom. Such a subpoena may be served in connection with any cause or matter pending before the High Court, the Court of Appeal or any inferior court or tribunal (such as a coroner's court) in aid of which the High Court may act. Pursuant to section 67(1), a judge of the High Court, if satisfied that it is proper to compel the personal attendance at any proceedings of any witness not within the jurisdiction of the court (or the production by any such witness of any document or exhibit at any proceedings), may order that a writ of subpoena shall issue in special form commanding the witness, wherever he shall be within the United Kingdom, to attend the proceedings. The service of any such writ in any part of the United Kingdom "shall be as valid and effectual to all intents and purposes as if it had been served within the jurisdiction of the court."

[9] Pursuant to section 67(4), every writ issued under section 67 must bear a statement to the effect that it is issued by the special order of a judge.

[10] The key provision for present purposes is sub-section (5). It provides as follows:

> "If any person served with a writ issued under this section does not appear as required by the writ, the High Court, on proof to the satisfaction of the court of the service of the writ and of the default, may transmit a certificate of the default under the seal of the court or under the hand of a judge of the court, if the service was in Scotland to the Court of Session in Edinburgh, and if the service was in England or Wales to the High Court of Justice in London, and the court to which the certificate is so sent shall thereupon proceed against and punish the person so having made the default in like manner as if that person had neglected or refused to appear in obedience to process issued out of that court."

[11] It is common case that there are two conditions to be met before a certificate of default may be issued and transmitted, namely proof of the service of the writ of subpoena and proof of the witness's default. It is also common case that, even where those matters are established to the satisfaction of the High Court, there is no obligation upon the court to issue and transmit a certificate. It has a discretion as to whether or not to do so, signified by the use of the classically permissive word "may." The issue in this application is the manner in which such discretion should be exercised.

[12] For completeness, I should set out section 35(3) of the 2002 Act, referred to above. It provides:

> "Where the circumstances of any death which has been, or is being, investigated by a coroner appear to the coroner to disclose that an offence may have been committed against the law of Northern Ireland or the law of any other country or territory, the coroner must as soon as practicable send to the Director a written report of the circumstances."

Summary of the parties' positions

[13] Ms Herdman submits that this is a straightforward case, where the two conditions for the issue of a certificate of default, namely valid service of the subpoena and a failure to attend proceedings in answer to it, are clearly established. Indeed, it is common case that the subpoena was validly served and not complied with. She submits that, in such circumstances, the court should only exceptionally decline to certify that default.

[14] On behalf of Soldier F, Mr Mulholland argued that the court should exercise its discretion not to certify default because of the prejudice which may arise to his client either in presenting his case in mitigation to the Court of Session or in defending himself in later criminal proceedings which may follow the conclusion of the inquest. This was a case where, by reason of the risk of such prejudice, the court should either decline to issue a certificate or should alternatively stay this application or defer ruling upon it. In this regard, reliance was placed upon a decision of McAlinden J, which was said to be similar to the present case, in which he stayed the application for a certificate of default in respect of a soldier (known as 'M4') involved in the inquest into the death of Thomas Mills, where he had failed to attend in answer to a subpoena to attend an inquest hearing being held before Coroner McCrisken. (The circumstances of that case appear in the judgment of Keegan LCJ in *M4 v The Coroners' Service of Northern Ireland* [2022] NICA 6, in which the Court of Appeal upheld McAlinden J's refusal to set aside the subpoena served upon M4.) The learned judge was careful to emphasise that there ought to be a penalty hearing at some point in respect of M4's failure to comply with the subpoena; but he was persuaded to stay certification in order not to prejudice the case which might be

mounted at that hearing on behalf of M4, in light of his having been referred by the coroner to the DPP at the conclusion of the inquest. I discuss that decision further below.

[15] The coroner's riposte was that McAlinden J's decision arose in materially different circumstances and, insofar as necessary, it was submitted that it was determined without reference to a number of relevant authorities which would have illuminated the approach to be taken to the stay of civil proceedings which are argued to potentially prejudice later criminal proceedings.

Consideration

[16] McAlinden J's ruling in the M4 case ('the M4 Ruling') – which was given ex tempore and is unreported – has been provided to me in the form of a transcript of those proceedings. The ruling is impressive given the fact that it was handed down immediately after argument. It contains a statement of the following principles, with which I am in full agreement:

(1) The starting point in an application such as this is the principle that the rule of law should be protected and prioritised.

(2) Prima facie, a recipient of a subpoena who has not complied with it, as required, has put himself or herself in conflict with the rule of law. In normal circumstances, a certificate of default should be issued upon proof of the two statutory conditions set out in section 67(5).

(3) A discretion is provided to the court as to whether or not it should issue and transmit a certificate of default; but that is a very limited discretion. Examples of when it might be appropriate to exercise discretion not to issue a certificate of default include where some change of circumstance has arisen which was not foreseen when the subpoena was issued.

(4) Another recognised circumstance where exercise of the discretion not to issue a certificate of default *may* arise is where the pursuit of contempt proceedings may prejudice ongoing or contemplated criminal proceedings.

[17] Those principles are confirmed by my own reading and construction of the relevant provisions. It is significant, in my view, that the primary function of the court under section 67(5) is one of certification, that is to say, of satisfying itself that the subpoena was validly served and that there has been non-compliance (see the observations on the statutory use of the word "certify" in *Re Bunting's Application* [2023] NIKB 43, at para [31]). Once those matters have been established, the next natural step would be for a court to ascertain whether and how the witness should be punished for the default which had been established. Indeed, had Soldier F been resident in Northern Ireland, there would not have been any additional 'filter' stage between default and proceedings designed to consider whether and how he should

be punished. The coroner could himself proceed to punish by way of fine under section 17A(6) of the Coroners' Act (Northern Ireland) 1959, where the default related to a failure without reasonable excuse to comply with a notice issued by him under section 17A(1) or (2).

[18] Sections 17A-17C of the 1959 Act were introduced by means of section 49 of, and Schedule 11 to, the Coroners and Justice Act 2009 in order to simplify the process for a coroner wishing to compel the giving of evidence and/or production of documents and for enforcing any such requirement. However, it appears that a coroner also has a separate common law power to commit for contempt of court for failure to appear: see *Jervis on Coroners* (14th edition, Sweet & Maxwell) at paras 12-06 and 12-07; and, to similar effect, Dorries, *Coroners' Courts: A Guide to Law and Practice* (3rd edition, Oxford) at paras 7.189 and 7.190. Any such power has been expressly saved in Northern Ireland by section 17B(1)(c) of the 1959 Act, although the statutory and common law powers cannot both be exercised in respect of the same default. The imposition of a £1,000 fine under section 17A(6) is therefore not the only sanction available in respect of non-appearance at an inquest where the witness has been validly required to attend. Without having to decide this, it also seems to me that it would remain open to a coroner, in an appropriate case, to seek a subpoena from the High Court in aid of the coroner's court under RCJ Order 38, rule 17 even if the relevant witness was resident in this jurisdiction, rather than using the power under section 17A. In any event, the High Court would have power to commit for contempt under RCJ Order 52, rule 1(2)(a)(iii) in relation to non-appearance at proceedings in an inferior court.

[19] It is of course correct that section 67(5) of the Judicature Act provides a discretion, even when the conditions for certification have been met. However, the exercise of that discretion in a way which avoids, or defers, a hearing directed towards punishment for contempt will be the exception rather than the rule. A subpoena will only have been issued under section 67(5) where a judge of the High Court (or Court of Appeal, as the case may be) has been satisfied that it is proper to compel the personal attendance of the witness at the relevant proceedings. The propriety of that compulsion (at the time of the issue of the subpoena) is to be taken as read. An opportunity exists, as occurred in this case, for the recipient of a subpoena to apply to have it set aside. Where no such application has been made, or where such an application has been brought and refused, the propriety of compelling the witness's attendance is confirmed. Subpoenas are to be obeyed. The administration of justice cannot function properly if witnesses can ignore lawful requirements to attend in order to give evidence on matters which require adjudication before the courts. Where a witness wilfully disobeys a subpoena, he or she should expect there to be consequences. That is one reason why the form of a subpoena set out in Appendix A to the Rules of the Court of Judicature (Northern Ireland) 1980, as amended, expresses the subpoena as a command to attend in the name of the Sovereign. I turn, therefore, to the question of whether this case falls within the exceptional category where certification of default should be refused or postponed.

[20] I accept Ms Herdman's submission that this case is materially different from that which was considered by McAlinden J in the case of M4. Crucially, in the M4 case, the inquest had been closed and the coroner had referred the relevant soldier to the DPP under the 2002 Act. Criminal proceedings against M4 were a step closer than they are in this case. More importantly, however, there was no prospect at that point of contempt proceedings forcing or encouraging a change of heart on the part of the recalcitrant witness. In contrast, in the present case it is the coroner's position that there are clear public interest reasons why Soldier F ought to be compelled to attend the inquest to give evidence. The coroner has not given up hope that this might be secured. Indeed, he has declined to close the inquest hearing, notwithstanding that all other steps have (as I understand it) been completed, in order to leave scope for Soldier F to give evidence in the event that any contempt proceedings might bring about such a result. The coroner's submissions in this application indicated that he still hopes to hear from Soldier F and will permit addendum submissions to be lodged prior to his findings should that occur. It would assist him in his investigation of the circumstances of the deaths to have oral evidence from Soldier F. Such evidence would assist in informing his findings, including the question of whether any reference to the DPP should be made in respect of Soldier F or others. The inquest is due to be reviewed shortly, at which point the coroner hopes to have an update on the progress of the default proceedings in order to inform the way forward. The coroner's approach in this regard is bound to weigh heavily against a deferral of certification.

[21] Mr Mulholland told me from the Bar, in terms, that Soldier F would not be attending the inquest under any circumstances. He had reached this decision on an informed basis, after receiving legal advice about its possible ramifications. It remains to be seen whether Soldier F remains steadfast in that position if there is a more immediate prospect of punishment for contempt. However, even assuming that his position remains unchanged, it cannot be the case that Soldier F can avoid contempt proceedings at this stage simply on the basis of continued expressed unwillingness to comply with his legal obligation. That is particularly so in circumstances where it has been made clear that a variety of special measures could and would be made available to facilitate Soldier F giving his evidence in light of the health concerns he has raised. In addition, he would enjoy the right to exercise his privilege against self-incrimination in the course of the inquest hearing should he attend to give evidence. That is expressly protected by common law and rule 9(1) of the Coroners (Practice and Procedure) Rules (Northern Ireland) 1963.

[22] I reject the submission that any contempt proceedings in Scotland would be unfair or anomalous because the respondent would be subject to imprisonment in those proceedings, rather than merely a £1,000 fine if he were resident in Northern Ireland and proceeded against under article 17A(6) of the 1959 Act. For the reasons discussed at para [18] above, that is much too simplistic an analysis. I further reject the argument that the Court of Session would be unlikely to impose more than a £1,000 fine and that this would be of little persuasive or coercive value in

encouraging Soldier F's attendance. The course to be adopted by that court is a matter for it; but it is in no way restricted to a modest financial penalty.

[23] Importantly, I also accept the submission on behalf of the coroner that Soldier F has not established, to the requisite degree, that there is the type of prejudice to future criminal proceedings which would render it appropriate, exceptionally, for the court not to issue a certificate of default. There are no extant criminal proceedings against Soldier F at present. Even assuming that such criminal proceedings are likely – which, at this stage, is quite a leap – there is a reasonably high threshold to be crossed before contempt proceedings will be stayed for fear of prejudice to contemplated criminal proceedings.

[24] I examined a similar (although not identical) issue in *Re JR131's Application* [2021] NIQB 74; [2022] NI 258. That case involved the question of whether, and in what circumstances, it was open to a district judge to hold an inter partes hearing in relation to an application for a non-molestation order in circumstances where the factual contentions giving rise to the application were also the subject of an ongoing criminal investigation or of extant or anticipated criminal proceedings. Having reviewed a number of relevant authorities, said the following (at para [18]):

> "Analysis of the cases cited in argument suggests that the relevant principles are now relatively well settled. They suggest that civil proceedings should only be stayed where there is a real risk of serious prejudice to the defendant's right to fair trial in related criminal proceedings which cannot be adequately mitigated by the use of appropriate safeguards; and that this is a fairly high threshold."

[25] In the course of *JR131* are considered the decision in *Keeber v Keeber* [1995] 2 FLR 748, in which the English Court of Appeal overturned a stay of contempt proceedings for breach of an undertaking, where a criminal prosecution had arisen from the same facts. The court considered that contempt proceedings in particular should be dealt with quickly and decisively and should be adjourned only where there was a real risk of serious prejudice which might lead to injustice and related criminal proceedings. Shortly afterwards, that approach was endorsed by Lord Bingham in *M v M (Contempt: committal)* [1997] 1 FLR 76.

[26] Mr Mulholland relied upon the summary of principles at para 1.33 of *Miller on Contempt of Court* (4th edition, Oxford), drawn from the judgment of the Court of Appeal in *Barnet London Borough Council v Hurst* [2002] EWCA Civ 1009, at para [33]:

> "(1) The jurisdiction of the court when exercising its jurisdiction in contempt proceedings is quite separate from any criminal proceedings which may be brought in the criminal courts, notwithstanding

that it may arise out of the same set of factual circumstances.

(2) It is founded on an inherent power which derives from the jurisdiction of the court to enforce its orders.

(3) It is important that contempt proceedings should be dealt with swiftly and decisively.

(4) On the other hand a court has a discretion to adjourn contempt proceedings pending the outcome of other proceedings, but only where the satisfied that there would otherwise be a real risk of prejudice which might lead to injustice."

[27] I do not consider that there is any material difference between "a real risk of prejudice which might lead to injustice" (the phrase upon which Mr Mulholland relied, given the absence of the word "serious") and "a real risk of serious prejudice."

[28] The authors go on, at para 1.34:

> "The factors which may be relevant in the exercise of this discretion include (1) the complexity of the case; (2) whether the allegations are contested; and (3) whether the person seeking committal is adequately protected pending the outcome of the criminal prosecution…"

[29] Ultimately, I have not been persuaded that to transmit a certificate of default would give rise to a real risk of serious prejudice to Soldier F's right to a fair trial in any criminal proceedings which may follow against him, and which could not be adequately mitigated by the use of appropriate safeguards. In this regard, it is highly relevant that the subject matter of any possible future criminal proceedings (Soldier F's actions as a serving soldier in June 1991) is quite different from the subject matter of any contempt proceedings likely to follow now (Soldier F's actions in failing to attend an inquest hearing in July 2023). Indeed, this is the decisive point in my view. The two sets of proceedings do not arise out of the same set of factual circumstances. I might not go as far as to accept Ms Herdman's submission that any future criminal proceedings are "entirely unrelated" to Soldier F's failure to attend court. One reason for that failure may be his fear about future criminal proceedings. That fear is objectively unwarranted because of his right to exercise his privilege against self-incrimination in the event that he attended the inquest and does not wish to answer certain questions which might tend to incriminate him; especially when taken together with the content of the statement he has already provided to the coroner. However, there is very little, if any, overlap between the factual circumstances which might form the basis of any possible criminal proceedings

against him arising out of the deaths which are the subject of the inquest and the factual circumstances giving rise to his possible punishment for contempt. The risk of serious prejudice, therefore, is very low.

[30] Moreover, Mr Mulholland was unable to identify any concrete prejudice which would arise. The high point of the submission in this regard was really that a Scottish advocate appearing for Soldier F in contempt proceedings in the Court of Session may in some way feel constrained in terms of what might be said in defence or mitigation as to his failure to comply with the subpoena. Reading between the lines, it seems that Soldier F might want to rely on certain medical evidence which, in turn, referred to incidents in his past which gave rise to PTSD on his part. However, in my judgment the postulated prejudice does not begin to cross the threshold where contempt proceedings ought to be stayed. That is particularly so in circumstances where Soldier F has already provided detailed written evidence to the coroner in the form of a statement setting out his involvement in the Coagh operation and he has also already made detailed submissions (which have been rejected) to the High Court in Northern Ireland on a number of occasions as to why he ought not to be compelled to attend.

[31] In reaching this view, I have taken a different course from that taken by McAlinden J in the M4 ruling. For the reasons mentioned at para [20] above, the circumstances of this case are materially different from those which were before him. However, I also consider that there is force in the additional point made by Ms Herdman that McAlinden J does not appear to have been assisted with detailed reference to the authorities discussing the threshold which should be crossed for the risk of prejudice to anticipated criminal proceedings to be material. The transcript suggests that the application was made, resisted and determined on the basis of oral submissions, without any written submissions, and without reference to any of the authorities discussed at paras [24]-[28] above. Those authorities establish that, as a matter of general principle, contempt proceedings should be dealt with swiftly and decisively; and that there is an elevated hurdle to be overcome where an application is made to stay or defer such proceedings because of their possible impact on contemplated criminal proceedings, even where those proceedings are closely related.

[32] McAlinden J was also concerned that the discretion of the court receiving a certificate of default may be constrained in some way by the provision in section 67(5) that that court "shall thereupon proceed against and punish the person so having made the default…" For my part, I consider that the following words ("… in like manner as if that person had neglected or refused to appear in obedience to process issued out of that court") make clear that the receiving court's hands are not tied by the certification of the transmitting court. In short, the Court of Session will be entitled to take its own view, in light of whatever submissions are made to it on behalf of the coroner and Soldier F respectively, as to whether and how to proceed against Soldier F in light of his default.

Conclusion

[33] For the reasons given above, I intend to issue a certificate of the default of Soldier F under the seal of the High Court and I will direct that this be transmitted to the Court of Session in Edinburgh.

[34] I will hear the parties on the issue of costs.