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*Ref:* **HOR9938**

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

*Delivered:* **21/11/2016**

**IN THE MATTER OF AN INQUEST INTO THE DEATH OF PATRICK PEARSE JORDAN**

**Postscript on Anonymity Orders Relating to Officers M and Q**

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**HORNER J**

## Introduction

[1] On 7th November 2016, I delivered the judgment, verdict and findings, subject to editorial corrections, in the inquest touching the death of Pearse Jordan on 25th November 1992. I indicated that the judgment would be formally issued with corrections on 10th November 2016. Counsel for the next of kin indicated that they may wish me to convene a further hearing on that date in order to hear argument on matters arising from the judgment.

[2] In correspondence of 8th November 2016, the solicitor for the next of kin requested a hearing to address two issues. Firstly, whether I should send a report on the case to the Director of Public Prosecutions, in accordance with section 35(3) of the Justice (Northern Ireland) Act 2002, on the basis of my conclusions recorded at paragraphs [144] and [155] concerning the conduct and testimony of Officers M and Q. Secondly, whether the order for anonymity for Officers M and Q should be maintained. This judgment deals with the second issue. The first issue, relating to section 35(3) of the 2002 Act, will be the subject of separate consideration in another judgment.

[3] Paragraph [144] of the judgment states:

> "The evidence of Officers M and Q on the logbook issue was inconsistent and contradictory. Their explanations as to why it commenced at 5.03 were entirely unconvincing. I had an opportunity to watch as Mr Macdonald QC cross-examined them and I did not believe their testimony on this issue. I consider that one

> or both of them had edited the original log by removing all entries made before 5.03 pm."

[4] I concluded at paragraph [155] in sub-paragraph (a):

> "Officers M and Q were untruthful in their testimonies when they claimed that they had no idea that there was a real possibility the driver of the Orion was DP2, a hardened member of PIRA with a history of involvement in explosives and firearms."

[5] The correspondence referred me to a passage from the judgment of the ECtHR in Anguelova v Bulgaria [2002] 38 EHRR 659, upon which the next of kin had relied in their earlier written submissions on anonymity and screening and which I had cited at paragraph [130] of my judgment. The ECtHR emphasised in Anguelova that there "must be a sufficient element of public scrutiny of the investigation or its results to secure accountability in practice as well as in theory".

[6] The correspondence proceeded to make the following submission:

> "Given Mr Justice Horner's findings, it is our submission that accountability under Article 2 requires that the identity of those who, on the balance of probabilities, perjured themselves in the course of the inquest, and destroyed evidence relevant to a murder investigation, ought no longer be withheld from the next of kin, or the general public. It is our submission that the findings have shifted the balance against anonymity and in favour of identification.
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> For the aforementioned reasons we invite the Coroner [to] reverse his ruling on anonymity for the Officers M and Q."

[7] I heard further oral submissions on this matter on 10th November 2016, at which Officers M and Q were represented separately from PSNI. Counsel for the next of kin referred me to two authorities, the decision of the Court of Appeal in In the matter of an Application by Elizabeth McDonnell for Judicial Review [2015] NICA 72 and the decision of the Court Martial Appeal Court in R v Marine A and Others [2013] EWCA Crim 2367. In McDonnell, the Court of Appeal observed that there are "very limited circumstances" in which a witness, in respect of whom there was a finding that the witness would be subject to a real and immediate risk to life, could lose the protection of anonymity. The Court recognised that, where there has been a finding of unlawful conduct on the part of an individual contributing to a death, it may be necessary to conduct a balancing exercise to determine whether Article 2 rights could be outweighed by countervailing public interest

considerations, including such matters as the credibility of the inquiry and its role in restoring public confidence (referring to a dictum of Lord Carswell in Re Officer L [2007] UKHL 36 at paragraph 21).

[8] The Court was satisfied in McDonnell that no such countervailing considerations arose in that case and that no individual or group of individuals had been identified as responsible for any wrongdoing. The Court concluded therefore that there was no change of circumstances that would have required the Coroner to review his earlier decisions on anonymity.

[9] The context of Marine A, as was properly acknowledged by counsel for the next of kin, was different to the context of the present case. That was a criminal case in which three marines had appeared before a Court Martial charged with the murder of an unknown Afghan while on patrol in Afghanistan. Marine A was convicted of the murder, Marines B and C were acquitted. A prosecution against two other marines, Marines D and E, had been discontinued prior to arraignment. The Judge Advocate had made an order prior to the trial prohibiting the identification of the marines on the basis of a real and immediate risk to life. Following the trial, he lifted the prohibition on the basis of his finding that the fear that the lives of the marines would be placed at risk through publication of their names was not in fact well founded. The Court Martial Appeal Court dealt with the marines' applications for leave to appeal against the order lifting the prohibition as applications for judicial review of the Judge Advocate's decision. The Court dismissed the applications (save in that the Court remitted the cases of Marines D and E as they had not had the opportunity to make representations to the Judge Advocate on the matter). The Court took the opportunity to outline a series of questions that would provide a structured approach to applications to restrict the reporting of criminal proceedings.

[10] When considering the decision in Marine A alongside the context of the present case, it is important not to overlook the strongly compelling public interest considerations that militated against protecting the identity of the marines in that case. The Court said at paragraph [111] (emphasis added):

> "The case is of the greatest public interest, involving as it does *a unique charge of murder* against soldiers on military operations against a wounded detainee. There is therefore the greatest public interest in the whole of the proceedings being publicly reported."

[11] The Court went on to say at paragraph [112] (emphasis added):

> "In the case of Marine A, there is the greatest public interest in knowing who he was and his background, given his conviction. *It would require an overwhelming case*

> *if a person convicted of murder in the course of an armed conflict were to remain anonymous*."

[12] The Court later commented at paragraph [116] that the public interest in open justice in relation to Marine A (as explained at paragraph [111] of the Court's judgment) was the same in respect of Marines B and C and that it could make no difference that they were acquitted. I am not readily persuaded that the position of Officers M and Q in these proceedings is analogous to the position of the marines charged with murder in the Marine A case. In addition to this contextual distinction between the cases, it is important to note that ultimately in Marine A it was determined that there was *no* real and immediate threat to the lives of Marines A, B and C.

[13] In the present case, the starting point for consideration of this matter at this juncture must be the text of my judgment at paragraphs [89] to [136]. The grant of anonymity (and screening) to Officers M and Q was made on the basis of an objectively verified risk to life that, as was accepted by all parties, met the threshold for engagement of Article 2. It is perhaps worth noting that the threat to M was assessed as MODERATE, namely "an attack is possible, but not likely", but that in the event of an appearance at the inquest without anonymity (and screening) the threat was likely to rise within and possibly beyond the MODERATE threat band, depending on the nature of the evidence. The threat to Q was assessed as LOW, namely "an attack is unlikely", but potentially rising to MODERATE or beyond in the event of an appearance at the inquest without anonymity.

[14] Given my conclusion on the risk to life and the engagement of Article 2, I determined that the grant of anonymity represented a necessary and proportionate response to the risk. I was not persuaded by a submission made on behalf of the next of kin that the necessary protection could be achieved otherwise than through the grant of anonymity. I undertook to keep the matter under review in the course of the proceedings and I confirm that I in fact did so.

[15] In the course of the hearing, individual officers were reminded by counsel to the Coroner that the matter of anonymity was subject to ongoing review and they were asked to outline their concerns about giving evidence without the benefit of anonymity and screening. Giving evidence on the first day of the hearing, Officer Q stated:

> "During my career the IRA and other terrorist organisations were trying to kill me. I still believe they are out there and I think they'd have no compulsion about killing me now. If I gave my evidence in an open court with my name, I think I would be putting myself and my family in danger."

[16] On the second day of the hearing, Officer M stated:

> "I served for over 32 years as a police officer. I have been involved in several incidents of which they have been mentioned here in this Court today. The threat level remains high within the province and because of those facts I would have a serious concern for my own safety and the safety of my family. I also travel regularly to events in the Republic of Ireland, my Lord, and I would have concerns for that travel and again my safety. I am involved with an organisation that has outreach to all persons within different types of communities and I … am in regular contact with people who would have a republican and nationalist background, and again if my identity were to become known I would have concerns in that society and in that environment."

[17] I observed that the engagement of Article 2 was not dependent on the existence of subjective fear on the part of an officer, but I observed that the testimony of each officer about the risks they believed to exist appeared measured and reasonable and served to underline the real risk that each officer was prepared to take by giving sworn testimony.

[18] I pause to note that the application of Officer Q was also supported by medical evidence. In a medical certificate dated January 2016, he was described as having had significant symptoms in the past. He had been prescribed medication to reduce anxiety and had been counselled regarding anxiety management. He was presenting with acute anxiety with respect to the anticipated court appearance. The medical opinion was that the court appearance may well cause his symptoms to deteriorate significantly and that the court appearance could be detrimental to his health. It was also recorded that he had had a stroke in February 2015. Having determined that Article 2 was in play, it was not necessary for me formally to conduct the balancing exercise at common law (having regard amongst other matters to the subjective fears held by the officers) to determine whether it would have been unjust or unfair for the various applicants to give evidence without the grant of anonymity. I did, however, confirm that there was nothing to suggest that the subjective concerns of the applicants were not genuinely held. In the case of Officer Q (and three other officers), I also noted that the medical evidence submitted in support of the application would have weighed in favour of the grant of anonymity at common law.

[19] In the judgment, in which my findings are recorded, I noted the relevant passage from Anguelova in which the ECtHR referred to the importance of public scrutiny to secure accountability and the participatory rights of the next of kin. The section of my judgment on anonymity and screening concludes as follows:

> "[135] On the basis of the above, I confirm the grant of anonymity and screening and the related protective measures to the applicants. Nothing has occurred in the course of the hearing that would cause me to alter the rulings in respect of those witnesses. Having presided over the inquest, I am also satisfied that the determination that the witnesses should not be screened from Mr and Mrs Jordan was entirely correct. It is my sincere hope that they have been assisted by that determination.
>
> [136] Having regard to all of the factors that have been drawn to my attention in this matter, I am satisfied that the proper balance has been struck between, on the one hand, the protection of the Article 2 rights of the witnesses and, on the other, the participatory rights of the next of kin and the principle of open justice."

[20] It occurs to me that when considering whether the order for anonymity in respect of Officers M and Q should be lifted, I must ask two questions. Firstly, is there any reason for me to conclude that there is a likelihood of a difference in the risk assessment as a result of the verdict and findings (see paragraph 32 of McConville)? Counsel for PSNI suggested that the effect of the findings on the risk would be neutral at the very least, with the possibility of the risk being increased. It is my considered conclusion that there is no likelihood of the objectively verified risk to life being *decreased* as a result of the findings in respect of Officers M and Q. Nothing has occurred in the course of the hearing or as a result of my findings that could have a tendency to reduce the risk or to dislodge the Article 2 entitlement to protection.

[21] Secondly, do the verdict and findings insofar as they reflect on the conduct of M and Q require the balancing exercise to be conducted afresh, setting the countervailing considerations of public interest against the established Article 2 rights of those officers? I am not persuaded that it is necessary to embark on such an exercise in light of the findings. As I have observed above, the position of the officers in this case is not analogous to that of the marines charged with murder in the Marine A case. Further, there has been no finding in the inquest of unlawful conduct on the part of an officer contributing to a death. If, however, such an exercise were formally to be conducted, it is my considered view that any public interest there may be in revelation of those officers' names in light of the findings and, in particular, their wrongdoing, would still have to yield to the Article 2 rights of the officers. I remain satisfied, as I was at the time when my findings were finalised and distributed on 7th November 2016, that the grant of anonymity is a necessary and proportionate response to the risk to life posed to those officers in this case.

[22] I note in passing that (a) the continuing subjective fears of both Officer M and Officer Q and (b) the chronic medical condition of Officer Q, would have to be given due weight in any common law balancing exercise if the Article 2 risk had dissipated (which it has not).

[23] In conclusion, I would urge anyone reading the present Postscript to read in full the section on anonymity and screening applications in my judgment at paragraphs [89] to [136]. The issue of anonymity has been the subject of focused consideration in these proceedings: (a) from the time of the initial applications and my provisional rulings prior to the hearing, (b) through the hearing itself, (c) in the course of preparation of my judgment, verdict and findings and (d) latterly, in respect of Officers M and Q, having regard to the issue raised by the next of kin on receipt of my findings. I can say that I have at all times had due regard to the relevant principles governing the grant of anonymity, the submissions made on behalf of PSNI and the next of kin, the interests of open justice and accountability and the participatory rights of the next of kin at an Article 2 compliant inquest.

[24] I am satisfied for the reasons given that the grant of anonymity to Officer M and Officer Q remains justified; further, that the rights and interests of the witnesses, the next of kin and the public have throughout these proceedings been duly respected.