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(subject to editorial corrections)

THE HIGH COURT OF JUSTICE IN NORTHERN IRELAND

QUEEN'S BENCH DIVISION

CROWN SIDE

IN THE MATTER OF APPLICATIONS BY OFFICER L AND OTHERS FOR JUDICIAL REVIEW

MORGAN J

[1] Office L and the other applicants are retired police officers. They have been called as witnesses to the forthcoming inquiry touching upon events relating to the death of Robert Hamill which occurred in Portadown Co Armagh on 27 April 1997. Each of them has applied to have his/her anonymity preserved and each of them has applied to give evidence behind a screen on the basis that their identification as witnesses at the inquiry would make them more vulnerable to attack by paramilitaries because their past history as members of the RUC would become known or more widely known to such groups. In a ruling dated 3 August 2006 the Inquiry Panel refused those applications. Each of the applicants now seeks judicial review of that decision.

[2] On 27 April 1997 at approximately 1 am Robert Hamill was the victim of a vicious assault perpetrated upon him at the intersection of Market Street and Thomas Street in Portadown Co Armagh. As a consequence of the injuries he received he died in hospital some days later.

[3] A police Land Rover occupied by four officers took up a position at the intersection of Thomas Street and Market Street on the night of the incident. Constable N was the driver of the Land Rover. C, S and A were the other members of the crew. A is separately represented and is not a party to these proceedings. C, S and N are the first three applicants in these proceedings. At the time of the attack McC was attached to CID South region and was actively involved in the investigation into the circumstances of the death of Robert Hamill. McC is the fourth applicant. O, W, S and A were uniformed officers involved in crowd control on the night of the assault. They are the fifth, sixth, seventh and eighth applicants. B was part of a backup unit which

attended the scene of the assault and is the ninth applicant. L was involved in the investigation for approximately 1 month and was thereafter transferred. L is the 10th applicant. McA was also involved in the investigation into the death and was involved in the handling of exhibits and taking of relevant statements. McA is the 11th applicant.

[4] Subsequent to the death of Robert Hamill there were allegations of collusion between police and those responsible for killing him. The United Kingdom government requested Mr Justice Peter Cory, a retired judge of the Canadian High Court, to compile a report in respect of allegations of collusion by members of the security forces in connection with the death. On 1 April 2004 he reported and concluded that there should be a public inquiry in connection with the death.

[5] On 16 November 2004 the Secretary of State for Northern Ireland announced the establishment of an Inquiry under section 44 of the Police (Northern Ireland) Act 1998 in respect of the circumstances surrounding the death of Robert Hamill. The terms of reference of the Inquiry required it to determine: --

> "whether any wrongful act or omission by or within the Royal Ulster Constabulary facilitated his death or obstructed the investigation of it, or whether attempts were made to do so; whether any such act or omission was intentional or negligent; whether the investigation of his death was carried out with due diligence; and to make recommendations".

On 29 March 2006 the Secretary of State for Northern Ireland, exercising powers given by section 15 of the Inquiries Act 2005, converted the Inquiry into one under that Act.

[6] By virtue of section 2 of the 2005 Act an Inquiry Panel is not to rule on, and has no power to determine, any person's civil or criminal liability. But an Inquiry Panel is not to be inhibited in the discharge of its functions by any likelihood of liability being inferred from facts that it determines or recommendations that it makes. Section 17 provides that the procedure and conduct of an inquiry are to be such as the chairman of the inquiry may direct subject to any other provisions of the Act. Section 17 (3) provides that 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.

[7] Section 18 provides for public access to inquiry proceedings and information as follows: -

"**18. Public access to inquiry proceedings and information**

(1) Subject to any restrictions imposed by a notice or order under section 19, the chairman must take such steps as he considers reasonable to secure that members of the public (including reporters) are able-

(a) to attend the inquiry or to see and hear a simultaneous transmission of proceedings at the inquiry;

(b) to obtain or to view a record of evidence and documents given, produced or provided to the inquiry or inquiry panel."

Restrictions on public access are dealt with in section 19.

Restrictions on public access etc

19. (1) Restrictions may, in accordance with this section, be imposed on-

(a) attendance at an inquiry, or at any particular part of an inquiry;

(b) disclosure or publication of any evidence or documents given, produced or provided to an inquiry.

(2) Restrictions may be imposed in either or both of the following ways-

(a) by being specified in a notice (a "restriction notice") given by the Minister to the chairman at any time before the end of the inquiry;

(b) by being specified in an order (a "restriction order") made by the chairman during the course of the inquiry.

(3) A restriction notice or restriction order must specify only such restrictions-
(a) as are required by any statutory provision, enforceable Community 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 subsection (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 to impair the efficiency or effectiveness of the inquiry, or

(ii) otherwise to result in additional cost (whether to public funds or to witnesses or others).

(5) In subsection (4)(b) "harm or damage" includes in particular-

(a) death or injury;

(b) damage to national security or international relations;

(c) damage to the economic interests of the United Kingdom or of any part of the United Kingdom;

(d) damage caused by disclosure of commercially sensitive information."

[8] By letter dated 9 May 2005, prior to its first preliminary hearing, the solicitor to the inquiry wrote to the interested parties indicating that the inquiry hoped that the vast majority of information would be placed in the

public domain at the appropriate time but indicating that arrangements could be made for anonymity of witnesses and other sources of information where appropriate. The applicants duly applied for anonymity on the basis of the increased risk to their lives as a result of giving evidence to the inquiry. On 26 July 2005 the inquiry wrote to PSNI requesting it to carry out a general risk assessment for witnesses involved in the inquiry. By letter dated 12 September 2005 the PSNI confirmed that an initial threat risk analysis had been carried out and that "PSNI is not aware of any information at this time which would indicate a specific threat to the Robert Hamill Inquiry or to those witnesses connected to it". In a written ruling served on 26 September 2005 the chairman concluded that there was not any material before him which would justify the granting of anonymity to any applicant. He indicated that he would consider any further reasons in support of their applications either in writing or orally.

[9] On 28 September 2005 the solicitor to the inquiry wrote to PSNI seeking individual risk assessments in relation to the applicants. Under cover of a letter dated 20 March 2006 PSNI provided details in relation to each applicant. The letter continued: --

> "I should point out however that although an officer may not have a specific threat against him the general threat which existed against all officers would have applied and indeed still does at the present time from dissident groups."

The general threat was described in the challenged ruling in a passage about which there is no dispute in this case: --

> "The evidence from the PSNI in relation to the assessment of risk was that all police officers and former police officers and their families in Northern Ireland are at some risk of death or injury from attacks upon them by paramilitaries, whether Republican or loyalist, and that in the Portadown and Armagh areas there has been an enhancement of those risks arising out of the death of Rosemary Nelson."

[10] By this stage the applicants were seeking both anonymity and screening in respect of their appearance before the inquiry. In a ruling delivered under cover of a letter dated 4 April 2006 the chairman rejected the applications in respect of each of the applicants. At paragraph 4 of the ruling he stated that the applicants' submissions elided two separate questions: --

(a) if the application is refused in respect of any individual, would the conduct of the inquiry create a real risk that he or his family would suffer injury or be killed (articles 2 and 3 ECHR). If so, the application must be granted in respect of that individual;

(b) if not, should the inquiry conclude that some lesser risk or inconvenience to the individuals outweighs the interests of openness.

At paragraph 15 he set out his conclusion in relation to risk: --

> "15. A careful consideration of all the factors set out above has led me to the firm conclusion that none of the applicants or their families would be at any greater risk as a result of being named at the public hearings as a police officer, or former police officer, who has had some connection with the events surrounding Robert Hamill's death and the subsequent investigations into it or who is member of his or her family than police officers in general going about their public duties on a daily basis in Northern Ireland or members of their families" .

He stated that the scales were weighed heavily in favour of complete openness and rejected the applications. At paragraph 21 he indicated that he was willing to consider any further reasons in support of the applications and the covering letter invited the applicants to advise the inquiry if they intended to appeal the ruling to the full panel.

[11] The applicants accepted the invitation and an oral hearing was conducted before the full panel on 15 and 16 May 2006. The panel delivered its decision on 3 August 2006 rejecting the applications and that is the determination which is the subject of the judicial review challenge.

[12] In the course of its ruling the panel looked first at the submissions based on article 2 of the convention. It formulated the issue of risk in the following terms: --

> "is that risk materially increased in the case of an officer or former officer or his or her family if he or she is required to give evidence to the inquiry either because he or she (1) is named in public or (2) is able to be seen by the public when entering the inquiry chamber and giving evidence or (3) by a combination of these?"

The panel concluded that if the answer to any part of the question was "yes" then, depending on the answers to the three parts of the question, the applicant should be allowed to give evidence without being named and/or behind a screen. If the answer to all parts of the question was "no" then, in so far as the application was based on article 2, it must fail. The panel then considered the evidence of each of the applicants and concluded that the question should be answered in the negative in each case. Accordingly the applications under article 2 failed.

[13] The panel next considered how it should approach the application on the basis of the common law. It first asked:-

> "does the applicant have a fear that, if he or she has to give evidence (1) as a named witness or (2) without being screened or (3) both as a named and unscreened witness, the general risk referred to will be materially increased?"

It considered that it would be material, but not necessarily decisive, to take account of the fact that the question formulated in relation to article 2 had been answered in the negative. If the answer to that question was "yes" the panel considered that there had to be a balancing exercise in which the applicant's fear was considered along with a range of factors set out in the ruling in order to determine whether the interests of justice and fairness to the applicant required that he or she should remain anonymous or be screened or both.

14. In compliance with the test devised by it the panel looked first at the subjective fears of the applicants: --

> "In assessing the weight to be attached to what we regard as understandable fears in the light of the troubled times Northern Ireland has experienced over many years, we nonetheless consider it right, when balancing those fears against the public interest, to take into account the very significant fact that they are not well founded in fact."

The panel referred to a letter of 8 August 2005 written by the applicant's solicitor to the Secretary to the Inquiry in which he said:

> " If I have not managed to do so before, I want to convey to you the climate of fear which obtains among some of my clients at the prospect of being required to give evidence about the circumstances surrounding the attack on Robert Hamill. I do not

> mean specifically this inquiry -- I mean about giving evidence in public to any investigation. The fear is very real and arises out of a belief -- whether rational or irrational -- that their lives will be placed in danger if the give evidence in public."

The panel concluded that so generalised a fear had more of the irrational than rational in it.

[15] The panel then looked at the balancing exercise. It recognised the importance of engendering public confidence in its findings. It considered that such confidence would be undermined if the identity of those giving evidence was protected by a "cloak of secrecy". It accepted a submission by Mr McGrory on behalf of the Hamill family that having regard to the circumstances in which the inquiry was established the principle of openness was exceptionally important. It considered that the grant of anonymity would also put practical difficulties in the way of the inquiry's task to try to establish the truth. It recognised that some officers, even though screened and unnamed, could be identified by the role they played by those who already had some knowledge of the events. The panel came to the clear conclusion that the applications for anonymity based on common law must be rejected and was firmly of the view that the balance came down heavily against those applicants. In respect of one applicant because of the applicant's medical circumstances the panel concluded that it should offer some form of anonymity.

[16] For the applicants Mr O'Donoghue QC who appeared with Mr O'Hare first sought leave to amend the Order 53 statement. He contended that by virtue of section 19(2) of the 2005 Act restrictions on public access could only be imposed by the Minister or the chairman during the course of the inquiry. He submitted that the effect of section 19 (2) (b) was that the panel had no jurisdiction to entertain an application for a restriction order and that its decision should, therefore, be quashed or a declaration made that it had no effect.

[17] Secondly he contended that the application for a restriction order in this case required the chairman to consider the exercise of his powers pursuant to section 19(3)(b) of the 2005 Act. In order to do so he was required to take into account the matters set out in section 19 (4). He submitted that the test devised by the Tribunal in respect of the article 2 issue did not faithfully follow the requirements of section 19 (4) and that the determination was consequently vitiated by that illegality.

[18] Thirdly he submitted that where the issue concerned the risk to life of a witness called in public proceedings there was no support in the authorities for the contention that this question was to be determined by establishing

whether the increase in risk was material. In any event if he was wrong in that he contended that the decision was irrational for the reasons set out in his written submissions.

[19] For the Tribunal Mr Underwood QC who appeared with Ms Anderson submitted that by virtue of section 17 of the 2005 Act the procedure and conduct of an inquiry are to be such as the chairman of the inquiry may direct. In this application the chairman had issued a ruling following written representations. He invited the parties either to make further representations to him or alternatively to have a hearing before the full panel. By virtue of section 17 he was entitled to take either course. The fact that a restriction order had to be made by the chairman during the course of the inquiry pursuant to section 19 (2) (b) did not go to jurisdiction. Accordingly he submitted that the application for leave to amend the Order 53 statement should be refused.

[20] Secondly he submitted that the application in this case was made under section 19(3)(a) of the 2005 Act. The submission on behalf of the applicants was that the restriction order in this case was required by virtue of the positive obligation to protect life imposed upon the state by virtue of article 2 of the convention or common law. Section 19 (4) did not arise in those circumstances.

[21] In respect of the approach which the Tribunal took to the article 2 issue he submitted firstly that in this context the word "material" was synonymous with "any". In any event he submitted that there was a threshold risk to life which had to be achieved before the positive obligation under article 2 was engaged. He submitted, accordingly, that the test devised by the Tribunal was appropriate. He made further detailed written submissions dealing with the rationality issue.

[22] I am grateful to counsel for their helpful oral and written submissions. The applicants' first submission is that I should find that the Tribunal had no jurisdiction to entertain the application by virtue of the provisions of section 19(2) (b) of the 2005 Act. I entirely accept that a restriction order must be made by the chairman. It does not follow, however, that the application has to be entertained by the chairman alone. I accept that section 17(1) of the 2005 Act enables the chairman to direct how the inquiry should proceed to deal with the issues before it. In order to deal with this issue the chairman was entitled in my view to follow a process whereby the issue was argued orally before the Tribunal. The effect of s.19(2)(b) was to prevent any decision reached by the Tribunal taking effect until the restriction order had issued under the hand of the chairman. Accordingly I do not consider that this criticism gives rise to an arguable case with a reasonable prospect of success and I refuse leave to amend the Order 53 statement.

[23] The second issue concerns the applicability of section 19(4) of the 2005 Act. That subsection is only engaged where it is proposed that the restriction order be made pursuant to section 19 (3) (b). At all material times the application in this case was made on the basis that that the restriction order was required in order to comply with the provisions of article 2 of the convention or common law. Such an application falls plainly within section 19(3)(a) as one in which the contention is that the restriction order is required by a rule of law. I do not, therefore, consider that section 19 (4) is engaged.

[24] I now turn to look at the use of the word "material" in the test devised by the Tribunal in its ruling of 3 August 2006. In order to do so I consider it helpful to look at the context. In his ruling of 4 April 2006 the chairman asked "would the conduct of the inquiry create a real risk that he or his family would suffer injury or be killed". Although he did not expressly deal with the issue of screening he concluded in respect of anonymity at paragraph 15 of that ruling that "none of the applicants or other families would be at any greater risk as a result of being named". In the challenged ruling of 3 August 2006 the test recognises the general risk to which all police officers and former police officers are subject and asks whether "that risk is materially increased in the case of an officer or former officer or his or her family if he or she is required to give evidence to the enquiry". The context strongly supports the view that the word "materially" is inserted to establish some form of threshold in relation to risk. I have also considered the approach of the Tribunal to the individual cases within the ruling. By way of example the approach in relation to officer L sets out a number of competing factors. In its conclusion the panel stated that it was not persuaded that giving evidence named and unscreened would add materially to the general risk from terrorism which the officer faces. Given the context of the preceding discussion in relation to that officer I consider that it is at the very least unclear that this is an indication that the Tribunal concluded that there was no added risk. I conclude, therefore, that the word "materially" is inserted to establish some form of threshold and that the threshold is lower than the "real and immediate risk" test set out in Osman v United Kingdom.

[25] The approach which the court should take to the threshold of risk which engages article 2 of the convention has been considered in three decisions of the Court of Appeal in England and Wales. The first of these was R (A and others) v Lord Saville of Newdigate (2001) EWCA Civ 2048. That was an appeal in which the court was considering the article 2 rights of soldiers who were ordered by the Bloody Sunday Tribunal to give their evidence in Derry rather than at a venue in Great Britain. The court's conclusion on the threshold of risk was set out at paragraphs 28 and 29:

> "28. In R v Governor of Pentonville Prison, Ex p Fernandez [1971] 1 WLR 987, after adumbrating the various phrases which he considered expressed the

same degree of likelihood of risk, Lord Diplock referred, at p 994, to the alternative of 'applying, untrammelled by semantics, principles of common sense and common humanity'. We believe that there is much to commend that approach in the present case. The search for a phrase which encapsulates a threshold of risk which engages article 2 is a search for a chimera. The phrases advanced by Mr Clarke were all taken from decisions involving contexts quite different from the present. These decisions provide no authoritative basis for adopting the phrases as a threshold test for article 2 purposes. Of one thing we are quite clear. The degree of risk described as "real and immediate" in Osman v United Kingdom 29 EHRR 245, as used in that case, was a very high degree of risk calling for positive action from the authorities to protect life. It was 'a real and immediate risk to the life of an identified individual or individuals from the criminal acts of a third party' which was, or ought to have been, known to the authorities: p 305, para 116. Such a degree of risk is well above the threshold that will engage article 2 when the risk is attendant upon some action that an authority is contemplating putting into effect itself. It was not an appropriate test to invoke in the present context.

29. In R v Lord Saville of Newdigate, Ex p A [2000] 1 WLR 1855, 1877, para 68(5) Lord Woolf MR said:

> 'the right approach here once it is accepted that the fears of the soldiers are based on reasonable grounds should be to ask: is there any compelling justification for naming the soldiers, the evidence being that this would increase the risk?" The reference to reasonable grounds was, as we understand it, to grounds that were objectively reasonable, but Lord Woolf MR had earlier commented, at p 1876, para 68(4): "From their point of view it is what they reasonably fear which is important, not the degree of risk which the tribunal identifies'.

Although the passage clearly recognises the existence of a threshold which will engage article 2 the court declined to give any guidance as to how that threshold should be measured. It described the approach which should be followed in these circumstances at paragraph 31:

> '31. We consider that the appropriate course is to consider first the nature of the subjective fears that the soldier witnesses are likely to experience if called to give evidence in the Guildhall, to consider the extent to which those fears are objectively justified and then to consider the extent to which those fears, and the grounds giving rise to them, will be alleviated if the soldiers give their evidence somewhere in Great Britain rather than in Londonderry. That alleviation then has to be balanced against the adverse consequences to the inquiry of the move of venue, applying common sense and humanity. The result of the balancing exercise will determine the appropriate decision. This course will, we believe, accommodate both the requirements of article 2 and the common law requirement that the procedure should be fair'."

[26] This issue was also considered in R (Bloggs 61) v Secretary of State for the home Department (2003) EWCA Civ 686. That was a case in which a prisoner who had provided information to the prosecuting authorities which had not been used by them sought to prevent his return to mainstream prison. The approach to his article 2 rights and the threshold of risk is set out at paragraphs 60 and 61:

> "60. Whatever the risk to a person's life and whatever the mechanism that may give rise to it, the approach of Lord Diplock in R v Governor of Pentonville Prison, Ex p Fernandez [1971] 1 WLR 987, adopted by the court in R (A) v Lord Saville of Newdigate [2002] 1 WLR 1249 seems to me, with respect, to be entirely logical and of general application. If a risk to life is not "real", it is not a risk to life. If a risk to life is not "immediate" in the sense

> that it is not present at the time or during the period when it is claimed that a protective duty is owned by a public body, it is not a risk that can engage article 2. It is a future risk that may, at some later date, do so. To be a candidate for engaging article 2, all that is needed is 'a risk to life'. To engage it depends, in the circumstances of each case, on the degree of risk, which necessarily includes consideration of the nature of the threat, the protective means in being or proposed to counter it and the adequacy of those means.
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> 61. The word 'risk' in the general context of risk to life engaging article 2 is, as Lord Phillips of Worth Matravers MR said, one of common sense application to individual circumstances. In that general sense, it can and should be used without a qualifying adjective. In its application to different facts, there will inevitably be a temptation to resort to the seriousness or level or degree of the risk of occurrence, as distinct from the fatal consequence of occurrence, in respect of which a duty to provide public protection is claimed. But the seriousness, level or degree of occurrence is not a given or absolute quality. I would add to Lord Phillips's observation in R (A) v Lord Saville of Newdigate that the "The search for a phrase which encapsulates a threshold of risk which engages article 2 is a search for a chimera", that it could also be unhelpful to attempt to identify some sort of broad tariff of thresholds of risk for different categories of case. I note that, although Crane J, in his helpful analysis, at paragraphs 22 to 37 of his judgment in R (D F) v Chief Constable of the Norfolk Police [2002] EWHC 1738 (Admin), identified, as a generality, different levels of risk for those in the community and those in prisons, he immediately qualified it in the circumstances of the case before him by reference to the level of protection offered and reasonably available to meet it."

[27] The third of these cases is R (A) v HM Coroner for Inner South London (2004) EWCA Civ 1439. That was a case in which police officers sought anonymity when giving evidence before a coroner's inquest. The court addressed the question of the threshold of risk at paragraph 30: -

> "30. In my judgment Mr Millar QC's submissions on this issue are to be preferred. It seems clear from the observations of Lord Woolf and Lord Phillips that a degree of risk described as "real and immediate", the Osman test, sets the threshold too high. A test based on speculation would clearly set the test too low. Between these two parameters there will be a spectrum of risks of varying seriousness supported by objective evidence of varying degrees of strength. Like Lord Phillips in Saville (2) , a decision which in any event binds this court, I do not think it possible or sensible to give any more definitive description than that there must be reasonable grounds which show that the fears of a witness are objectively justified. It will be for a coroner or other decision-maker in each case in which such an application is made to decide whether the evidence is such as to show that the witness' fears are objectively justified. When it comes to the balancing exercise involved in the third test, obviously, the more serious the risk and the stronger the evidence objectively justifying the fears of the witness, the more likely the balance will favour the grant of anonymity.".

[28] In this jurisdiction the Court of Appeal addressed the Widgery soldiers case in Gerard Donaghy's application (2002) NICA 25. The respondent relied particularly on the judgment of Girvan J. In his consideration of the Widgery soldiers case he acknowledged the desirability of following and applying the decision of the English Court of Appeal. He also accepted that there was a threshold of risk without which article 2 was not engaged. It is important to note, however, that he did not attempt to define that threshold and that he then went on to set out the approach which the court should take :

> "What the Court of Appeal ruling calls for is a judgment by the Tribunal that properly weighs in the balance the rights of the witnesses and their rights to a fair procedure on the one hand and the rights of other interested parties before the Tribunal and the interests of a fair inquiry. If the steps sought by the witnesses go beyond what is necessary for the proper protection and vindication of their article 2 rights and the right to fairness in the light of the risk and in the light of the countervailing rights of other interested parties then the Tribunal should not accede to the witnesses' application in the form in which it is made and it would have to protect the rights in a more

> balanced way. Thus, for example, if the police witnesses in the present case had sought not screening but a direction that their evidence be given in camera or that they should be excused from giving evidence at all then the Tribunal, when weighing the risk to their lives and their right to fairness on the one hand and the rights of the families and the interests of a fair inquiry, could conclude that the witnesses' concerns would be adequately and properly catered for by a screening order."

[29] The issue was again considered by the Court of Appeal in Martin Meehan's Application (20030 NICA 34. Carswell LCJ as he then was set out how the court should approach its task at paragraph 18:

> "[18] In our opinion it is useful to focus, as did the judge in the present case, on whether a breach of Article 2 has been established rather than concentrating on the question whether Article 2 has been engaged. Of course if Article 2 has not been engaged at all, there cannot be a breach, but a decision that it has been engaged does not necessarily provide a conclusive answer to the question whether the State has been in breach of the requirements of the Article. We respectfully agree with the approach of the Court of Appeal in Lord Saville of Newdigate v Widgery Soldiers, which in our view is not inconsistent with that of the ECtHR in Osman v United Kingdom. The court should ascertain the extent or degree of risk to life, take into account whether or not that risk has been created by some action carried out (or proposed) by the State, determine whether it would be difficult for the State to act to reduce the risk and whether there are cogent reasons in the public interest why it should not take a course of action open to it which would reduce the risk. It should then balance all these considerations in order to determine whether there has been a breach of Article 2."

[30] Finally in re W (2004) NIQB 67 Weatherup J examined the approach which the court should take when considering article 2 rights in the context of personal protection. He dealt with the question of the threshold at paragraph 17:

> "[17] The approach to art 2 obligations is not based on an applicant reaching a threshold of risk set at different levels in different contexts, but rather about balancing the risk against reasonable measures to reduce the risk. The relevant risk must be real and immediate where a real risk is one that is objectively verified and an immediate risk is one that is present and continuing. The reasonable steps required by the authorities depend upon the degree and character of the risk and the anticipated effect of the proposed measures. Carswell LCJ in *Re Meehan's Application* put four factors in the balance, first, the extent or degree of risk, second, whether the State creates the risk, third, the difficulties involved in reducing the risk, and fourth, any public interest in not taking action. ".

He recognised that if there was no objective evidence of a risk to life then clearly article 2 would not be engaged.

[31] In my view these authorities make it plain that the Tribunal should first have established the nature of the subjective fears of the applicants. It should then have asked in respect of each of the applicants whether there was objective evidence that the requirement that they give evidence named and unscreened gave rise to any increased risk to life. If the answer to that question was no it is in my view clear that article 2 would neither have been engaged nor breached. In those circumstances the common law rights of the applicants would have fallen to be considered. If, however, there was any objective evidence of an increased risk to life in any case it would have been necessary for the Tribunal to carry out the balancing exercise which was set out by the Court of Appeal in the Widgery soldiers case and which has been approved both in this jurisdiction and in England and Wales. It is not possible to avoid this obligation by the assertion of a threshold risk to life below which article 2 will not be engaged. As the court said in Meehan the principal task for the Tribunal was to establish whether article 2 would be breached rather than devising tests as to whether the article was engaged. The obligation on the Tribunal to carry out the balancing exercise where there is objective justification of any increased risk to life properly reflects the fundamental nature of the right to life in the convention. In this case I find that the Tribunal has not reached any determination in respect of each applicant as to whether there was any objective justification for the fears which each of these applicants has expressed. It has avoided doing so by asking itself whether the giving of evidence unscreened and named would materially increase the risk to life in respect of each of the applicants. Accordingly I consider that the Tribunal's approach to the article 2 issue in this case was flawed and that its decision should be quashed. In those circumstances the issue as to irrationality does not arise but I should make it

clear that the evaluation of the evidence is very much a matter for the Tribunal.