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*(subject to editorial corrections)**

IN HER MAJESTY'S COURT OF APPEAL IN NORTHERN IRELAND

A and Others Application (Nelson Witnesses) [2009] NICA 6

IN THE MATTER OF AN APPLICATION BY A AND OTHERS (NELSON WITNESSES) FOR JUDICIAL REVIEW

Before Kerr LCJ, Higgins LJ and Girvan LJ

KERR LCJ

Introduction

[1] This is an appeal from a judgment of Weatherup J whereby he dismissed an application by former members of the Royal Irish Regiment which sought judicial review of the decision of the Inquiry panel that is conducting an investigation into the death of Rosemary Nelson. Mrs Nelson was a prominent solicitor in Northern Ireland. She was murdered on 15 March 1999. Each of the applicants for judicial review (and the appellants before this court) was a member of the Royal Irish Regiment at the time of her death and all were then based in Portadown, County Armagh.

[2] Mrs Nelson was murdered outside her home in Lurgan, County Armagh when a booby trap bomb exploded under her car. At that time, all of the appellants were performing patrol, checkpoint or other duties in and around Lurgan. At the request of the Inquiry panel each appellant provided a witness statement relating to his general duties at that time, and the duties that he had undertaken on the day that Rosemary Nelson was killed. It has been decided that none of the appellants will be required to give oral evidence. The written statements that they have made will form part of the material to be published by the Inquiry, however.

[3] The single issue before Weatherup J and this court has been whether the appellants should be identified as persons who had previously served in the regiment. This will occur if, as is its current intention, the Inquiry publishes their statements without redaction. The appellants do not object in

principle to their statements being made publicly available. Their concern is that their names should not be disclosed and that nothing should be published that could identify them as former members of the regiment.

Background to the panel's decision

[4] The terms of reference for the Inquiry were set out in a statement published by the Secretary of State for Northern Ireland on 16 November 2004: -

> "To inquire into the death of Rosemary Nelson with a view to determining whether any wrongful act or omission by or within the Royal Ulster Constabulary, Northern Ireland Office, Army or other State Agency facilitated her 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 her death was carried out with due diligence; and to make recommendations"

[5] In the course of the Inquiry, the Ministry of Defence made a number of applications for anonymity for military witnesses (including the appellants) who were to provide evidence to the Inquiry. The Inquiry gave a generic ruling on the question of anonymity on 21 February 2008 and at the same time issued individual decisions refusing anonymity to each of the appellants. The Ministry of Defence renewed its applications on their behalf and on 28 March 2008, the Inquiry dealt with these. They maintained their decision to refuse anonymity but indicated that none of the appellants would be required to give oral evidence. The only references to their names would be in the witness statements and in the Inquiry bundle. It was also indicated that none of the appellants was 'in the spotlight' of the investigation and that the conduct of the appellants did not form 'the main focus of the Inquiry'.

[6] The Inquiry panel asked more than three hundred and fifty people to provide witness statements. Of these, a total of one hundred and forty-five applied for anonymity. One hundred and eleven of these have been determined by the Inquiry. Sixty-four individuals have been granted anonymity and forty-seven have been refused. In relation to MoD personnel, forty-three applications for anonymity have been received. Two of these were withdrawn, five are currently outstanding. Seventeen have been granted anonymity and nineteen have been refused. These include the present appellants.

[7] In the case of former or current members of the regiment, a single generic threat assessment was submitted to the Inquiry panel. It was based on a threat risk analysis by the security sub-branch of the Police Service of Northern Ireland and stated that the threat to members of the regiment attending to give evidence at the Inquiry was assessed as "moderate". This means that an attack is thought to be unlikely but possible. It was made clear that the assessment did not take cognisance of the particular circumstances of individual members of the regiment nor did it take into account the evidence that they were to give to the Inquiry.

[8] The Inquiry considered it necessary to assess where a particular applicant for anonymity lay within the broad category of moderate risk since some of the soldiers were deeply involved in intelligence gathering and had been in possession of sensitive intelligence information. Others, such as the appellants in this case, were engaged on routine tasks. Where it felt able to do so, therefore, and when it was deemed appropriate, the panel assessed whether the risk to an individual applicant for anonymity was relatively high or relatively low within the moderate category.

[9] The panel accepted that all members of the Royal Irish Regiment were perceived by some terrorist groups, in particular Republican dissidents, as legitimate targets. Having made this general acknowledgment, the panel then considered the individual circumstances of each applicant. This particular consideration covered the evidence that they were likely to be required to give to the Inquiry, the role that they had played in the regiment and the area in Northern Ireland in which they lived. Some soldiers had a particularly sensitive role. Some lived in what has been described as the Mid-Ulster triangle where the risk to members of the security forces has been deemed to be particularly acute. The panel concluded that all the appellants fell within the relatively low range of the moderate category.

The decision to refuse anonymity

[10] In its generic ruling the Inquiry found that there was no real or immediate risk to the lives of the appellants such as would prompt an obligation under article 2 of the European Convention on Human Rights to take measures to protect them, including permission that they remain anonymous. That conclusion has not been challenged.

[11] The focus of the appellants' attack has been on the Inquiry panel's findings in relation to the duty of fairness owed to them at common law. On this issue, the Inquiry panel accepted that paramilitary activity and paramilitary violence continued to be a feature of life in Northern Ireland. Dissident republican groups continued to target and undertake attacks on police officers. The Inquiry noted the announcement in February 2008 by the Real IRA that it was planning to launch a new offensive. It also took into

account the warning given at that time by the Chief Constable that there was a "serious" threat from "disorganised but dangerous" dissident republicans. The panel accepted that the targeting and attacks on the Police Service were relevant to the "continuing threat posed to security forces generally in Northern Ireland, whether the police or army personnel". It further acknowledged that service in the Royal Irish Regiment was perceived to involve sympathy with "loyalist aspirations"; it accepted that the 3rd Battalion, Royal Irish Regiment (to which each of the appellants had belonged) had been engaged in undertaking patrol and other duties in strongly republican districts of Lurgan; and it also recognised that since the Royal Irish Regiment had been disbanded, those who had previously served in it would not have the protection available to serving personnel.

[12] The individual decisions relating to the appellants are in broadly similar terms but contain some variation to reflect the individual circumstances of each. In all instances, the conclusion of the panel was expressed as follows: -

> "The Panel has carried out a careful balancing process pursuant to its common law duty of fairness. The Panel has given particular weight to the objectively verified risk in this case, as analysed above.
>
> In those circumstances and when considering the powerful reasons why the Inquiry should be as open as possible, anonymity is not deemed to be necessary in the interests of fairness in this case. Consequently the application is refused."

[13] The 'powerful reasons' that the Inquiry should be as open as possible can be gleaned from various references in the generic decision. At paragraph 21 of this, the panel referred to its "heavy burden … to do everything it can to get to the truth"; at paragraph 54 reference was made to the need for "openness, public confidence in the Inquiry etc"; and at paragraphs 71 – 72 the panel specified the following matters as being particularly relevant to the public interest that the Inquiry should be "as open as possible": -

(i) that so far as possible, the Inquiry hearings should be conducted in public;
(ii) that the family of Rosemary Nelson should be able to participate effectively in the business of the Inquiry so as to ensure that it was effective;
(iii) that the Inquiry's ability to get to the truth should not be inhibited, and that similarly, its ability to hold persons to account and to make recommendations should not be impaired; and

(iv) that evidence given to the Inquiry should be made public so as to maintain public confidence in its independence, in its effectiveness, and in the conclusions that it reached.

The arguments

[14] The appellants contend that the common law duty of fairness required that there be compelling reasons to justify the refusal to grant anonymity. The respondent argues that this is not a universal prerequisite. What is required is a balancing exercise, weighing the risk to the applicant for anonymity against the factors which favour openness. In some circumstances, where the risk is sufficiently grave, compelling reasons may be required. This is not such a case, the respondent says. Alternatively, it is claimed that, if compelling justification is required, it was unquestionably present in this instance.

[15] The second principal submission of the appellants is that the Inquiry panel's approach to the matters that it had identified as germane to the question of anonymity was incorrect. In particular, the 'routine' nature of the evidence the appellants could give should have led to the conclusion that there was no compelling justification for refusing the applications for anonymity. Instead the panel had treated this as a reason for deciding that the level of risk to them was reduced. It was further submitted that the Inquiry had failed to identify the appellants' place of residence or place of work as factors material to the objective risk to which each is exposed. Finally, it was argued that the panel had acted inconsistently as between those who had been granted anonymity and those who had been refused.

[16] On the question of the review of the panel's decision, the appellants argue that the court should reach its own judgment on whether the duty of fairness to them requires that anonymity ought to be allowed. The respondent suggests that the court should give considerable weight to the conclusion of the Inquiry on this issue, particularly since it was best placed to assess the principal reason for not granting anonymity, *viz* that, to do so, would result in 'an overwhelming preponderance of unnamed witnesses from MoD/PSNI' with an inevitable collapse in public confidence in the Inquiry.

Is compelling justification required?

[17] Mr Swift, who appeared with Mr Scoffield for the appellants, argued that the panel ought to have directed itself on the approach to the obligation of fairness in accordance with the decision in *R v Lord Saville of Newdigate ex parte A* [2000] 1 WLR 1855. This, he suggested, made clear that where a risk to the lives of witnesses arose from the giving of evidence to an inquiry, an application that they should be permitted to do so anonymously could only be refused if there were compelling reasons justifying the refusal. Instead, Mr

Swift claimed, the panel had focused on the decision in *Re Officer L's application* [2007] 1 WLR 2135 which it had erroneously regarded as overtaking the principle established by *ex parte A*.

[18] The *ex parte A* case involved a ruling by the Bloody Sunday inquiry that soldiers who were to give evidence about the events on 30 January 1972 in Londonderry should be referred to by their full names. Seventeen soldiers, each of whom had fired live rounds, sought judicial review on the ground that the tribunal's decision was unreasonable. The Divisional Court allowed the application and quashed the tribunal's ruling in so far as it applied to soldiers who had fired live rounds. The Court of Appeal dismissed an appeal by the tribunal, holding that, in the absence of compelling justification, it was unreasonable for a decision-maker to reach a decision which contravened or might contravene human rights, and where a fundamental right was engaged the options available to the reasonable decision-maker were curtailed. At page 1877, Lord Woolf MR, delivering the judgment of the court 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?"

[19] In the present appeal, it is accepted that the fears of the appellants are based on reasonable grounds. It is also accepted that there will be an increase in the risk to them by their being identified as former members of the Royal Irish Regiment. The risk arises from that earlier membership. At present it is not known that they had been members of the regiment. When that becomes known, the risk will materialise. If the test adumbrated by Lord Woolf is deemed to be of general application and if it has survived the decision in *Re Officer L*, it is difficult to see how the panel could lawfully refuse the applications for anonymity unless it concluded, on reasonable grounds, that there was compelling justification for naming the appellants.

[20] Before turning to the opinion of Lord Carswell in the *Officer L* case, it is important to recall that the appeal in that case was primarily concerned with the decision of the tribunal as to the proper approach to the question whether article 2 of ECHR was engaged. The House of Lords decided that "although it did not specifically so state in its ruling, it was inherent in all its discussion of the article 2 issue that the Inquiry did not consider that the pre-existing risk to any of the respondents or other applicants was sufficiently severe to reach the article 2 level of a real and immediate risk" before the question of their giving evidence arose. The Inquiry concluded that the giving of evidence would not involve any increase in the level of risk and that therefore it was not necessary to address the question whether the giving of evidence gave rise to a risk that would activate article 2. This approach was endorsed by the House of Lords

and consideration of the common law duty of fairness was essentially incidental to the principal finding.

[21] At paragraph 22, however, Lord Carswell addressed the common law question and said this: -

> "The principles which apply to a tribunal's common law duty of fairness towards the persons whom it proposes to call to give evidence before it are distinct and in some respects different from those which govern a decision made in respect of an article 2 risk. They entail consideration of concerns other than the risk to life, although as the Court of Appeal said in paragraph 8 of its judgment in the *Widgery Soldiers* case, an allegation of unfairness which involves a risk to the lives of witnesses is pre-eminently one that the court must consider with the most anxious scrutiny. Subjective fears, even if not well founded, can be taken into account, as the Court of Appeal said in the earlier case of *R v Lord Saville of Newdigate, ex p A* [2000] 1 WLR 1855. It is unfair and wrong that witnesses should be avoidably subjected to fears arising from giving evidence, the more so if that has an adverse impact on their health. It is possible to envisage a range of other matters which could make for unfairness in relation of witnesses. Whether it is necessary to require witnesses to give evidence without anonymity is to be determined, as the tribunal correctly apprehended, by balancing a number of factors which need to be weighed in order to reach a determination."

[22] It is clear that Lord Carswell was here addressing fears entertained by witnesses in relation to risk to life where the risk fell short of that required to invoke the protection afforded by article 2 of ECHR. He considered that where such fears existed, a balance required to be struck between the interests of those who felt those fears and other competing interests. One may suppose that these countervailing interests would include the need to demonstrate openness in the manner in which an investigation of a controversial death is conducted. Lord Carswell did not consider that, in such a context, it would be necessary to show that there was compelling justification for refusing an application for anonymity.

[23] Lord Woolf's discussion of the way in which the issue of anonymity was to be addressed necessarily took place in a common law context since the Human Rights Act 1998 had not come into force at the time that the judgment

of the Court of Appeal was delivered. It is clear, however, that the judgment was strongly influenced by the consideration that a refusal to grant anonymity might contravene a fundamental human right, the right to life. In *Re Officer L*, however, it had been held that the right to life under article 2 of ECHR did not arise. Whereas in *ex parte A* the possibility (at least) of a violation of article 2 arose, in *Officer L* that was not an issue.

[24] Largely for this reason, I have concluded that Lord Woolf did not propound a rule intended to be of general application to the effect that where a risk to life arose, compelling justification was required before a claim for anonymity of witnesses could be refused. Put simply, the context here is different. Whereas in *ex parte A* the decision might well have infringed the applicants' rights under article 2, in the present case it has been determined that this does not arise. I am of the view that a risk falling short of that required to activate article 2 of ECHR falls to be assessed simply as one of a number of factors in an even-handed evaluation of competing interests rather than as a matter which requires to be offset by compelling justification.

The approach of the panel to the relevant evidence

[25] The first area of challenge under this subject relates to the question of the evidence to be given by the appellants. Whereas the panel considered that its routine character made it less likely that the risk to them would be increased, the appellants make the case that the mundane nature of the evidence makes the disclosure of their names less significant in any assessment of the need for openness. Both views are, in my opinion, entirely tenable. More importantly, they are not mutually exclusive. There is nothing in the least contradictory between, on the one hand, the conclusion that former soldiers performing routine patrols are less likely to be at risk from malevolent elements than those engaged in intelligence gathering and, on the other, the view that the need to promote confidence in the Inquiry's proceedings is unlikely to be significantly enhanced by the disclosure of the names of those who were peripheral to the main focus of the investigation. Both views must be accommodated in the evaluation of whether anonymity should be allowed.

[26] The claim that the panel failed to take into account the places of work and residence of the appellants must be viewed in light of its findings in the second annex to the generic ruling: -

> "7. Most of the soldiers likely to be potential witnesses come from the home based 3rd Battalion, Royal Irish Regiment based in Mahon Road, Portadown. Many members of that battalion were part-time reservists. Recruitment to the Royal Irish

was or was perceived to be from communities sympathetic to Loyalist aspirations.

8. In the years 1997 to 1999 soldiers from the 3rd Battalion were frequently patrolling or carrying out operations in strongly Republican districts of Lurgan. Their duties included manning vehicle checkpoints and observing and recording the movements and activities of suspected terrorists and their associates.

9. The home-based Battalions of the Royal Irish Regiment have been disbanded. Consequently the Panel has taken into account the fact that many of its members are in the process of redundancy. The effect of this is that certain members of RIR may in the relatively near future be without the protection associated with being a serving member of the armed forces. Many will continue to live in districts close to where Republican paramilitaries and their supporters live. In addition those persons will be seeking new employment and they may be reluctant to disclose to their potential employer and more generally to the public the fact of their former role in the RIR. The same may apply to those who left the RIR in earlier years."

[27] Moreover, in paragraph 62 of the generic ruling the panel recorded: -

> "… it is apparent from the latest objective material as to the security situation that some areas within the mid-Ulster triangle continue to be the subject of dissident activity and that certain areas are perceived to be more risky than others. When considering applications where the individual lives in the mid-Ulster triangle, the Panel has been guided by the up to date evidence as to the security situation in each location, assisted in large part by the IMC [Independent Monitoring Commission] reports and in particular the maps which show the geographical distribution of incidents of paramilitary violence"

[28] Further reference to the geographical dimension of the threat is to be found in the letter of 28 March 2008, where reference is made to the variations in the pattern of violence in different areas of Northern Ireland as specifically

referred to in the 17th IMC Report. It is acknowledged that if a witness lives in or near to an area which has been the subject of continued violence on the part of Republican dissidents, it may well be easier for that person to be identified and targeted. In light of these references, I cannot accept that the places where the appellants live and work have not been considered by the panel.

[29] The appellants' third complaint in relation to the panel's approach to the evidence was of a lack of consistency in dealing with individual cases. Thus, it was claimed, in none of the cases of the four appellants who live in the Mid-Ulster triangle was this factor regarded as being of particular importance in assessing the objective level of risk. In contrast to this, the appellants point to the fact that of the ten soldiers who have been granted anonymity, six live in the Mid-Ulster triangle and their places of residence were noted as of particular importance in the objective level of risk.

[30] Weatherup J analysed this complaint carefully in paragraphs [29] to [35] of his judgment. As he has pointed out, factors other than the residence of those soldiers who were granted anonymity played a part in the decision that they should not be identified. The fact that they live where they do was considered relevant but it was clearly not determinative of the issue of whether they should be granted anonymity. The residence of those who were granted anonymity was deemed, *in combination with other factors*, to tip the balance in favour of acceding to their applications. In the appellants' case those other factors were either not present or were not of equivalent significance to their cases as to those who were granted anonymity. It was not a matter, therefore, of the question of residence being disregarded or discounted in the appellants' cases. It was merely that this factor was not sufficiently supported by other factors that would have warranted a different stance on the question of anonymity. There is therefore no reason to suppose that the residence factor was accorded any less importance in the case of those whose applications were refused than it was for those to whom anonymity was granted.

[31] In this context I should say that I cannot accept Mr Swift's claim to the effect that the panel had not identified the appellants' places of residence or work as 'matters relevant to the objective risk to which each was subjected' or that it had not regarded 'the residence of four of the appellants in the Mid-Ulster triangle as relevant to' that risk. It appears to me that the panel did in fact have regard to these matters but, for the reasons that I have sought to explain in the preceding paragraph, did not consider these factors *in their cases* to be determinative.

The basis on which the decision of the panel may be reviewed

[32] It was submitted by the appellants that the decision on whether it was fair to identify them was one that should be taken by the court. This was not an instance of the court's supervisory jurisdiction extending only so far as an examination of whether the decision of the panel was *Wednesbury* unreasonable. The court must itself make the judgment whether the duty of fairness owed to the appellants demanded that they should have the protection of the anonymity which they seek.

[33] For the respondent, Mr Eadie QC, who appeared with Ms Grange, accepted that fairness was ultimately a matter for the court but he suggested that we should have conspicuous regard for the views of the panel – not only because of its considerable expertise and experience but also because it was uniquely well placed to assess the impact that a failure to require the witnesses to be identified would have on the authority of its findings and the perception of its independence.

[34] In *ex parte A* Lord Woolf said (at paragraph 38) that, "[w]hether a decision [of a tribunal] reached in the exercise of its discretion is fair or not is ultimately one which will be determined by the courts". This, of course, does not deal directly with the means by which such determination is to be made. Later passages in the judgment make it clear that, however the question is to be decided, a *Wednesbury* unreasonableness test is not appropriate. At paragraph 41 Lord Woolf quoted from his own and Lloyd LJ's judgments in *Reg. v. Panel on Take-overs and Mergers, ex parte Guinness plc.* [1990] 1 QB 146: -

> "Lloyd LJ said, at p 184:
>
> > '*[Counsel for the panel] argued that the correct test is Wednesbury unreasonableness, because there could, he said, be no criticism of the way in which the panel reached its decision on 25 August. It is the substance of that decision, viz., the decision not to adjourn the hearing fixed for 2 September, which is in issue. I cannot accept that argument. It confuses substance and procedure. If a tribunal adopts a procedure which is unfair, then the court may, in the exercise of its discretion, seldom withheld, quash the resulting decision by applying the rules of natural justice. The test cannot be different, just because the tribunal decides to adopt a procedure which is unfair*. Of course the court will give great weight to the tribunal's own view of what is fair, and will not lightly decide that a tribunal has adopted a

> procedure which is unfair, especially so distinguished and experienced a tribunal as the panel. But in the last resort the court is the arbiter of what is fair. I would therefore agree with [counsel for Guinness] that the decision to hold the hearing on 2 September is not to be tested by whether it was one which no reasonable tribunal could have reached.' (Emphasis supplied.)

Woolf LJ added, at pp 193–194:

> 'On the application for judicial review it is appropriate for the court to focus on the activities of the panel as a whole and ask with regard to those activities, in the words of Lord Donaldson of Lymington M.R., 'whether something has gone wrong' in nature and degree which requires the intervention of the courts. Nowadays it is more common to test decisions of the sort reached by the panel in this case by a standard of what is called 'fairness.' I venture to suggest that in the present circumstances in answering the question which Lord Donaldson of Lymington M.R. has posed it is more appropriate to use the term which has fallen from favour of 'natural justice.'
>
> In particular in considering whether something has gone wrong the court is concerned as to whether what has happened has resulted in real injustice. If it has, then the court has to intervene, since the panel is not entitled to confer on itself the power to inflict injustice on those who operate in the market which it supervises'."

[35] From these passages it can be seen that a rather less disconnected scrutiny from that which is involved in the traditional *Wednesbury* model is favoured where what is at stake is the risk of injustice or unfairness to the individual. This is particularly so where one is concerned with a possible risk

to the life of the person affected by the decision. The same theme finds expression again in the speech of Lord Carswell in *Re Officer L.* At paragraph 22 he referred with approval to what the Court of Appeal had said in *R (A) v Lord Saville of Newdigate* [2002] 1 WLR 1249, (per Lord Phillips MR at [7] – [8]) when it was observed that "an allegation of unfairness which involves a risk to the lives of witnesses is pre-eminently one that the court must consider with the most anxious scrutiny".

[36] As Girvan LJ has pointed out in paragraph [27] of his judgment (which I have had the opportunity to read in draft), there is now recognised a 'sliding scale' of intensity of review where a decision is under challenge. This will vary according to the nature of the decision and the interest affected by it. In the now celebrated words of Lord Steyn in *R (Daly) v Secretary of State for the Home Department* [2001] 2 AC 532, 548 "in law context is everything". The context for the present case is provided by the following considerations: the deep concern that the appellants have about the impact that the revelation that they were members of the Royal Irish Regiment might have on their personal security; the assessment that has been made by the security services of the likelihood of their security being imperilled by that revelation; the nature of the evidence that they are to provide; the consideration of their personal circumstances by the Inquiry panel; and the impact that the withholding of this information might have on the public's perception of independence of the Inquiry's findings.

[37] It appears to me that the place that this particular review must occupy on the sliding scale is one where the court brings its own judgment to bear on the matters that have been canvassed both by the appellants and the panel, while recognising that the panel enjoys a more intimate familiarity with those issues and is better placed to make a judgment than is the court on the effect that the concealment of the appellants' names would have on the public confidence in the outcome of the investigation which is such an important part of the Inquiry process.

Conclusions

[38] For the reasons that I have given above, I do not consider that compelling justification is required before a decision may be taken to refuse anonymity to the appellants. I am of the view that this is a decision to be taken after weighing the various competing interests. It goes without saying that all relevant matters must be taken into account but, again for the reasons that I have given, I believe that the Inquiry panel has addressed all the appropriate issues in its consideration of whether the appellants should be granted anonymity.

[39] A very wide range of people in Northern Ireland have been at risk of terrorist attack over the past thirty-five years. That risk has increased and

diminished at various times throughout that period. It is generally recognised that the current level of terrorist threat to groups that were formerly possible targets of paramilitary organisations has lessened. It is also undeniably true that the risk of terrorist attack by dissident groups has not been eliminated. Although current information suggests that the principal target of such groups is the serving police force, the possibility of attack on former members of the security services cannot be entirely dismissed.

[40] The risk to the appellants was judged generally to lie in the moderate range. A more refined examination of each of their cases by the Inquiry panel was conducted in which their personal circumstances were considered on an individual basis. This led to the conclusion that they occupied the lower end of the moderate range. I have found nothing on which that conclusion may legitimately be challenged. In particular, I consider that the panel was correct to have regard to the fact that the evidence which they have supplied is uncontroversial and is unlikely to excite the interest of malevolent forces, although, of course, I accept the general proposition made by Girvan LJ that terrorists have shown themselves in the unhappy history of events in Northern Ireland to be both unpredictable and opportunistic.

[41] Ranged against the considerations discussed in the preceding paragraph is the fact that the fears entertained by the appellants are genuinely and reasonably held. One must also take into account the argument that since the evidence they give is uncontroversial, the erosion of public confidence that would be occasioned by permitting them to remain anonymous might be insignificant. It has been asserted, however, that if the appellants are not identified, a great many other witnesses may reasonably claim to be included in the same dispensation. Quite apart from this, I consider that the impact on the authority of the Inquiry and the general view as to its openness will be considerable if an entire category of witnesses (whose evidence is not remotely of a sensitive nature) remains unidentified.

[42] I have concluded, therefore, that the decision to refuse the applications for anonymity was correctly made and I would dismiss the appeal. It may be that a final decision on anonymity can be deferred. As Girvan LJ has pointed out, anonymity, once lost, cannot be restored and it is conceivable that further material will become available which might affect the Inquiry panel's view as to the propriety of revealing the appellants' identities. If there is no substantial reason for disclosing this information now, the panel might want to consider whether it would be better to postpone the determination of this issue.

[43] I do not find, however, that the tribunal *must* defer this decision. It lies within its discretion to do so but, on the material so far presented, I could not conclude that it was bound to do so. The case was not advanced on the basis that the decision on anonymity was taken prematurely. The competing

arguments on the question of timing (which I have no doubt could be canvassed) have not been aired. Girvan LJ has concluded that the determination of the anonymity question at this stage is premature. Without hearing argument on the matter, I do not feel able to share that view.

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*(subject to editorial corrections)**

IN HER MAJESTY'S COURT OF APPEAL IN NORTHERN IRELAND

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A and Others Application (Nelson Witnesses) [2009] NICA 6

IN THE MATTER OF AN APPLICATION BY A AND OTHERS (NELSON WITNESSES) FOR JUDICIAL REVIEW

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Before Kerr LCJ, Higgins LJ and Girvan LJ

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HIGGINS LJ

[1] I have had the advantage of reading in draft the judgment of the Lord Chief Justice. For the reasons he gives, with which I agree, I too would dismiss the appeal. However I wish to add a few comments of my own.

[2] This is an appeal from a decision of Weatherup J whereby he dismissed an application for judicial review by former members of the Royal Irish Regiment. In November 2004 the Secretary of State for Northern Ireland established an Inquiry to conduct an investigation into the death of Rosemary Nelson, a prominent solicitor in Northern Ireland. She died as a result of an explosive device which detonated under her motor vehicle outside her home on 15 March 1999.

[3] The terms of the Inquiry are –

> "To inquire into the death of Rosemary Nelson with a view to determining whether any wrongful act or omission by or within the Royal Ulster Constabulary, Northern Ireland Office, Army or other State Agency facilitated her 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 her death was carried out with due diligence; and to make recommendations"

[4] The appellants are former members of the 3rd Battalion of the Royal Irish Regiment based at Portadown, County Armagh. In 1999 each was a serving member of the Battalion whose duties extended to the town of Lurgan in County Armagh and included carrying out patrols and manning checkpoints. Each has provided a written statement to the Inquiry setting out their general duties in the Lurgan area as members of the Regiment and their specific duties on the 15 March 1999. A substantial number of persons have provided written statements to the Tribunal. Many of them are former members of the Royal Irish Regiment or other army units, as well as former and serving members of the police force. One hundred and forty-five of these persons applied for witness anonymity, of whom sixty-four were successful and forty-seven were refused. The Ministry of Defence applied for anonymity for a number of service personnel, including the appellants. So far seventeen of these applications have been granted and nineteen (including the appellants) have been refused.

[5] On 21 February 2008 the Inquiry Panel gave a generic ruling on applications for anonymity as well as individual rulings, which included individual rulings on the appellants. None of the appellants was successful in his application for anonymity. Further applications for anonymity were made by the Ministry of Defence on behalf of the twelve appellants on 28 March 2008, however the Tribunal adhered to its original rulings. It has been decided that it is not necessary for any of the appellants to give oral evidence to the Inquiry, but each of their statements, including their identities, will be included as part of the Report to be made published by the Inquiry. It is accepted that none of them provide any evidence that is central to the main issues that lie at the heart of the Inquiry as defined in the terms of reference.

[6] All of the appellants live in Northern Ireland and have managed, over a number of years, to maintain largely confidential the fact that they have served in the Royal Irish Regiment. That service has been part-time and throughout they have lived and worked in the community. They have no objection to their statements being made public but are concerned that if their names are disclosed in the Inquiry Report, they could be identified as having served in the Royal Irish Regiment. A generic threat assessment in respect of former members of the Regiment was provided to the Tribunal. This assessment did not take into account the individual circumstances of each member of the Regiment or the nature of the evidence that they are to provide to the Inquiry. It gauged the threat to members (or former members) of the Regiment as moderate, that is, an attack is considered unlikely but is nonetheless possible. The members of the Regiment who applied for anonymity were engaged in different duties within the Regiment. Some (but not the appellants) were engaged in intelligence matters and thereby in possession of sensitive material while others performed routine security duties and patrols in different areas. All were in the category deemed

moderate. The approach of the Inquiry team was to assess where each lay within the moderate category. It was accepted that all who had served with the Regiment were considered by terrorists to be legitimate targets. It was also accepted that identification as former members of the Regiment would increase the risk that they faced and that their concerns for their safety are based on reasonable grounds. This was the starting point for the Inquiry. It then considered the individual circumstances of each appellant, where they lived in Northern Ireland, their duties within the Regiment and the nature of the evidence they would be providing to the Inquiry. It was accepted that paramilitary activity remained a feature of life in Northern Ireland and that this activity included dissident republican organisations like the Real IRA. It noted the recent warnings from the Chief Constable about the threat from dissident republicans and accepted that both police and army personnel were at risk from this source and that former members of the Regiment would no longer have the same protection as serving members.

[7] In its generic ruling the Inquiry concluded that there was no real or immediate risk to the lives of the appellants such as would engage Article 2 of the European Convention on Human Rights. That conclusion is not challenged. Having assessed the various factors referred to above the Inquiry concluded that all of the appellants lay within the lower end of the moderate category. Consequently it carried out a balancing exercise pursuant to the common law duty of fairness. It concluded there was no reason to extend to the appellants the anonymity afforded to others who fell into the higher end of the moderate category. In each case its conclusions were expressed were in these terms –

> "The Panel has carried out a careful balancing process pursuant to its common law duty of fairness. The Panel has given particular weight to the objectively verified risk in this case, as analysed above.
>
> In those circumstances and when considering the powerful reasons why the Inquiry should be as open as possible, anonymity is not deemed to be necessary in the interests of fairness in this case. Consequently the application is refused."

[8] The appellants appealed against that ruling by way of judicial review and Weatherup J dismissed the appeals and upheld the approach adopted by the Inquiry Panel. The principal ground of appeal to this court is that Weatherup J erred in law in his conclusion as to the effect of the decision of the House of Lords in Re Officer L's Application 2007 1WLR 2135. It was submitted by Mr Swift QC, who with Mr Scoffield, appeared on behalf of the appellants, that the common law duty of fairness, referred to by the Inquiry

Panel in its ruling above, required compelling reasons to justify a refusal to grant anonymity to persons in the appellants' situation. This was based on a passage in the judgment of Lord Wolff MR in R v Lord Saville of Newdigate ex parte A 2000 1 WLR 1855 at page 1877. This case arose out of a ruling by the Bloody Sunday Inquiry that all soldiers due to give evidence to that Inquiry should be referred to by their full names. Some of the soldiers who had discharged their weapons on the day in question sought a judicial review of that decision. A Divisional Court quashed the ruling and an appeal to the Court of Appeal was dismissed. At paragraph 68 Lord Woolf stated –

> "We agree with the tribunal that the issue is not to be determined by the onus of proof. However, 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?"

That ruling was made in the context of an application for anonymity in which there was a clear risk to life involving the soldiers who discharged live rounds on Bloody Sunday and a possible breach of Article 2 of the European Convention on Human Rights, if it had applied at that time.

[9] In Re Officer L's Application concerned claims for anonymity by serving and former police officers who were notified of an intention to call them as witnesses in another Inquiry being conducted in Northern Ireland into the death of Robert Hamill, who died on 8 May 1997 from injuries received some days earlier during an affray in Portadown, County Armagh. While the police officers in that application expressed fears in relation to their lives, the risk was not of a level which would attract the protection afforded by Article 2 of the European Convention. Lord Carswell delivered the leading opinion with which the others members of the House of Lords (including Lord Woolf), agreed. In the course of his opinion he set out the principles which should apply where a Tribunal is considering the common law duty of fairness (in contrast to Article 2 of the European Convention on Human Rights) in respect of person whom it proposes to call as witnesses. At paragraph 22 he said –

> "[22] The principles which apply to a tribunal's common law duty of fairness towards the persons whom it proposes to call to give evidence before it are distinct and in some respects different from those which govern a decision made in respect of an article 2 risk. They entail consideration of concerns other than the risk to life, although as the Court of Appeal said in paragraph 8 of its

> judgment in the *Widgery Soldiers* case, an allegation of unfairness which involves a risk to the lives of witnesses is pre-eminently one that the court must consider with the most anxious scrutiny. Subjective fears, even if not well founded, can be taken into account, as the Court of Appeal said in the earlier case of *R v Lord Saville of Newdigate, ex p A* [2000] 1 WLR 1855. It is unfair and wrong that witnesses should be avoidably subjected to fears arising from giving evidence, the more so if that has an adverse impact on their health. It is possible to envisage a range of other matters which could make for unfairness in relation of witnesses. Whether it is necessary to require witnesses to give evidence without anonymity is to be determined, as the tribunal correctly apprehended, by balancing a number of factors which need to be weighed in order to reach a determination."

[10] At paragraph 29 Lord Carswell reduced the principles to be applied by a Tribunal considering an application for anonymity to a single test.

> "29. In pursuit of this end, I suggest that the exercise to be carried out by the tribunal faced with a request for anonymity should be the application of the common law test, with an excursion, if the facts require it, into the territory of article 2. Such an excursion would only be necessary if the tribunal found that, viewed objectively, a risk to the witness's life would be created or materially increased if they gave evidence without anonymity. If so, it should decide whether that increased risk would amount to a real and immediate risk to life. If it would, then the tribunal would ordinarily have little difficulty in determining that it would be reasonable in all the circumstances to give the witnesses a degree of anonymity. That would then conclude the exercise, for that anonymity would be required by article 2 and it would be unnecessary for the tribunal to give further consideration to the matter. If there would not be a real and immediate threat to the witness's life, then article 2 would drop out of consideration aid the tribunal would continue to decide the matter as one governed by the common law principles. In coming to that decision the existence of subjective fears can be taken into account, on the basis which I earlier

> discussed (see paragraph 22). For the same reasons as those which I have set out in paragraph 20, however, I would not regard it as essential in every case to commence consideration of the issue by seeking to identify such subjective fears."

[11] It is clear from these passages that the application of the test involves balancing various factors, not least the fears expressed by the applicants and the wider considerations of the nature of the Inquiry, in this instance, inter alia, whether the death of Rosemary Nelson was facilitated by any wrongful act within the Army or other State Agency. It is not a test in which the applications for anonymity could only be refused if there was compelling justification for doing so. The justification put forward for refusing anonymity is one of the factors to be weighed in the balance. As Mr Eadie QC, who with Miss Grange appeared on behalf of the Inquiry submitted, there may be instances in which compelling justification might be required to refuse the application, but this was not one of them. The Inquiry Panel correctly applied the test approved in Officer L's Application.

[12] Weatherup J dealt with the issue at paragraph 16 of his judgment:

> "[16] I am satisfied that the approach to common law procedural fairness, as set out by Lord Carswell in Officer L's application, applies to cases of increased risk as well as cases where there is no increased risk to the witness concerned. The factors in favour of anonymity, whether risk to life or otherwise, must be balanced against the factors in favour of no anonymity, whether considerations of public hearings or public confidence or otherwise. The weightier the factors in favour of anonymity the weightier must be any countervailing factors if they are to prevail. I do not accept that there is some additional or residual requirement for compelling justification in the event that an increased risk to the witness can be established. The extent of the increased risk will be a factor in favour of anonymity but there is no standard requirement of compelling justification for any increased risk, rather the exercise involves conducting a balancing exercise. Accordingly I do not accept the applicants' contentions in relation to the issue of compelling justification and am satisfied that Lord Carswell's balancing approach set out in Officer L's application covers all cases, whether or not there is evidence of increased risk. That being the requirement there was no requirement to establish

> compelling justification in the present case but rather the exercise was and is to determine whether, taking account of all the circumstances, the proper balance has been struck so as to achieve procedural fairness."

[13] The generic and individual rulings demonstrate that the Panel exercised great care in coming to its conclusions and I can find no error in the decision of Weatherup J that the grounds on which judicial review was sought were not made out.

[14] In the opening paragraphs of his opinion in Officer L's Application Lord Carswell recognised the hardship borne by the police during years of civil unrest. Those remarks apply equally to locally based members of the Army. It is accepted that it is for the court to determine whether the decision to refuse anonymity was fair in all the circumstances. However the court was urged to give considerable weight to the Inquiry Panel's own view in this regard, bearing in mind the Panel's extensive knowledge of the nature of the inquiry being conducted and the lines being pursued. I accept that the court should pay regard to the views of the Inquiry Panel on the issue of fairness but in the context of an inquiry into events in Northern Ireland it must be limited. It cannot be overlooked that this court has lived and worked through the last forty years in this province and is well aware of the fears of those who have done much to protect society from violence and unrest, as well as the sacrifices they have made. With that in mind I have looked carefully at the rulings of the Inquiry Panel but as I have indicated can find no error in them.

[15] It has been decided that none of the appellants are required to give evidence and that their statements will form part of the Inquiry Panel's report. It has been confirmed that the Inquiry Panel will keep issues relating to anonymity under review. However once disclosure is made it cannot be retrieved. In those circumstances I consider there is much to be said for deferment of the final decision until publication is due. But that is a decision for the Panel. Whenever the decision is taken it will be determined in light of the security situation as it then is; hopefully better. But if the decision is deferred until at or near publication the Panel will have the advantage of the conclusions which it has reached according to the terms of reference set out above. Those conclusions may impact on the present concerns about public confidence in the Inquiry to an extent that it is no longer necessary to name any of the appellants whose statements will be included in the report. While there is no power in this court to order this approach to the anonymity issue, the Inquiry Panel may wish to take into account the views of this court on this matter.

Neutral Citation No.: [2009] NICA 6 | *Ref:* **GIR7408**

Judgment: approved by the Court for handing down | *Delivered:* **11-02-09**

*(subject to editorial corrections)**

IN HER MAJESTY'S COURT OF APPEAL IN NORTHERN IRELAND

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A and Others Application (Nelson Witnesses) [2009] NICA 6

A'S APPLICATION AND OTHERS (NELSON WITNESSES) FOR JUDICIAL REVIEW

_____

Before Kerr LCJ, Higgins LJ and Girvan LJ

GIRVAN LJ

Introduction

[1] This appeal raises the question whether anonymity should be accorded to the appellants who have provided evidence to a public inquiry established to inquire into the death of Rosemary Nelson ("the Inquiry"). The Inquiry was established by the Secretary of State on 16 November 2004 to inquire into the circumstances of her death and to determine whether any wrongful act or omission within the RUC, the Northern Ireland Office, the Army or other state agencies facilitated her death or obstructed the investigation, whether such act or omission was intentional or negligent, whether the investigation of her death was carried out with due diligence and to make recommendations. The establishment of the Inquiry had followed Justice Corry's report in 2003 in which he concluded that there was evidence of collusion by Government agencies in the murder warranting public inquiry.

[2] The appellants were all former military personnel who live in Northern Ireland. Each of them has furnished to the Inquiry a witness statement describing the work undertaken by the soldier whether on patrol or at checkpoints when carrying out other duties in Lurgan and relating to the knowledge of Rosemary Nelson and what their duties were on the day that she was murdered. The Ministry of Defence made a number of applications for anonymity in relation to various witnesses who were to provide statements to the Inquiry. The appeal relates only to the appellants each of whom was refused anonymity as a result of individual decisions made by the Inquiry.

The Generic Ruling

[3] The Inquiry gave what it described as a generic ruling on 21 February in relation to the anonymity application made on behalf of the appellants and other witnesses who are not the subject of this appeal. Although described as final the Inquiry made clear that in the evolving inquiry the decisions will be kept under review as the Inquiry proceeded to the extent that they would be a purpose in the individual case in doing so. It is clear however that once the identity of a witness is revealed the witness will lose once and for all the benefit of anonymity notwithstanding any later change of mind on the part of the Inquiry and accordingly in relation to those individuals a change of mind could serve no purpose. The generic ruling sets out the Inquiry's analysis of the legal considerations and its view on the proper test to be applied. It reviewed the evidence relating to the security situation in Northern Ireland and has set out the factors and materials it considered it should take into account in reaching its individual decisions. In a series of annexes to the ruling it set out its general observations on the current risks to former and current Ministry of Defence personnel and other categories of witnesses.

[4] The ruling makes clear that the Inquiry has over the course of the preceding three years gathered relevant material with a view to preparing an Inquiry bundle for use at the full hearings. In addition to the gathering of relevant documentation for use in the Inquiry bundle the Inquiry asked 350 people to provide witness statements. Any release of witness statements has taken place in a cautiously redacted basis pending final decisions on anonymity. Anonymity has very properly continued to apply to the witness statements of the appellants pending a final determination of the judicial review application which gives rise to this appeal. There is nothing to suggest that this has interfered in any way with the proper progress of the Inquiry or has caused any prejudice to any interested party.

[5] While recognising what Lord Carswell said in Re Officer L's Application [2007] 1WLR 2315 that analysis could in many cases be approached "as a single decision under common law having regard in the process to the requirements of article 2" the Inquiry considered it convenient to consider the article 2 in a common law test distinctly. It concluded that in no case to date did the panel conclude that the high article 2 threshold had been met. The appellants in this case do not challenge the panel's refusal to accord them anonymity under the article 2 test. Rather the appeal turns on whether the Inquiry gave proper effect to the common law duty of fairness. Paragraphs 47.1 to 47.3 set out what the Inquiry considered to be the main propositions emerging from Lord Carswell's speech in Re Officer L's application [2007] 1WLR 2135 ("Re L") in respect of the principles of common law fairness:

"47.1 The duty of fairness to those who gave evidence to the inquiry entails consideration and concerns other than whether there is real and immediate risk to life in the Article 2 sense. In particular the following amongst other matters related to risk can be taken into account:

- subjective fears, even if not well founded;
- concerns that giving evidence might damage the health of the person concerned;
- an increase in the level of risk faced by a person (even if not meeting the Article 2 "real and immediate" threshold).

47.2 There are no doubt other factors relating to risk that could be relevant to the issue of whether to spare to refuse anonymity (for example, those cited in paragraph 14 of Lord Carswell's speech).

47.3 Those factors need to be balanced against other matters related to the conduct, perception and effectiveness of the inquiry (for example, those cited in paragraph 14 of Lord Carswell's speech)."

[6] The panel went on in paragraph 33 to state:

"The Inquiry then has gone on to consider the following matters:

53.1 Whether the Inquiry is satisfied that there is some, (albeit less serious objectively verified) risk, that exists if anonymity is not granted.

53.2 Whether there is genuine subjective fear; and if so, of what consequences if anonymity is not granted.

53.3 Whether there are any other factors relevant to the fairness of refusing anonymity eg frailty, risk to health etc.

54. A balancing process is then to be carried out applying the common law principles referred to above ie the level of risk plus any other applicable factors have to be balanced against competing consideration including the desire for openness public confidence in the inquiry etc. …. An Inquiry

> has to explain why it has judged that one outweighs the other. In each case subjective fears have been taken into account however these have been given less weight than objectively assessed risk.
>
> 55. It is important to note at this stage that at no stage to date has the panel concluded the high article 2 threshold has been met …"

[7] The panel analysed the current security situation being informed in that regard by the 2007 Report of the Independent Monitoring Commission. While recognising the great improvement in the security situation it also recognised that paramilitary murders continue to occur and both dissident Republican and Loyalist groups present a continuing threat of violence. It noted that some areas within the mid-Ulster triangle, in particular, continued to be subject to dissident activity and that certain areas are more risky than others. The panel noted the announcement of the Real IRA in early February 2008 that it was preparing a new offensive. The group said that the PSNI would be prime targets as well as British soldiers and British ministers. Its announcement was followed by a warning from the Chief Constable of the PSNI regarding a serious threat from disorganised but dangerous dissident Republicans. This represented a level of threat warning higher than others issued in recent years. The panel indicated that his warning and the evidence of attacks in November 2007 involving off-duty police officers had informed the panel generally when making its assessment and had specifically been taken into account when considering the individual threat assessment most of which pre-dated those events.

[8] In informing itself on the question of threat assessment the panel received an oral presentation from the security sub-branch of the PSNI in relation to the process of threat assessment analysis. The PSNI categories of threat levels range from "low" (meaning that an attack is unlikely) through "moderate" (meaning that an attack is possible but not likely) and "substantial" meaning that an attack is a strong possibility. Severe and critical risk refer to even graver levels of risk. The panel concluded that even within those categories there could be a range of levels of risk. Thus within the moderate band risk the risk may be relevantly high or low. The panel concluded that in assessing risk there is a significant element of judgment involved. It was in the panel's view "as much an art as a science." In the context of the present case perhaps a more accurate way of putting it would be to say that the assessment of risk requires a judgment to be made in the light of the known facts recognising that there are imponderable and unpredictable factors in play since it is impossible to read the minds or predict the actions of terrorists.

[9] In paragraph 69 the panel set out a non-exhaustive list of different factors that bear on the nature and extent of the risk (for example the extent to which names are already linked to the case, the extent to which applicants are already in the public domain, the physical location of the applicant's home and place of work, the broad nature of the issues to which it seems likely the applicant's evidence may relate). In paragraph 70 the panel recognised that the common law principles in article 8 involved a broader focus, these included a risk to the appellants' health in giving evidence, the age and frailty of the applicant and risks to and concerns about the applicant's family.

[10] In paragraph 71 of the ruling the panel deals with the question of the public interest in having the Inquiry as open as possible. The panel referred to the genesis of the Inquiry in the report of Justice Corry who emphasised that the hearings should be held in public to the extent possible. Fairness in the context included fairness to the Nelson family as well as fairness to witnesses and the family had a legitimate interest in the effectiveness of the Inquiry. If the evidence in the Inquiry was not made public it might inhibit the Inquiry in its task of seeking the truth and carrying out a full and effective investigation. It might hamper public understanding of the full oral hearing, the written evidence and the final report. It may undermine public confidence and the independence of the Inquiry, its effectiveness and the conclusions reached. Individuals would not be held to account in the way which was fully satisfactory to the general public and/or some of the full participants and it might hamper the Inquiry's ability to make recommendations. The ruling in paragraph 72 pointed out that the Inquiry was inquisitorial and not adversarial so provisions governing and the case laws founded on adversarial hearings were of limited assistance in the very different circumstances of the Inquiry and article 6 jurisprudence was of more limited relevance. In paragraph 72.3 the ruling stated:

> "Save in very exceptional circumstances, the evidence of the individual (aside from that person's identity and appearance) will be given in public. Save in certain exceptional cases, witnesses will be questioned and held answerable for their actions in public, albeit that their evidence will be anonymised. In those circumstances the family's ability to participate effectively and the ability of the inquiry to assess the evidence and fulfil its terms of reference will be substantially unaffected."

[11] In Annex 2 of the generic ruling the panel set out general observations on the current risks of former and current Ministry of Defence personnel. The panel recognised the continuing threat posed to security forces generally in Northern Ireland, whether the police or any person or army personnel. It accepted that the military personnel and Ministry of Defence Northern

Ireland based civil servants are perceived by some terrorist groups and in particular Republican dissidents as legitimate targets. In paragraph 6 of annex 2 the panel stated:

> "The threat risk assessment for all Ministry of Defence personnel which was provided to the panel on 24 July 2006 has also been taken into consideration. This states "Following a threat risk analysis conducted by the Security Sub-Branch, PSNI, I have to advise that the threat to members of the Royal Irish Regiment tending to give evidence at the above enquiry (sic) is assessed at 'Moderate'. The Panel also takes into account the qualification contained in this assessment which states I would point out that this is a generic assessment, which takes no cognizance of the individual circumstances, including the nature of the evidence to be given, the soldiers concerned.
>
> As outlined earlier in this generic final ruling on anonymity, a moderate threat level is defined as one where an attack is possible but not likely."

The Individual Decisions

[12] Having set out its general approach to the various anonymity applications the panel reached decisions in relation to the individual applicants, the appellants in this appeal, which related to witnesses A,B,C,D,E,F,G,H,J,K,L and M. In each decision it recorded the material it had considered in addition to the generic ruling. In each case the panel considered the contents of the individual witness's statement to the inquiry and the MOD's confidential annex.

[13] Each of the appellants is a former soldier in the Royal Irish Regiment. They left the service at different times, one in 2003 (Witness E) and the others in the course of 2006 and 2007. Each have maintained that he has consistently sought to be discrete as to his role as a member of the armed forces in Northern Ireland and each considers that he is vulnerable to attack from dissident Republican terrorists. Four of the witnesses reside in the so-called mid-Ulster triangle an area recognised to be riskier than other parts of Northern Ireland though the panel recognise that the risk applied throughout Northern Ireland.

[14] In each case the panel accepted that the applicant would be at some risk from dissident Republicans as a result of giving evidence at the inquiry (which in a generic basis have been assessed as moderate). But given the broad nature of the evidence which was uncontroversial the objective risk in

the individual cases of the appellants was to be relatively low. In each case the panel concluded that there was no evidence that the relevant witnesses would have had access to a significant amount of sensitive information. The panel accepted in each case that the individual had a genuine fear that giving evidence at the Inquiry would increase the risk and threat to life. In each case the panel concluded that, having carried out a carefully balanced process to his common law duty of fairness, anonymity should be refused. It gave particular weight to the objectively verified risk which in each case was assessed at the lower end of the moderate bracket. It concluded that in those circumstances and when considering the powerful reasons why the Inquiry should be as open as possible anonymity was not deemed to be necessary in the interests of fairness.

Relevant questions

[15] Three separate questions arise in this case. The first question relates to the proper approach in law to the obligation of fairness in a case such as this where a witness is seeking anonymity. Secondly, the question arises as to the nature of review which the court must carry out in this case. Having determined the proper approach and defined the role of the court, the court must proceed to determine whether the Inquiry reached a flawed decision which should be set aside in any of the cases.

The arguments on the first question

[16] Mr Swift on behalf of the appellants contended that the Inquiry Panel had erred in its approach to the exercise of weighing the competing arguments for and against granting anonymity. He contended that both the Inquiry and Weatherup J at first instance erred in concluding that in the present case the obligation of fairness did not require the Inquiry to be satisfied that there were compelling reasons to justify the decision to refuse the anonymity requested. Counsel relied in particular on a passage from the judgment of Lord Woolf in R v Lord Saville of Newdidgate (ex parte A) [2000] 1 WLR 1855 ("Re A"), a case involving the question of whether anonymity should be accorded to soldier witnesses in the Bloody Sunday Inquiry. The relevant passage reads:

> "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 soldier, the evidence being that it would increase the risk."

Mr Swift fastened on this statement arguing that Lord Woolf was therein formulating an overriding test to be applied in a case such as the present.

[17] Mr Eadie QC on behalf of the Inquiry argued that Lord Woolf was not formulating an overriding test but rather was making a fact specific pronouncement that was entirely correct on the context of the particular case where the objective risk to the soldiers was much more serious than in the present case. He argued that Lord Woolf was recognising that the balancing exercise at common law would have to take into account the weight of justification for naming the individuals when compared with other competing factors weighing in favour of anonymity. He contended that the approach adopted by the Panel Inquiry was entirely in line with the approach articulated by Lord Carswell in Re L.

Resolving the first question

[18] In Re L the House of Lords considered the correctness of the decision by the Hamill Inquiry relating to the application of article 2 of the Convention to the facts of applications for witness anonymity in that Inquiry. The House's conclusion as to the height of the threshold for the application of Article 2 in such cases is not an issue in this appeal and the House of Lords ruling in that context is definitive. However, Lord Carswell in his speech with which all the other Law Lords agreed took the opportunity to provide guidance as to the proper approach to the common law duty of fairness towards people whom a tribunal proposes to call to give evidence. In that case the evidence pointed to no increase in risk arising from giving evidence. Lord Carswell concluded that the tribunal's approach to the common law duty was correct pointing out that if there has been no increase in risk then it is not unfair on that account to require a witness to give evidence. Since the question of Wednesbury unreasonableness had not been resolved in the courts below he refrained from expressing an opinion on the tribunal's justification for reaching the conclusion which it did in that case. It appears that in fact when the matter was remitted to Morgan J on the Wednesbury issue the parties resolved their differences so there is no further ruling in relation Re L on that issue.

[19] In paragraphs [27] to [29] Lord Carswell deals at some length with the question of the relationship between the requirements of article 2 and the common law duty of fairness, particularly in the context of the two issues arising at the same time in a case. He concluded that the exercise to be carried out should be the common law test, that is to say the balancing exercise, with an excursion, if the facts require it, into the territory of article 2. Article 2 can only arise if the high threat threshold of real and immediate risk is satisfied. If it is, the granting of anonymity would normally be the appropriate step to take and that would conclude the exercise. If the threshold is not passed then the tribunal would continue to decide the matter as one governed by the common law principles. In coming to that decision the existence of subjective fears can be taken into account on the basis discussed in paragraph 22 of Lord Carswell's speech. He pointed out that in

some cases subjective fears may not be relevant. There may be cases where the risk to life exists even though a person robustly disclaims any fear, in such case it may not be necessary to dwell on the question of subjective fears.

[20] In paragraph [22] of his speech Lord Carswell stated:

> "The principles which apply to a tribunal's common law duty of fairness towards the person who it proposes to call to give evidence before it are distinct and in some respects different from those which govern a decision made in respect of an Article 2 risk. They entail consideration of concerns other than the risk to life, although as the Court of Appeal said in paragraph 8 of its judgment in the Widgery Soldiers case [2002] 1 WLR 1249, an allegation of unfairness which involves a risk to the lives of witnesses is pre-eminently one that the court must consider with the most anxious scrutiny. Subjective fears, even if not well founded, can be taken into account, as the Court of Appeal said in the earlier case of R v Lord Saville of Newdidgate ex parte A [2000] 1 WLR 1855 is unfair and wrong that witnesses should be avoidably subjected to fears arising from giving evidence, the more so if that has an adverse impact on their health. It is possible to envisage a range of other matters which could make for unfairness in relation to witnesses. Whether it is necessary to require witnesses to give evidence without anonymity is to be determined, as the tribunal correctly apprehended, by balancing a number of factors which need to be weighed in order to reach a determination."

[21] A careful reading of Lord Carswell's speech shows that he was not purporting to state any new law as to the question of the common law principles to be applied. The House was concerned to assist lower tribunals in dealing with cases in which article 2 and common law issues arise and to ensure the correct sequencing of issues to be considered.

[22] In seeking to arrive at the relevant common law principles or tests to be applied regard can be had to earlier decisions in this field. There is nothing in Re L that shows Lord Woolf was in error in his approach as adopted in Re A. However, one must take care to read Lord Woolf's statement in Re A in its proper factual context. One must be careful not to attribute the characteristics of a quasi-statutory test to judicial dicta that are tailored to their particular context.

[23] What the common law requires is fairness to the individual witness in all the relevant circumstances of the individual case. The determination of what is fair requires the carrying out of a balancing exercise. The nature of such an exercise necessarily requires putting into the scales the arguments and factors favouring the granting or withholding of anonymity. The passage from Lord Woolf should not be read as stating a broad overriding principle that the common law duty of fairness in any case where a claimed risk to life and subject fears arise requires that anonymity should be granted in the absence of compelling reasons. How the balance is struck in individual cases will, of course, be fact specific. Where there is a risk to the life of a witness the extent of the risk is a highly relevant factor to be put into the scales. Common sense and humanity would lead to the conclusion that the greater the risk the more persuasive the case for anonymity and the more the court would have to be persuaded that the countervailing factors are even more persuasive so as to lead to a refusal of anonymity or, in the words of Lord Woolf, there would have to be some compelling reason for refusing anonymity. Using the terminology in Ex parte Brind [1991] AC 969 there would have to be a competing public interest of sufficient importance to justify withholding anonymity.

[24] There is nothing in the generic ruling to suggest that the panel misdirected themselves as to the law to be applied in determining whether anonymity should be granted. The question to which it is necessary to turn is whether it applied the law correctly and took account of the relevant factors in the correct manner in the decision which they reached in the individual cases. In answering that question the court must determine the nature of its supervisory functions in reviewing the panel's decisions.

The arguments on the second question

[25] Mr Swift argued that what fairness requires is to be determined by the court. He called in aid Ex parte Guinness to support his argument that the courts have rejected the proposition that the requirements of fairness are to be determined on a Wednesbury rationality basis. The court's concern should be the substantive outcome and not merely whether the inquiry adopted a fair procedure and had reached a permissible outcome. He referred again to Lord Carswell's acceptance of the proposition that "an allegation of unfairness involving the risk to the lives of witnesses is pre-eminently one that the court must consider with the most anxious scrutiny." Refusing anonymity is a serious and final step. It is not sufficient for the Inquiry to state that all and only relevant considerations have been taken into account. Nor is it sufficient for the Inquiry to point to some evidence in support of the conclusions it reached. The court is entitled and bound to consider whether there were or were not powerful reasons such that anonymity should or should not be considered necessary in the interests of fairness in the case. The court has to consider whether the Inquiry was right to conclude that dissident

Republicans were less likely to target former soldiers if they gave only routine evidence. It had to consider whether it was right not to identify the appellants' places of residence or work as matters relevant to the objective risk to which each was subjected and whether the Inquiry was correct not to regard the residence of four of the appellants in the mid-Ulster triangle as relevant to the objective risk to which each was subject particularly bearing in mind that in other cases in which anonymity was granted this information was regarded as relevant.

[26] Mr Eadie QC accepted that fairness is ultimately a matter for the court but the court should give considerable weight to the Inquiry panel's own view since fairness involves a number of elements of judgment some of which the Inquiry panel is particularly well placed to form a view. He contended that in reality there is likely to be little if any real distinction between the question "was the question fair" and the question "was the decision properly taken and rational". Counsel maintained that Weatherup J in his judgment approached the matter correctly and was correct in its conclusion that the panel's decision was rational and fair.

Resolving the second question

[27] The law now recognises what has been called a sliding scale of review. The traditionally restricted nature of review by reference to the Wednesbury principles of rationality yields in certain cases to a more intrusive form of review. The heightened scrutiny approach was a public law development which pre-dated the incorporation of the Convention by the Human Rights Act 1998 and found its origin in R v Ministry of Defence ex parte Smith [1996] QB 517 in which Lord Bingham said that the more substantial the interference with human rights the more the court will require by way of justification before it is satisfied that the reason is reasonable." Subsequent case law in R(Daly) v Secretary of State for the Home Department [2001] 2 AC 532, R(SB) v Governor of Denbigh School [2007] 1 AC 100 and most recently Re E(a child) [2008]UKHL 66 show that there is an intensity of review even greater than the heightened scrutiny test when an issue of proportionality under the Convention arises. In Re L Lord Carswell in paragraph [22] accepted as correct the approach adopted in the Widgery Soldiers case that an allegation of unfairness which involved risk to life is pre-eminently one that the court must consider with the most anxious scrutiny. Lord Carswell prefaced his remark by pointing out that the principles which apply to the common law duty of fairness to witnesses are distinct and sometimes different from those which govern a decision in respect of an article 2 risk. It is thus apparent that the heightened scrutiny test albeit not the Daly test applies even though in this case the risk to life ultimately fails to reach the threshold to engage article 2.

[28] The case does involve a question of a risk to lives and this necessitates heightened scrutiny. In relation to the review of the question of fairness the decisions in Ex parte A and in Ex parte Guinness indicate that the court's function is not merely to determine whether the impugned decisions were rational and tenable but to decide whether the outcome was in fact unfair to the appellants in the result. Taking these factors together it appears clear that the court must scrutinise the Inquiry's decision with care, carefully taking into account the reasoning of the Inquiry to which proper respect should be given. Questions of procedure and of procedural fairness are not questions in respect of which the Inquiry has a peculiar special expertise. In reaching its ultimate conclusion the court of course will give respect to the conclusions of the panel which will clearly weigh in the scales of the ultimate judgment. While it would be wrong to interpret the Inquiry's decisions "in a minute textual way … it must be right in every case to see whether substantial and proper reasons are given" (R (Kurecaj) v Secretary of State for the Home Department (2002) EWHC 1199 per Gibbs J).

Resolving the third question

[29] In carrying out the balancing exercise required to be carried out and determining the applications for anonymity the following factors in favour of anonymity must be taken into account.

(i) The applicants have genuine subjective fears as to the safety of their lives if their names are disclosed by the Inquiry to the public.

(ii) Such fears are by no means fanciful. The security advice pointed to a moderate risk, that is to say a possible though not likely risk to life. Such a risk could thus not be ruled out. The assessment of the degree of risk within that category of moderate risk cannot be calculated with any degree of certainty and much depends on ongoing security and political developments in a situation which, while improved compared to the past, remains uncertain. This uncertainty makes the subjective fears of the individuals the more readily understandable and rational. Regard must be had to the unpredictability of the actions of "disorganised and dangerous" criminals. These factors apply a fortiori in the case of the appellants who reside in the Mid-Ulster Triangle.

(iii) The history of terrorism in Northern Ireland shows that those involved in terrorism operate unpredictably, at times randomly and often opportunistically. Terrorists do not necessarily determine their victims on the basis of a logical analysis of the evidence or by reference to a careful weighing of the compelative arguments of why one witness should be attacked before another. Accordingly the fact that the witnesses' evidence is merely routine does not necessarily significantly reduce the risk of life flowing from being named as a former member of the Royal Irish Rangers.

(iv) The fears of the witnesses that because they are named as former members of the RIR they will thereby become potential legitimate targets arise from the evidence of how terrorists have behaved in the past.

(v) The evidence obtained from the witnesses is in use in the Inquiry and the anonymity of these appellants does not affect the value or weight of that evidence which goes to routine factual matters that are sufficiently uncontentious and clear for the Inquiry to be able to conclude that it is unnecessary for any of the appellants to be called to give evidence in public. There does not need to be any public scrutiny of that evidence which essentially is not in dispute. The fact that the sources of the factual material which is not in contention have been accorded anonymity up to now has caused no practical difficulties to date.

(vi) The names and identities of the individuals are, of themselves, of no relevance to the factual evidence adduced from them and the public have no real interest in knowing their names.

(vii) Withholding the names of these individuals will not hamper any of the parties to the Inquiry or the public from understanding the evidence of the tribunal or its final report.

(viii) Since the evidence is uncontentious and routine anonymity can in no way inhibit the Inquiry in seeking the truth in carrying out a full and effective investigation. The evidence is neither central nor decisive.

(ix) There is no question of any tendency on the part of the witnesses to be dishonest which could justify open and public scrutiny in cross-examination.

[30] In turning to the countervailing factors that militate against anonymity the Inquiry founds its decision to refuse anonymity on the ground that it is not necessary in the interests of fairness when considering the powerful reasons why the Inquiry should be as open as possible. It gave particular weight to the objectively verified risk which in each case is assessed at the lower end of the moderate bracket.

[31] While it is entirely correct to say that it is generally highly desirable that an Inquiry such as this one should be conducted in as open a manner as possible that general desirability must not divert attention away from the need to focus attention on the individual cases of the individual appellant witnesses. Assuming in the absence of specific security evidence that the Inquiry Panel was correct to place the objective risk to the individuals at the lower end of the moderate bracket, the fact remains that there is a risk to life which gives rise to a legitimate and rational concern on the part of the witnesses concerned. The Inquiry's concern about public perceptions in

relation to the granting of anonymity to the appellants clearly substantially influenced its decisions but the Inquiry did not consider the reasonableness or justification of adverse public perceptions. It did not consider the question whether a public perception that granting anonymity to *these* appellants undermines or tends to undermine the credibility of the inquiry would be a fair and rational viewpoint. In the context of the case law relating to apparent bias in the case of judges or tribunals (which raise issues of perception) it is clear that the test to be carried out is by reference to the fair minded and informed observer. In the most recent pronouncement of the House of Lords in this field in Helow v Secretary of State for the Home Department [2008] UKHL 62 Lord Hope pointed out that such an observer is fair-minded, the sort of person who always reserves judgment on every point until he or she has seen and fully understood both sides of the argument, is not unduly sensitive or suspicious and who is informed taking the trouble to inform himself or herself on other matters that are relevant. Where there are strong factors which point in favour of the granting of anonymity the desirability of openness cannot of itself be a sufficient countervailing factor otherwise anonymity could never be granted in a public inquiry in which the powerful desirability of openness is always going to be present since such inquiries are supposed to be "public" inquiries. A fair-minded member of the public, however, properly informed as to the relevant considerations pointing in favour of anonymity to *these* witnesses in the context of their evidence could not legitimately draw adverse inferences against the overall credibility of the Inquiry from the according of anonymity to witnesses in circumstances justifying it. It would certainly be premature for it to reach that conclusion at this stage of the Inquiry.

Proposed disposal of the appeal

[32] When one subjects the decisions of the Inquiry in relation to the individual appellants to anxious scrutiny and poses the question whether substantial and proper reasons have been established to justify the decisions to refuse anonymity in the light of the strongly persuasive factors favouring anonymity I am compelled to conclude that they have not been established. I reach this conclusion in the circumstances prevailing at this point on the assumption that the Inquiry propose to identify the appellants forthwith if the appellants are unsuccessful in their appeal.

[33] The identity of the witnesses has been withheld on a provisional basis. This has caused no inconvenience or injustice in the conduct of the Inquiry. This Inquiry will take a considerable further period to reach a conclusion. Once the identity of a witness is revealed the benefit of anonymity has been lost for good. By the stage at which the Inquiry is reaching conclusions it will have received all the relevant evidence which may or may not point to the desirability of anonymity continuing or ceasing in relation to these witnesses.

By then the security evidence may or may not weaken or strengthen the case for or against anonymity; by then, in the light of the totality of the evidence, the identity of the appellants may become of even less relevance and by then the run of the Inquiry as a whole may have dispelled or significantly reduced any feared public perceptions of lack of openness arising from the absence of the identities of the appellants. In short nothing has occurred to date to demonstrate that the Inquiry at this point in time should discontinue its provisional grant of anonymity. My conclusion is that the case for anonymity has been made out at this point but the matter may change in the light of changed circumstances and it would be premature to withhold continued anonymity at this point. Accordingly, I would allow the appeal. The question of prematurity was not argued in the course of the appeal but in view of its potential relevance if the point is raised before the Inquiry it would be bound to consider the issue having regard to its duty to keep under review its decisions affecting the fair procedures.

[33] Having regard to the conclusions which I have reached it is unnecessary to consider the issue of the potential impact of article 8 on the outcome of this appeal. This was an issue which was not really explored in the course of the appeal. The appellants wish for perfectly justifiable reasons to keep private their past associations with the Army. A refusal of anonymity impacts upon their privacy and their private lives. In R v Davis [2006] 1 WLR at 313 Judge P considered that exposing witnesses to the danger of retaliation engages article 8. The House of Lords in its decision did not deal with article 8. It concluded that the accused's right to a fair trial required that a defendant should be confronted by his accusers in order that he might cross-examine them and challenge their evidence. This pointed to the necessity of withholding anonymity in order to safeguard the rights of the accused under article 6. Had article 8 been in issue the requisite necessity would be established for the purposes of article 8.2. Such considerations as arose in R v Davis do not arise in an inquiry in which there is no trial and no accused and the inquiry is inquisitorial (see Lord Bingham's reference to anonymity in inquests at paragraph [21] of his speech [2008] 3 All ER 461.) If article 8 is engaged the question would arise as to whether the necessity for revealing their past Army associations had been established. Had I come to a different conclusion on the other issues in the appeal further argument on the question of article 8 would, in my view, have been necessary. I consider that before the Inquiry reaches a final decision on the question of anonymity it would need to address the issue.