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IN HER MAJESTY'S COURT OF APPEAL IN NORTHERN IRELAND

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

Before Kerr LCJ, Campbell LJ and Girvan LJ

KERR LCJ

Introduction

[1] This is an appeal from the judgment of Morgan J whereby he granted judicial review of a ruling made by the panel members of the Inquiry into the death of Robert Hamill. The ruling had been made on the issue of the anonymity of witnesses who are due to give evidence at the Inquiry. A number of police witnesses, some of them serving officers and others who have retired, applied to have their names withheld and that they should be screened from the public while giving evidence. A number of civilian witnesses who have not served in the police force made similar applications.

[2] On 26 September 2005 the chairman of the Inquiry, Sir Edwin Jowitt, gave a ruling that, on the materials then submitted, it had not been shown that there were grounds for granting anonymity. He indicated that he would consider any further reasons in support of a claim for anonymity. In consequence, an oral hearing of the application took place on 15-16 May 2006. Following this the panel ruled that none of the respondents to the present appeal would be granted anonymity or screened while giving evidence. The respondents then applied for judicial review of that ruling and Morgan J decided that the panel (also referred to in his judgment and throughout the court papers as 'the tribunal') had failed to apply the correct test in addressing the rights under article 2 of the European Convention on Human Rights and Fundamental Freedoms of those who had applied for anonymity.

Factual background

[3] Robert Hamill died on 27 April 1997 after being attacked by a number of persons in Portadown, County Armagh. After his death allegations were made that members of the Royal Ulster Constabulary had observed the perpetrators kick Mr Hamill while he lay on the ground but did not intervene to assist him. It was also alleged that one officer had perverted the course of justice by assisting a suspected perpetrator.

[4] After receiving a recommendation from Judge Cory, a retired Canadian judge who had been asked to consider whether and how this death and other controversial killings in Northern Ireland should be investigated, the government decided that a public inquiry into Mr Hamill's death should be held. On 16 November 2004, the Right Honourable Paul Murphy MP (then Secretary of State for Northern Ireland) announced the following terms of reference for the Inquiry: -

> "To inquire into the death of Robert Hamill with a view to determining 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."

[5] Individuals identified as potential witnesses were informed by the solicitor to the Inquiry that arrangements could be made that they should remain anonymous in special circumstances and that applications for anonymity were to be directed to the Inquiry chairman. This prompted a number of applications. As a result of these, on 26 July 2005, the Inquiry requested the Police Service for Northern Ireland to carry out a general risk assessment for witnesses involved in the Inquiry similar to that carried out for the Saville Inquiry. PSNI replied to this request on 12 September 2005 in the following terms: -

> "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"

[6] This did not constitute a similar risk assessment to that which had been conducted for the Saville Inquiry. For that inquiry, the risk to witnesses that might arise by their giving evidence in Londonderry had been directly addressed.

[7] On 28 September 2005 the Inquiry wrote to PSNI to obtain individual risk assessments in relation to each of the respondents. Information held by PSNI in relation to any risks faced by any individual police officer at any time was obtained and considered by the Inquiry panel.

[8] During the oral hearing on 15 and 16 May 2006, the Inquiry panel heard evidence from a number of witnesses. It was provided with detailed written materials in respect of each individual applicant for anonymity. The following information was also considered: -

- An account of the role of each witness in relation to the incident in which Mr Hamill had been killed, including the extent to which they had been referred to by other witnesses;

- Documents such as police statements and transcripts of evidence of witnesses given at the trial of a man called Hobson who had been charged in relation to the killing;

- Individual risk assessments where these were available;

- Medical reports where relevant;

- Other materials touching on the question whether the identity of individual witnesses was already in the public domain in relation to the killing of Mr Hamill;

- The index of the oral evidence given publicly at the Hobson trial by a number of witnesses under their own names with extracts of illustrative passages of their testimony;

- Documents which formed part of the Inquiry materials and which demonstrated that some of the applicants for anonymity had acted in connection with the Robert Hamill investigation using their own names;

- Documents from the British Irish Rights Watch in which that organisation demonstrated how it was possible to name many of the witnesses connected with the Inquiry by reference to their role as described in the Cory Report, although in that report they had been referred to by letter.

[9] The Inquiry panel also considered material providing information on the general security situation in Northern Ireland relevant to police issues, including the International Monitoring Commission reports and material

relating to the use of the Scheme for the Purchase of Evacuated Dwellings (SPED).

The Inquiry's ruling

[10] The Inquiry panel made its ruling on 3 August 2006. The applicants for anonymity were divided into groups. Group 1 comprised former or serving police officers who were due to be called to give oral evidence at the hearing. Group 2 consisted of former or serving officers who would have a statement in their name read at the hearing. Group 3 were former or serving officers who were not due to be called nor would a statement in their name be read at the hearing and civilians made up group 4. The respondents to this appeal all fell within group 1.

[11] The ruling first set out the panel's consideration of the article 2 issue. It then addressed the claim to anonymity based on common law principles. On the article 2 point the panel outlined its approach in the following passage: -

> "Article 2 ECHR
>
> I (a). 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. No evidence was adduced in contradiction of this, however, it is acknowledged that views may differ in this regard. On the basis of the evidence, which we accept, the following question arises: 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 (i) is named in public or (ii) is able to be seen by the public when entering the Inquiry chamber and giving evidence or (iii) by a combination of these?
>
> (b). So far as those witnesses are concerned who are not and never have been police officers and who are referred to in Counsel to the Inquiry's fourth group of witnesses the question of the risks to which all serving and former police officers in Northern Ireland are subject does not come into

play. The question becomes for them: is there in the case of a witness or members of his or her family any real risk to life or limb if he or she is required to give evidence to the Robert Hamill Inquiry either because he or she (i) is named in public or (ii) is able to be seen by the public when entering the Inquiry chamber and giving evidence or (iii) by a combination of these?

II. If the answer to any parts of the question set out at I (a) or (b) above is '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.

III. If the answer to all parts of the question set out at I(a) or (b) above is 'no' then, in so far as the application is based on Article 2 it must fail. The application must then be considered at common law."

[12] The panel concluded that, in considering the question (for the purposes of article 2) whether there would be a material increase to the risks which applicants for anonymity faced if they were to give evidence named and unscreened it was necessary to look at a number of factors. These were then set out as follows: -

"(i) Are we helped … by the conclusions reached in the Bloody Sunday judicial reviews as a result of applying the relevant legal principles to the facts of those cases?

(ii) The present situation in Northern Ireland.

(iii) The significance of the risk assessments with which we have been provided.

(iii) The reports of the International Monitoring Commission.

(iv) Recent terrorist activity in Northern Ireland.

(v) The stance of the PSNI in relation to these applications.

(vi) The extent of the publicity given in the media to the Robert Hamill case at the time of his death and in the years since and the extent of the publicity given to calls made for a public inquiry and to the Robert Hamill Inquiry once it was set up towards the end of 2004.

(vii) Whether condemnatory attitudes towards the police have grown stronger as a result of or since the setting up of this Inquiry and the attendant publicity and interest it has generated.

(viii) Has the public perception of the police involvement in the investigations which followed Robert Hamill's death which was formed before this Inquiry was set up been altered for the worse by the use of the word "collusion" in the Cory Report, to which many of the witnesses have referred mistakenly as being included in our terms of reference?

(ix) The extent to which the names of the applicants are already in the public domain.

(x) Whether it is relevant that no harm has been suffered by any of the applicants arising out of their involvement in the Robert Hamill case.

(xi) If terrorists had wished or wish to target those who were part of the Portadown police force in 1997 would they have had or have any difficulty in identifying and locating them, regardless of whether or not witnesses give evidence unnamed and screened?

(xii) The facts that, save for one officer, no other officers or former officers have claimed anonymity and that although consideration was given to making an application for anonymity at the Hobson trial it was not pursued.

(xiii) The extent to which the names of police officers giving evidence in criminal proceedings are reported by the media."

[13] In relation to the claim based on common law the panel described its approach in this way: -

"Common Law

IV(a) In the case of a serving or former police officer - does the applicant have a fear that, if he or she has to give evidence (i) as a named witness or (ii) without being screened or (iii) both as a named and unscreened witness, the general risk referred to in question I above will be materially increased?

(b). Does an applicant referred to in the fourth group have a fear that, if he or she is required to give evidence (i) as a named witness or (ii) without being screened or (iii) both as a named and unscreened witness, there will be a risk to life or limb of him or her or to the members of his or her family?

V. In answering question IV above it will be material, but not necessarily decisive, to take account of the fact that question I has been answered in the negative as being relevant to answering the question IV. We remind ourselves, though, of a passage from Lord Woolf's judgment in *ex parte A* set out on page 8 of Mr O'Hare's second submission:

> "In the present appeal, the fact that the soldier witnesses will have subjective fears if called to give evidence in Londonderry is a relevant factor when considering whether it will be fair to require them to do so. Those fears, however, have much more significance if they are objectively justified."

VI. If the answer to question IV is 'no' then the application fails.

VII. If the answer to the question IV is 'yes' there has to be a balancing exercise and the applicant's fear has to be considered along with the following factors in order to determine whether the interest of justice and fairness to the applicant require that he or she should remain anonymous or be screened

or both:

(i) the seriousness of the applicant's fear and its impact on him or her;

(ii) the reason for the applicant's fear;

(iii) the likely effect of granting anonymity in removing or reducing that fear;

(iv) the effect on the public's perception of the impartiality of the Inquiry, having regard to the factors which led to the Minister's decision to hold a public inquiry and to its terms of reference;

(v) the likely effect on the applicant of refusing his or her application in whole or in part;

(vi) the likely effect on the Inquiry's ability to arrive at the truth if it refuses or grants the application in whole or in part;

(vii) the likely effect on the ability of the public to follow the evidence if the Panel refuses or grants the application in whole or in part;

(viii) the fact that the answer to question I above was 'no'."

[14] In relation to the article 2 issue as it affected the civilian witness group the panel expressed the relevant question in this way: whether there was a real risk arising from their giving evidence at the hearings of the Robert Hamill Inquiry. As to serving and former police officers they considered that account had to be taken of the evidence from PSNI that all serving and former police officers in Northern Ireland were at some risk from attack by terrorists simply because they were or had been police officers. They decided, therefore, that it was necessary to determine whether there was a distinct risk of terrorist attack that flowed from these witnesses giving evidence at the Inquiry in addition to the residual risk associated with police service. They considered that, in order to reach a conclusion on this question, it was necessary to ask whether the risk of terrorist attack was materially increased as a result of giving evidence publicly at the Inquiry. They concluded that it was not.

[15] No balancing exercise was conducted by the Inquiry in relation to the article 2 issue. Its approach was to consider whether a relevant risk existed. If it did then article 2 was engaged. The risk could not be avoided or nullified by invoking countervailing factors such as the public interest in transparency and openness of proceedings before the Inquiry. The balancing exercise arose only in relation to the Inquiry's consideration of the claim to anonymity based on common law principles.

Morgan J's judgment

[16] Morgan J concluded that the panel had adopted a wrong approach to the question whether article 2 was engaged. He considered that it should have first addressed the question whether the applicants for anonymity had subjective fears that their lives would be put at risk by being required to give evidence openly. If the panel concluded that such fears existed, it would then have been necessary to consider whether those fears were objectively justified. If objective justification for the fears was found to be present, it would be necessary to carry out a balancing exercise such as was described in *R v. Lord Saville of Newdigate and others, ex parte A and others* [2000] 1 WLR 1855 and *Lord Saville of Newdigate and others v Widgery soldiers and others* [2001] EWCA Civ 2048.

[17] The learned judge based his conclusions on a review of these decisions and other judgments in this jurisdiction. His reasoning is encapsulated in paragraph 31 of his judgment: -

> "[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."

The arguments on the appeal

[18] For the appellant, Mr Underwood QC submitted that the judge was wrong to conclude that, for the purpose of deciding whether article 2 was engaged, it was necessary to address the question whether the applicants for anonymity had subjective fears as to their safety and then to consider whether those fears were objectively justified. The article 2 exercise required only the application of a simple test: was there a risk to the witnesses' lives as a consequence of their giving evidence unscreened and under their own names. In any event, Mr Underwood submitted, there was liberal reference throughout the ruling to the panel having directly considered what Morgan J had concluded they had ignored *viz* the objective justification for the expressed fears of the respondents.

[19] It was necessary, said Mr Underwood, that any canvassed risk arose as a result of the requirement that the witnesses give evidence. It could not be the case that a residual risk unconnected with their giving evidence to the Inquiry and arising solely because they were or had been members of the police force would give rise to entitlement to article 2 protection.

[20] For the respondents Mr O'Donoghue QC contended that the approach to the article 2 question of ascertaining whether there were subjective fears and then assessing whether these were objectively justified had been fully endorsed by the Court of Appeal both in this jurisdiction and in England and Wales. He accepted that, at the point where a conclusion had been reached that the fears were objectively justified, a balancing exercise should be conducted in order to determine whether a risk existed that would warrant article 2 protection but argued that there was only one conceivable outcome for that exercise. The encroachment on the efficacy of the Inquiry's investigations by the screening and anonymising of witnesses was, he said, so slight that there could be no debate that these measures should be put in place.

[21] Mr O'Donoghue took issue with the learned judge's view that it was necessary that the objective evidence established that the giving of evidence named and unscreened incurred an 'increased' risk to life. It was, he submitted, sufficient that their lives were at risk. There was no authority to support the suggestion nor principle that required that there be a superimposed risk directly connected to the contemplated result of the decision under consideration (in this case, the requirement to give evidence unscreened and under the witnesses' own names).

[22] Finally, Mr O'Donoghue contended that the panel had wrongly imposed a burden of proof on the respondents whereby they were required to establish that the risks existed. In this connection he referred us to page 54 of the panel's ruling where it is stated: -

> "We are not persuaded that for [Officer L] to give evidence named and unscreened would add materially to the general risk from terrorism which she faces, along with other police officers in Northern Ireland."

Subjective fears/objective justification

[23] The genesis of the subjective fears/objective justification approach – at least so far as applications for special measures for witnesses at public inquiries is concerned – appears to be the *Ex parte A* case. In that case soldiers required to give evidence about the events on Bloody Sunday sought anonymity. This was refused by the Saville tribunal. A challenge to that decision succeeded before the Divisional Court in England. On appeal, the Court of Appeal recorded that the soldiers had reasonable grounds for being in fear for their safety if they were required to give evidence under their own names. At paragraph 68 (5) of the judgment of the court delivered by Lord Woolf CJ, he said: -

> "… in our judgment 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?"

[24] It must, of course, be remembered that in the *Ex parte A* case the court was not required to determine whether there had been a breach of article 2 of ECHR since, at the time that it was decided, the Convention had not been incorporated into the domestic law of the United Kingdom. The decision of the Saville tribunal was quashed because it was judged to be irrational. This is clear from the final paragraph of the judgment in which the court said that it did not consider that any decision was possible other than to grant anonymity to the soldiers.

[25] In the *Widgery soldiers'* case the challenge was to the decision of the tribunal that soldiers must give evidence in Londonderry. Lord Phillips MR observed that the reference to reasonable grounds in the passage from the judgment of Lord Woolf quoted above was "to grounds that were objectively reasonable". He then set out the test that he considered should be applied in order to deal both with the claim that to require the soldiers to give evidence in Londonderry involved a breach of their article 2 rights and their rights at common law: -

> "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] The "adverse consequences" referred to in this paragraph were described in a later passage of the court's judgment as those outlined in the tribunal's ruling that "the chance of this Inquiry restoring public confidence in general

and that of the people most affected in particular …would be very seriously diminished (if not destroyed) by holding the Inquiry or a major part of the Inquiry far away and across the Irish Sea, unless there were compelling reasons to do so".

[27] The Bloody Sunday Inquiry spawned yet a further challenge to its ruling on the issue of how witnesses should give evidence. In this instance the challenge was litigated in the courts of this jurisdiction rather than in England and Wales. The challenge was to the tribunal's decision that police officers should give evidence behind screens. At first instance in *Re Mary Doherty's application* [2002] NIQB 16 I considered the test adumbrated in the *Widgery soldiers'* case and commented that I had some difficulty with the view that a balancing exercise had to be carried out between the measures needed to "alleviate" the subjective fears of the witnesses and the grounds giving rise to them on the one hand and "the adverse consequences" that the measures would cause on the other. The following is the relevant extract from the judgment: -

> "If the measures needed to alleviate the fears and the reasons for them are to be regarded as the steps necessary to protect the witnesses' substantive Article 2 rights (in other words their right to have their life protected), I cannot accept that these can be mitigated by adverse consequences that might accrue to others' procedural Article 2 rights."

[28] In one of the three judgments delivered in the Court of Appeal in the same case, now *sub nom. Re an application by the next of kin of Gerard Donaghy* [2002] NICA 25, Girvan J considered that no difficulty arose from the application of the *Widgery soldiers'* test. After quoting the passage from my judgment cited above he said: -

> "As I read paragraph 31 of the judgment however it appears to me that no such difficulty arises. 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] What, on reflection, I failed to make sufficiently clear in the *Re Doherty* judgment was that the difficulty I had with paragraph 31 of the *Widgery soldiers'* judgment arose from the notion that the question whether the risk (which prompts the engagement of article 2) existed was to be decided by the application of a balancing exercise. Indeed, on further reflection, I rather doubt that this is what the Court of Appeal in the *Widgery soldiers'* case was suggesting. The balancing test contemplated in paragraph 31 is predicated on the fears being objectively justified, in other words, on the risk having been established.

[30] As we shall discuss below, one can recognise a role for a balancing exercise at the stage where the risk is in existence and what is at stake is the sufficiency of measures required to meet it. It appears to us, however, that this will usually be a different type of balancing exercise from that which is involved in the common law context since the balancing exercise for article 2 must always have as its goal the achievement of the minimum protection necessary to protect the individual's convention right whereas at common law it will normally involve a weighing of countervailing factors such as the openness of proceedings against the subjective fears of the person affected. For that reason it is, we believe, important not to conflate the Convention and common law requirements since this may divert attention from the essential elements of the test as to whether the need for article 2 protection arises.

[31] The indispensable first step in the quest to discover whether article 2 is engaged is to address the question whether there is a risk to life. The nature of the risk has been expressed in various ways. In *Osman v. United Kingdom* [1998] 29 EHRR 245 it was described as "a real and immediate risk to the life of an identified individual or individuals from the criminal acts of a third party". In the *Widgery soldiers'* case it was stated that the characterisation of the risk will depend on the context in which it falls to be evaluated. In *R (on the application of Bloggs) v Secretary of State for the Home Department* (2003)

EWCA CIV 686 the Court of Appeal in England and Wales dealt with the question of what would constitute a risk to life at paragraph 61 of its judgment in the following terms: -

> "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 owed 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".

[32] In this jurisdiction Weatherup J put it thus in *Re W's application* [2004] NIQB 67: -

> "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."

[33] To attempt an answer to the question "is there a risk to life" by expressing the query in terms of whether there are subjective fears which are objectively justified risks distraction from the simple issue whether a risk exists. The question whether fears are genuinely felt and whether they are justified is obviously relevant in the common law context but an examination of whether there are subjective fears does not assist in determining whether article 2 is engaged. Put simply, the existence of subjective fears is not a prerequisite to the engagement of article 2. If a risk to life exists, article 2 will be engaged even if the person affected has no subjective fears. As the Court of Appeal in *Bloggs* said, all that is needed is a risk to life. This is an objective question.

A balancing exercise?

[34] We have no difficulty with the proposition that a balancing exercise must be carried out in order to decide whether at common law measures such as the screening or anonymising of witnesses are required. Plainly, a number of factors must be taken into account for that purpose. The weighing and resolution of competing factors in this context can reasonably be described as a balancing exercise. The same cannot be said for the question whether a risk

sufficient to trigger article 2 exists. That risk is either present or it is not. Its existence cannot be denied simply because there are factors which militate against the granting of anonymity.

[35] Where the balancing exercise in the article 2 context arises is, we believe, on the choice of measures necessary to meet the risk. But, as we have said, this will usually be a different exercise from that involved in the common law context for it must be geared to ensuring that the risk to life is afforded the necessary protection that article 2 guarantees. Countervailing factors such as the need to inspire confidence in the deliberations of the Inquiry by having all witnesses identified cannot be allowed to displace what is required to ensure that this essential protection is provided to the witnesses. Where the measures sought exceed what is required to provide the necessary level of protection there can be a balancing of these with other competing factors but that is the extent to which such an exercise may be undertaken.

The panel's approach

[36] In the present case the panel did not address the question whether the applicants for anonymity had subjective fears for their safety in order to reach its conclusion about article 2 (although this was considered in relation to the position at common law). For the reasons that we have earlier given, we are of the opinion that it was not necessary that they do so in order to reach a determination of the article 2 issue. We are satisfied that the panel did consider whether there was a risk to the life of the respondents. It is clear from paragraph I (a) of the ruling (quoted above at paragraph [11]) that the panel deliberated on whether there was an increased risk arising from the giving of evidence to the Inquiry. It acknowledged the existence of some risk of death or injury from attacks on the respondents by paramilitaries and that in the Portadown and Armagh areas there had been an enhancement of those risks arising out of the death of Rosemary Nelson.

[37] Three aspects of the panel's approach remain to be considered. First whether the panel was right to deem it necessary that there be an increased risk arising from the giving of evidence; secondly whether it wrongly imported a threshold requirement by framing the relevant question in this way: is the 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"; finally, did the Inquiry require the respondents to discharge an onus of proving that the risk existed.

Is it necessary that the risk be increased?

[38] Morgan J appears to have accepted the correctness of the panel's view that there should be an increased risk to life occasioned by the requirement to give evidence unscreened and under their own names before article 2 was

triggered for he said that the panel should have asked itself the question whether "there was objective evidence that the requirement that they give evidence named and unscreened gave rise to any increased risk to life" – paragraph [31].

[39] No respondents' notice under Order 59 of the Rules of the Supreme Court (Northern Ireland) 1980 was served and, strictly speaking, this was required in order that a challenge to this aspect of the judgment could be made. Without demur from Mr Underwood, however, Mr O'Donoghue argued that the judge erred in his conclusion on this issue and we consider that we should deal with that submission.

[40] Mr O'Donoghue suggested that the existence of an established threat (without more) was sufficient to trigger article 2. The giving of evidence could reasonably be regarded, he claimed, as the occasion on which such a risk would crystallise. It was not feasible to cloak oneself with anonymity for the normal incidents of life but where it was possible to conceal one's identity while giving evidence to the Inquiry, this should be permitted in order to cater for the threat that the panel had acknowledged already existed.

[41] In so far as these submissions depend on the premise that the Inquiry was wrong to seek a nexus between a risk to the life of the witnesses and the requirement that they give evidence openly, we do not accept them. If the threat is unaltered – indeed, wholly unaffected – by the requirement that the witnesses give evidence under their own names and unscreened, article 2 cannot be said to be engaged by that requirement. The suggestion that a threat would crystallise on the witnesses giving evidence is simply another way of saying that being required to give evidence *would give rise to* a real risk to life sufficient to activate the article 2 duty.

[42] We consider, however, that the issue is more properly addressed by asking the simple question 'will the requirement to give evidence give rise to a real risk to life'. To express the matter in terms of an increased risk implies that the existing threat could not play a part in the assessment and that a risk of a greater order of magnitude or of a different character was needed to engage article 2. But if a real risk to life from giving evidence eventuates from the matters that underpin the existing threat without there being an increase in the level of that threat, it nevertheless engages article 2.

[43] We are fortified in our view that the proper question to ask is the simple one, 'is there a real risk' rather than 'is there an increase in the risk' by the consideration that there is an obvious difficulty in establishing an increase in a risk which is, of its nature, unspecific. That difficulty is compounded by the failure of PSNI to address directly the question whether giving evidence would have an impact on the risk to the individuals concerned but this may simply reflect the difficulty attendant on such an exercise. In the event, we

are satisfied that the panel applied the wrong test to determine whether article 2 was engaged.

[44] Mr Underwood argued that, however the test may have been phrased by the panel, in fact the question whether giving evidence would subject the witnesses to a greater intensity of public scrutiny was considered. In effect, therefore, the panel had addressed the question was there a risk arising from the giving of evidence. It is to our minds clear, however, that the panel embarked on a search for a risk or an element of risk that could be distinguished from that which had already been identified. That was impermissible, in our judgment.

The use of the expression 'material increase'

[45] In light of our conclusion that the panel erred in posing the question as it did, this issue is essentially academic but we intend to consider it briefly since Morgan J found that the use of the expression erected an unacceptable threshold. At paragraph [24] of his judgment the learned judge said: -

> "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 Inquiry". 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*."

[46] Without determining the matter, since it is unnecessary to do so, we question whether requiring that there be a material increase in the risk could properly be characterised as a 'lower' threshold than that adumbrated in *Osman.* It appears to us that this may in fact create a greater hurdle than was contemplated in that case. The more pertinent issue, however, is whether the use of the adverb 'materially' enhanced the increase that the Inquiry required to be demonstrated. In our judgment it did not. Read in its complete context, the ruling cannot, in our opinion, be regarded as requiring more than a demonstrable addition to the pre-existing risk to the witnesses.

[47] In law a material consideration is one of which cognisance must be taken. A material increase to risk is an increase which is of legal relevance. I consider that the panel, in its use of the expression 'materially increased' was doing no more than referring to an increase of risk which was legally significant. We do not believe that it intended to import to the test to be applied anything more than an increase of which the law would take cognisance.

Did the panel's approach require the respondents to discharge an onus of proof?

[48] Mr O'Donoghue relied principally on a passage of the panel's specific ruling on the case of an individual respondent (at page 54) in support of the claim that they had imposed a burden of proof on the respondents to establish that an increased risk existed. The panel said at this point: -

> "We are not persuaded that for [Officer L] to give evidence named and unscreened would add materially to the general risk from terrorism which [Officer L] faces, along with other police officers in Northern Ireland."

[49] This excerpt from the ruling must not be isolated from the panel's overall consideration of the issue. The Inquiry's counsel had made written submissions to the panel in which they stated, "we do not suggest that the officers have an onus of proof, or that the risk of death is capable of 'proof' in a forensic sense". At page 10 of its ruling the panel stated: -

> "There is no question of an applicant having to prove that the risk would materialise absent anonymity and this has not been suggested."

[50] We are satisfied that the panel did not require the respondents to discharge a burden of proof.

Conclusions

[51] The panel should not have determined whether article 2 was engaged by asking whether the risk to the lives of the respondents was increased from its pre-existing state by their having to give evidence. This issue should have been dealt with by posing the simple question, "will there be a real risk to their lives if they are required to give evidence under their own names and unscreened".

[52] We do not accept that it is inevitable that the same conclusion would have been reached by the panel if they had framed the query in that way. The correct question focuses the examination on the risk that arises from the giving of evidence, untrammelled by the need to supply some unquantified and unspecific further element to the risk acknowledged to exist. It also connects the possible incidence of the risk to the giving of evidence openly which, we believe, is a necessary ingredient of the investigation.

[53] The judicial review application made by the respondents before Morgan J included the claim that the decision of the panel was irrational. The learned judge considered that the issue did not arise since he had concluded that the panel had applied the wrong test. We have reached the same conclusion, albeit by a different route. In any event, the issue of irrationality was not argued before this court and we refrain from expressing any view on it. We would propose that the parties should be given the opportunity to make submissions as to how – if at all – that matter should now be addressed.

[54] We have concluded that the appeal must be dismissed and the decision of the panel quashed. It will now be necessary for the panel to address once more the question of whether the respondents' article 2 rights are engaged. It must do so by determining whether there will be a real risk to their lives by having to give evidence under their own names and unscreened rather than whether any existing risk would be increased.