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IN THE CORONER'S COURT IN NORTHERN IRELAND

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BEFORE THE CORONER
MR JUSTICE HUDDLESTON

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

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RULING ON APPLICATION BY CERTAIN WITNESSES FOR ANONYMITY AND SCREENING

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Introduction

[1] Applications for special measures have been received from **SOLDIER M** and **POLICE WITNESS P1** (to become **PW4**) both of whom are due to give evidence in these inquest proceedings. The applications - each of which have been circulated to the properly interested persons (PIPs) - have been objected to by those who represent the next of kin (NOK).

[2] Each of the applications are grounded on the following:

(i) A general statement of the legal principles;

(ii) Individual applications from each of the applicants;

(iii) Various materials including statistical data in respect of terrorist related incidents in the two years leading up to March 2023 and the threat posed by, in particular, dissident republicans;

(iv) Police assessments of risk in respect of the individuals; and

(v) Security services threat assessments.

The Legal Principles

[3] The legal principles governing applications of this type are very well established. In terms of the legal submissions which I have received I do not detect any dissent from those principles – the arguments are based more on their application to this case. In general, coroners have powers at common law to regulate their own proceedings including, where appropriate, affording protection to witnesses by the provision of special measures – such as anonymity and screening.

[4] Whilst the principle of open justice must always be uppermost in the coroner's mind in dealing with such matters, since the enactment of the Human Rights Act 1998 coroners also have a duty to take such measures as are required to satisfy the obligations imposed by Article 2 of the European Convention on Human Rights (ECHR).

[5] This territory was examined in depth in the case of *Re Officer L* [2007] UKHL 36, where Lord Carswell explained that a Tribunal faced with such an application should apply the common law test with consideration of the provisions of Article 2 in mind. In that context subjective beliefs and fears are matters which can and should be taken into account. The provisions of the ECHR, requires the Tribunal therefore to consider whether a risk to the witness's life would be created or materially increased if they are not allowed to give their evidence subject to special measures. If there is no "real and immediate risk" to life (ie, one that is objectively verified and is continuing) then Article 2 drops out of consideration and the application should be dealt with on ordinary common law principles.

[6] Those principles are grounded fundamentally on fairness and involve an analysis of:

(i) The individual circumstances of the witness;

(ii) His or her subjective fears;

(iii) The likely effect of granting anonymity or screening or other special measures.

(iv) Any objective evidence of risk.

(v) Any other relevant factors relating to whether it would be unfair to give evidence without some protective measures.

[7] As to the question of risk, one must consider whether that is fanciful or, if satisfied that there is an immediate risk (ie one which is not either fanciful or trivial). Sadly in this jurisdiction and given the overall context in which this inquest is set

these considerations do raise particular issues in respect of the security services – see in *Re C's Application* [2012] NICA 47.

[8] The coroner is also entitled to take a "precautionary approach" as indicated by Stephens J in the case of *Re Jordan* [2014] NIQB 11.

[9] A precautionary approach, even where the security risks of assessment may be "low" must also, therefore, take into account any potentially increased risk which might result from the giving of evidence – see Keegan J in the Ballymurphy Inquest [2021] NI Coroner 6.

[10] I am also mindful that a good deal of both the statistical information and, indeed, the threat assessments themselves, were undertaken before the NI terrorist threat level was increased from substantial to severe on 28 March 2023 meaning that in general terms a terrorist attack is now considered "highly likely."

Submissions on behalf of the next of kin

[11] The next of kin argue that by reference to an objective assessment of risk that the applications for anonymity and screening should be refused. Their submissions emphasise the importance of open justice and, it is suggested, that the provision of special measures would have the potential to protect the witnesses from effective scrutiny and/or adverse comment but, in addition, hamper the inquest's capacity to determine how Mr Doherty and Mr Fleming died. In short, it is argued that to allow special measures would compromise the inquest in a manner contrary to Article 2.

[12] In particular, the next of kin seek to distinguish the case of *R(On the Application of A) v Lord Saville v Newdigate and others* [2002] 1 WLR 1249 relied upon regarding the continuing threat to former soldiers and police. The next of kin submit that the context of that decision was different for a number of reasons but also involved a higher degree of risk and was without the possibility of video link evidence.

[13] As regards the statistical data the next of kin are generally critical. They claim that there is an evident disconnect between some of the evidence and the risk to former soldiers/police officers giving evidence in an inquest – often (certainly in the case of the military witnesses) where they reside outside of the jurisdiction.

[14] They also point to the fact that there is no evidence of a single attack by dissident republicans on a former soldier or former police officer and certainly not one in the context where evidence has been given in a legacy inquest.

Consideration

[15] Whilst I accept that the evidence before me is largely generic in respect of the individual applications, I have, nonetheless, adopted the precautionary approach as

in *Re Jordan* supra in light of the personal statements which I have received. In that context I regard it to be the case that:

(i) If either the common law or Article 2 test is engaged – as I am satisfied is the case here for the witnesses who have made the applications - then the minimum protection which the court should afford is anonymity;

(ii) On the question of screening I think that needs to be separately considered as it does represent a further infringement of the open justice principle. In that context, however, the question of screening relates purely to screening from public view. At all times the witnesses will be seen by the coroner and legal representatives of each as well as being heard by those in the public gallery and the media. To that extent, as Hutton LCJ indicated in *MOD's Application* [1994] NI 279, it remains a limited restriction. I do not share the view of those who represent the NOK that screening is something that protects the witnesses from effective scrutiny – either by counsel or, indeed, this inquest.

[16] I am also cognisant that taking into account both the provisions which prevailed in the court system by virtue of the Coronavirus Act and with the benefit of more recent authorities and academic analysis that doubt has been cast on the efficacy of demeanour as a means of assessing the true credibility of a witness: see for example Leggatt LJ in *R(On the Application of SS) v Secretary of State for the Home Department* [2018] EWCA Civ 1391.

[17] In general I do not share the concerns expressed by those who represent the next of kin that the provision of special measures in some way negatively impedes the provision of evidence to the extent they suggest. Indeed, in the present context, subject to the important proviso that those who give evidence are available to all legal representatives for the purposes of questioning I think it may allay what could be an impediment on their giving evidence.

Individual Applications

Soldier M

[18] Soldier M was a Sergeant in the Royal Military Police (Special Investigations Branch) at the time of the index incident. He has provided a witness statement in which he confirms that he attended the scene in the aftermath of the shootings and was briefed to prepare a report for army command structure. His application is for anonymity and screening measures but also that he gives evidence remotely via a live video link. Although he does not say it in his application, I have assumed that means he seeks screening from all but the coroner and the individual legal representatives. My ruling is on that basis.

[18] Soldier M left the army in 1988 and claims real and continuing concern as to risk of harm to his safety and that of his family if he is identified. It is his subjective

view that it would not be difficult to locate him should his identity become public. He maintains that he has not broadcast the fact that he was a soldier and that only family and some close friends know of his former role. He reports having some online presence through social media both in terms of work done since leaving the army and through social media.

[19] In addition, he also raises concerns around his medical conditions and worries that identification may have a detrimental impact on his health. At its height Solider M's application is based on the threat to his safety from dissident republicans and he relies upon the common law and Articles 2 and 3 ECHR on the basis of a genuine fear for his safety and that of his family. The PSNI threat assessment in his case is dated February 2023 and records a "low threat" from NI related terrorism in both NI and GB i.e., that an attack is highly unlikely.

[20] Given the somewhat limited nature of the role which M had in these events and adopting, as I have said, the precautionary approach as per *Jordan*, I am satisfied witness M should be accorded anonymity and screening from everyone other than legal representatives and, of course, the coroner. Given the nature of his role I do not think that this forms any form of impediment to either the integrity of the inquest nor, indeed, to counsel's opportunity to adequately question and, indeed, question this witness. I am more than satisfied that his evidence may be given via live link.

P1 (who will become PW4)

[21] P1 (now PW4) is a retired police officer who lives in Northern Ireland. He claims he is subject to the general threat of terrorist attack that applies in respect of all former and serving police officers. His role in the index incident was as a constable in the RUC attached to the communications department in Londonderry. He has provided both his original and an updated statement.

[22] PW4 recounts that in 1989 he was subject of a specific threat and was moved from his home through the SPED scheme. He is married with children, one of whom lives with him and is primary carer for his wife. He indicates that he has resided in the same house for many years and is well-established within this area and subjectively believes that if he were identified in connection with these proceedings he could "easily" be traced. He is concerned for his personal safety and that of his family and is equally concerned about the impact of identification on his health and well-being as he suffers from a medical condition. It has been established to my satisfaction that he was retired from the PSNI on medical grounds.

[23] He asserts a "real and genuine" fear from the threat from dissident republicans.

[24] In his case the PSNI threat assessment also indicated a LOW threat from NIRT. There is also no intelligence held to indicate a specific threat to this witness.

[25] Having considered the applicable legal principles, the details within his application, along with all the evidence that is available to me and, indeed, noting his role in the index incident, I am satisfied that P1/PW4 should be granted anonymity and screening to all, save from the legal representatives for the parties and the coroner.