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*(subject to editorial corrections)**

IN THE HIGH COURT OF JUSTICE IN NORTHERN IRELAND

QUEEN'S BENCH DIVISION (JUDICIAL REVIEW)

IN THE MATTER OF AN APPLICATION BY WITNESSES A, B, C, K AND N FOR JUDICIAL REVIEW

AND IN THE MATTER OF THE DECISIONS OF THE BILLY WRIGHT INQUIRY PANEL

GILLEN J

Introduction

[1] This is an application for judicial review of a decision of the Billy Wright Inquiry Panel ("the Inquiry Panel") made on 9 October 2006 in relation to 5 applicants described as A, B, C, K and N. Each of the applicants is a witness who was called to appear at a preliminary hearing of the Inquiry and who may be called as a witness at the full hearing of the Inquiry and/or referred to in the Inquiry report. Each applicant in this judicial review challenges the decision by the Inquiry Panel not to grant him or her anonymity and/or screening in the course of Inquiry proceedings. The applicants in each case seek an Order of Certiorari to quash the decision dealing with the specific refusal to grant anonymity and/or screening and a declaration that the decision was unlawful, ultra vires and of no force or effect. All applicants seek an Order of Mandamus requiring the Inquiry Panel to grant the applicant in each case both anonymity and screening at the forthcoming preliminary hearing of the Inquiry or in the alternative, requiring the Inquiry Panel to reconsider the applicants' application for anonymity and/or screening fairly, in accordance with law and in accordance with any judgment or direction of this court. In the course of the hearing, Mr Maguire

QC, who appeared on behalf of the applicants with Mr Schoffield abandoned certain other relief sought at paragraphs 2(d) and (e)(i)-(iii) of his Order 53 application.

[2]Both Mr Maguire and Mr Larkin QC, who appeared on behalf of the respondent with Ms Ross, conducted this application with great clarity and economy and served to isolate a number of common grounds which arose in relation to each case (subject to certain individual differences with which I shall deal subsequently in this judgment). Thus four primary issues arose which grounded the applicants' case and which required my consideration.

(a) Had the Inquiry Panel misdirected itself in law as to the correct test to be applied in the applicants' applications?

(b) Had the Inquiry Panel failed to discharge its duty of inquiry and/or failed to take relevant considerations into account by failing to seek or receive from the PSNI an individualised risk assessment in relation to each of the applicants?

(c) Had the Inquiry Panel reached it decisions in a procedurally unfair manner by failing to disclose to the applicants, in advance of its respective decisions, certain materials relied upon by the Panel?

(d) Had the Inquiry Panel misdirected itself in law and/or fact as to the meaning and effect of the reports published by the Independent Monitoring Commission?

Factual Background

[3] This Inquiry has been the subject of other litigation in the course of its history and this enables me to borrow for the purposes of this application the factual matrix set out helpfully by Deeny J in an unreported judgment In the Matter of an Application by David Wright for Judicial Review of a Decision of the Secretary of State for Northern Ireland (DEEF 5579 21st December 2006) at paragraph 2:

> "On 21 October 1998 three members of the Irish National Liberation Army, who were also serving prisoners at HMP The Maze, were convicted of the murder of Billy Wright. On 1 August 2001 the Governments of the United Kingdom and the Republic of Ireland reached an agreement at Weston Park in England. Among other matters both Governments agreed to appoint a judge of international standing to undertake `a thorough investigation of allegations of collusion (by the

> security forces) in the cases of the murders of' (a number of persons including Billy Wright). … Subsequently the Honourable Peter Cory, a retired judge of the Canadian Supreme Court, accepted this task and delivered reports on the six remaining cases on 7 October 2003. Her Majesty's Government published these reports on 1 April 2004 with some redaction of passages relating in particular to the names of those involved. On that occasion the then Secretary of State announced that the Inquiry into the death of Billy Wright would be established under the Prison Act (NI) 1953. On 8 July 2004 the Secretary of State made a statement on the governing principles for the Inquiry and on 16 November 2004 he announced the names of the Chairman and Panel members of the Inquiry and what the terms of reference would be. The Inquiry Panel consists of Lord MacLean, a Senator of the College of Justice in Scotland, 1990-2005, sitting with Professor Andrew Coyle and the Right Reverend John Oliver. At a preliminary hearing held in Belfast on 22 June 2005 Lord MacLean announced that he proposed to ask the Secretary of State to convert the Inquiry to an Inquiry under the Inquiries Act 2005 as the `list of issues requires examination of matters that go beyond the provisions of the Prison Act.' Such a request was formally made on 13 July 2005. The Secretary of State issued his decision to convert the Billy Wright Inquiry to an Inquiry under the 2005 Act on 23 November 2005."

That conversion decision was the subject of the challenge which Deeny J heard. He determined, inter alia, that the decision to convert the Inquiry into one under the 2005 legislation was unlawful. It is against that background that the ongoing proceedings were heard and the impugned decisions now under consideration determined.

The Applicants

[4] A and K are Prison Officers. The remaining three applicants are Civil Servants who worked for or presently work in the Prison Service in Northern Ireland. A and B sought both screening and anonymity. The remaining three sought anonymity only. The decisions relating to all the applicants except N were made on 9 October 2006 and the decision with reference to N was made on 26 October 2006. The Inquiry had convened in the week commencing 30

October 2006 and a full week was scheduled for that occasion with a further day in early December 2006. The judicial review proceedings in relation to all of the applicants except N were filed on 24 October 2006, that of N being filed on 8 November 2006. Responsibly the Inquiry decided, in order to prevent further disruption, that notwithstanding the impugned decisions, it would grant protective measures to the applicants pending the outcome of this application. Accordingly the witnesses did appear at the tribunal with the benefit of protective measures. However the Inquiry has made it clear that if the judicial review application fails, the identities of the unsuccessful applicants will be disclosed on the website in unexpurgated form. Accordingly I am satisfied that this is not an academic exercise and in any event may be relevant to further applications for protective measures in the future.

The Inquiry Protocol on Anonymity of Witnesses

[5] The Inquiry has published a protocol dealing with questions of anonymity of witnesses and related matters. Relevant extracts, which were the subject of comment during the hearing, were as follows:

> "2. As previously indicated in earlier Protocols, this is a public inquiry and, as far as possible, it will conduct its business in an open manner. Accordingly, as a general rule, all witness statements and other relevant documents to be considered by the Inquiry will be distributed to represented parties, referred to at the Inquiry's Public Hearing and thereafter published on the inquiry's website. Personal information other than that relating to the name and designation of a witness, such as private addresses, telephone numbers, contact details or other information that might identify where an individual resides, will never be disclosed and will always be redacted or removed from statements or documents.
>
> …
>
> 4. Any witness who considers s/he should be granted anonymity must make a written application to the Inquiry for anonymity and set out in full their reasons in support of that claim. An application should also be supported by any relevant evidence in support e.g. medical evidence.

…

6. In considering applications for anonymity, the Panel will take account of all relevant matters, including;

(1) the principle of open justice;

(2) whether the applicant's name has already entered the public domain;

(3) the level of any risk to the applicant that may arise through his/her name entering the public domain;

(4) the rights of the witness;

(5) the applicant's involvement in the matters under investigation, and whether there is a public interest in his/her name being known or not being known;

(6) any person making an application for anonymity must also consider whether if s/he is called to give oral evidence, s/he should be permitted to give his/her evidence behind screens thereby disclosing his/her identity to the Inquiry Panel and legal representatives only. The use of screens can be an alternative to anonymity, in that although a person's name becomes known, his/her identity does not. The use of screens can also be additional to anonymity;

(7) any grant of anonymity will be subject to review by the Inquiry Panel throughout the Inquiry proceedings. The individual concerned will be notified and given the opportunity to make further representations should the proposal be to review anonymity that has previously been granted".

[6] **The Individual Applications**

The Application of A

Applicant A sought both screening and anonymity. He informed the Inquiry that he was a Prison Officer, having been appointed as such in 1982. His application included the following:

> "The applicant has experienced the general threat posed by terrorists to serving and former Prison Officers in Northern Ireland over the years. Depending on circumstances the intensity of the threat has varied from time to time, both generally and in relation to individuals, but it has never gone away. The need to be vigilant and to take precautions of one kind or another has been and still is, for him, a daily fact of life. The applicant lives in Northern Ireland and will continue to live in Northern Ireland after he has given his evidence. The future course of events in Northern Ireland is uncertain and the possibility of a return to widespread terrorist violence cannot be ruled out. 29 Prison Officers and one civilian member of staff have been killed by terrorists and countless more have been attacked and intimidated. Over the last four years alone, over 450 Prison Officers have had to move home on occasions when their security has been compromised. The prospect of such a step represents a considerable threat."

He went on to record the large number of homes of Prison Officers that have been attacked, and Prison Officers threatened. At paragraph 4 he stated:

> "It is not possible to publicly disclose the individual reasons because they relate to the personal circumstances and experiences of the applicant. These reasons are set out in a separate sheet which is contained in a sealed envelope comprised in appendix A. He is only prepared to furnish these to the Inquiry provided they remain confidential and are only seen by the members of the Inquiry and its legal team".

[7] Mr Maguire emphasised at this stage therefore that he was not subject simply to a broad generic risk but had provided individual personal circumstances. The application by A went on to emphasise the intense sensitivity surrounding the death of Billy Wright who was a member of the Loyalist Volunteer Force, a proscribed organisation. It drew attention to the

fact that the most recent monitoring commission report (February 2006) made clear that Republican terrorists continued their targeting activity and that both dissident Republicans and Loyalists terrorist groups remained active. There was also a letter sent in support of the application by Annabel Jones, Head of Inquiries Coordination Unit in the Northern Ireland Office. That letter drew attention to the rights of the applicant under Article 2 of the European Convention of Human Rights. The following paragraph was contained in the letter:

> "On the Loyalist side we are particularly concerned that the oral hearings of the Inquiry are likely to lead to heightened emotions among LVF members and sympathisers. If any NIO officials are criticised for actions or omissions that might be perceived as having contributed to Billy Wright's death, the risk to them of attack by the LVF or a sympathiser will in turn increase. Whilst the current status of the LVF is unclear, it remains a specified organisation."

The author of the letter went on to record that it was not uncommon for NIO members of staff to withhold even from close friends and family the fact that they worked for the NIO. They will generally say that they work for the Civil Service in order to give the impression that they work for the much larger Northern Ireland Court Service which carries none of the stigma or connotations of the NIO.

[8] A further letter of support was sent on behalf of applicant A by Robin Mansfield the Director General of the Northern Ireland Prison Service. Inter alia, this letter recorded the significant proportion of terrorist attacks on Northern Ireland Prison Service staff that had taken place at or in the vicinity of their homes. Referring to the disclosure of information concerning NIPS staff obtained by the police following a police operation in October 2002, Mr Masefield's letter records:

> "As a consequence of the discovery of these documents 669 of our staff are admitted to the Key Persons Protection Scheme … a further 451 chose to move house under the Special Purchase of Evacuated Dwelling Scheme …"

The letter also made reference to the review headed by John Steele which resulted in the Government accepting that paramilitary affiliated prisoners could be held separately from each other in segregated wings and as a result of this a significant proportion of prison staff either have or will shortly be engaged in managing terrorist prisoners who, the letter alleges, because of

their cohesion and political motivations pose a much greater risk than the same number of integrated high risk prisoners.

[9] Thereafter a threat risk analysis was carried out on 11 September 2006 as a generic assessment. The court was provided with a letter from P McMullen Inspector of the PSNI ("the September letter") dealing with that risk assessment and contained the following terms:

> "As a result of our meeting at Dundonald on Monday 11 September 2006 and to clarify your questions, I can confirm that a threat risk analysis was conducted by Security Sub Branch of the PSNI.
>
> This analysis assessed the level of threat to witnesses in the categories outlined below whilst giving evidence to the Inquiry as `moderate' … However I would point out that this is a generic assessment. It is not possible to predict the exact level of threat which may present itself when witnesses give evidence in public and their identities and the nature of that evidence enters the public domain."

[10] Mr Maguire submitted that this assessment had not been provided to the applicant prior to the decision being taken by the Inquiry, and although it was part of the annex to the decision he was not given any opportunity to comment on it prior to the decision being taken.

[11] Mr Maguire also contended that the suggestion in paragraph 13 of the decision by the tribunal that "the Inquiry has been advised by PSNI that there is no evidence of any specific current threat to witnesses giving evidence to the Inquiry and there is no evidence of such a threat to this witness or his family" was not advice that had been given to him or that he had seen. Moreover paragraph 17 of the Inquiry decision declared:

> "… The Inquiry has been advised by PSNI that the most significant factor likely to give rise to an increase in the present threat is the nature of the evidence to be given by the witness. Witness A is being called to speak principally to the collection of documents after HMP Maze closed and was not involved in any of the substantive issues which the Inquiry will address at its full hearings. It is not anticipated this witness will be required to testify at those hearings".

Mr Maguire asserted this to be a contentious statement which had not been revealed to the applicant and which he had not been afforded an opportunity to rebut.

[12] Turning again to the terms of the decision in the case of A it is convenient at this stage to set out for ease of further reference in this judgment certain paragraphs of the decision itself. These paragraphs carried a resonance in the decisions relating to the other applicants:

> "Criteria
>
> 9. The Inquiry being conducted by the Panel is a public inquiry and that there is an assumption that its proceedings should be conducted insofar as it is possible openly and in public. However, the panel also has a duty as a public body to act in a manner compatible with the European Convention of Human Rights (ECHR). So far as individual witnesses are concerned, due regard must be had to their rights under Articles 2 and 8 of the ECHR and to the Inquiry's obligation to treat witnesses fairly.
>
> 10. In approaching this and other applications we have had regard to the tests formulated in the cases of R v Lord Saville of Newdigate ex parte A [2000] 1 WLR 1855; R (A) v Lord Saville of Newdigate [2002] 1 WLR 1249 and R (Family of Derek Bennett) v HMC for Inner London South [2004] EWCA Civ 1439. It is noted that these tests have been quoted with approval in the Court of Appeal in Northern Ireland in Re Donaghy [2002] NICA 25(1).
>
> 11. The criteria that we have applied in considering this and other applications are –
>
> > i. Does the application disclose a genuinely held fear by the Applicant that his/her right under Article 2 of ECHR to live safely and free from fear (or those of his/her family under Article 8) will be put at risk by a requirement to give evidence publicly at the Preliminary Hearing to be held later this year?

ii. To what extent are those fears objectively justified? In other words, is there a serious possibility or a reasonable chance that the giving of evidence at the Preliminary Inquiry would give rise to a real risk that his/her right to live safely would be endangered?

iii. Would it be unfair to any witness to require him/her to give evidence before the Inquiry without protection of identity when to do so would require that witness or his/her family to undergo an unnecessary risk?

iv. Would such a risk be alleviated by allowing the witness to give evidence anonymously or with screens or both?

v. If the answer to questions ii or iii and iv are in the affirmative, is there any other compelling reason for naming or identifying the witness when to do so would create or increase that risk?

…

Decision

16. The Panel has considered all of the material provided to it in support of the application and has taken account of the representations made on behalf of Mr David Wright. It has had due regard to the Threat Risk Analysis and supporting background provided by PSNI. It has also had regard to the reports of the International Monitoring Commission and in particular to the 11th report of that body.

…

18. The thrust of witness A's application is the threat posed to him and his family by virtue of the fact of his employment with NIPS as a Prison Officer. It is clear from the Threat Risk Analysis

provided to the Panel that there is a moderate risk to his safety by virtue of that employment. That risk exists at present and would exist whether or not he was required to give evidence to the inquiry. Having given evidence openly in court as a Prison Officer, witness A's anonymity has already been "lost". The issue for the Panel in this case, therefore, is whether by requiring this witness to give evidence openly and without protection of identity, there will be an increased or heightened risk to him.

19. On the basis of all the material we have considered, including the nature of the evidence that this witness will be expected to give at the Preliminary Hearing, the Panel are of the opinion that any fears held by witness A in relation to the safety of himself or of his family that the risk to him will increase should he give evidence publicly and openly to the Inquiry are not objectively justified and that it is not unfair to require him to give evidence without the protection of anonymity or screening. The application for anonymity and for screening is therefore refused.

20. It is not necessary for us to consider the extent to which any objectively based fears would be alleviated by granting the witness anonymity or allowing his evidence to be given behind screens. However, even if we found that these fears were based on reasonable grounds, we do not consider in the circumstances of this case that they would have been so alleviated. The witness has already `lost' anonymity and the nature of the evidence he is to give is non controversial and does not relate to the substantive issues the Inquiry is investigating.

21. For the sake of completeness, we are satisfied that there is nothing deriving from the principle of open justice that would have compelled us to require witness A to give evidence openly even had we been of the view that there was an objective basis for his fears. The preliminary hearing at which he is expected to give evidence is a procedural type hearing into the

existence and extent of recovery of documents and the grant of anonymity or of screening would not impinge upon the ability of the inquiry to comply with its terms of reference."

The Decision in B

[13] Witness B was not employed by the NIPS at the time of the death of Billy Wright and only became so employed in 2004. She works in the area of Records Management. Her application was based on a fear that if she gives evidence at the Inquiry she and her family will be exposed to a significantly greater level of risk to her personal safety than she is at present. She adopted the general arguments put forward by her employers on her behalf and provided the Inquiry with some details of her personal circumstances.

[14] Paragraph 16 of the decision recorded:

> "16. Although it is recognised that anonymity, once lost, is lost for all time, and that there is a possibility that the nature of risk may change and in particular may increase, the Inquiry has been advised by PSNI that the most significant factor likely to give rise to an increase in the present threat is the nature of the evidence to be given by the witness. Witness B is being called to speak principally to the policy for destruction of documents devised for NIPS in 2003. She was not involved in any of the substantive issues that the Inquiry will address at its full hearings. It is not anticipated that the witness will be required to testify at those hearings.
>
> 17. The thrust of witness B's application is the threat posed to her and her family by virtue of the fact of her employment since 2004 with NIPS in the administrative post. The Threat Risk Assessment provided to the Panel states that there is a moderate risk to her safety by virtue of that employment. The supporting material for that assessment, however, states that Civil Servants would not normally attract the same level of threat as those more directly involved in the prison regime in Northern Ireland and that the current threat to Civil Servants is likely to be low. Nevertheless, witness B is not at present generally known to be a public servant associated with

> NIPS. Should she be required to give evidence at the Preliminary Hearing without some protection a risk to her by disclosure of her employment with NIPS would be created whereas, without identification it does not exist at present. The issue for the Panel in this case, therefore, is whether by requiring this witness to give evidence openly and without protection of identity, there is a serious possibility that any latent risk to her will become real.
>
> 18. On the basis of all the material we have considered, including the nature of the evidence that this witness will be expected to give at the Preliminary Hearing, the Panel are of the opinion, even considering that the risk to her is graded as low, that there is an objective risk for witness B's fears for the safety of herself or her family and that it is unfair to require her to give evidence without some protection of identity.
>
> 19. We consider, however in the circumstances of this case that those fears can be adequately alleviated by protecting her identity in allowing her to give evidence in circumstances where she will be fully screened from members of the public, including the family of the deceased and representatives of the media. We do not consider that the non disclosure of her name would alleviate to any extent any risk to her safety. Accordingly the application is granted to the extent that witness B will be allowed to give her evidence behind screens."

[15] I pause to observe at this stage that Mr Maguire drew attention to the fact that paragraph 17 refers to the issue being whether "there is a serious possibility that any latent risk to her will become real" which he submitted appeared to elide the twin concepts of fairness under the common law and the obligation under Article 2 of the ECHR. As in the case of the other parties, paragraph 11 had set out the same five criteria as in the case of A.

The Decision in C

[16] The same five criteria were applied at paragraph 11 as had been applied in the case of A and B. Witness C was described as being employed by the NIPS between April 1998 and July 2000 and is still employed as a Civil

Servant in Northern Ireland. He is not and has never been a serving Prison Officer. He based his application on a fear that if he gives evidence at the Inquiry he and his family will be exposed to significantly greater level of risk to his personal safety than he is at present. Counsel drew attention to the fact that at paragraph 13 of the Panel decision, it refers to the Threat Risk Analysis of 12 September 2006 stating that the current threat to Civil Servants was likely to be low. Mr Maguire argued that this clearly did not derive from the letter of September 2006. Paragraph 15 referred to C being a public witness whose particulars were available on the World Wide Web. However counsel criticised this on the basis that it did not disclose what details were on the web or the age of those details. Moreover such details would have nothing to do with the Billy Wright Inquiry. In any event this was another example of information being raised for the first time in the decision which had not been confided to C prior to the decision being taken. Paragraph 19 of the Panel decision referred to witness C being called to speak principally to the collection of documents in connection with the investigation by Judge Cory and that he was not involved in any of the substantive issues which the Inquiry would address at its full hearings. Paragraph 18 recorded:

> "The issue for the Panel in this case, therefore is whether by requiring this witness to give evidence to the Inquiry openly and without protection of identity, there is a serious possibility that any present risk to him will be increased or heightened".

[17] Paragraph 19 stated:

> "It is clear that there is some risk. That is a risk which exists at present and will exist whether or not he was required to give evidence to the Inquiry. Disclosure of his involvement as a Civil Servant on the Web has had the effect that his anonymity as a Civil Servant has already been `lost'."

[18] It was Mr Maguire's submission that this was clearly an erroneous test since once the risk was acknowledged, the threshold under Article 2 of the ECHR was passed, and no protective measures were taken. It was his submission that once the threshold had been considered, there was thereafter no proper inquiry of protective measures.

The Decision in K

[19] K has for some time been and remains a serving Prison Officer. Counsel submitted that the Panel had fallen into the same error in his case as

in the others as evidenced by paragraph 18 of the decision in the case of K which records:

> "The thrust of witness K's application is the threat posed to him and his family by virtue of the fact of his employment with NIPS as a Prison Officer. It is clear from the Threat Risk Assessment provided to the Panel that there is a moderate risk to his safety by virtue of that employment. That risk exists at present and would exist whether or not he was required to give evidence to the Inquiry. The issue for the Panel in this case, therefore, is whether by requiring this witness to give evidence openly and without protection of identity, there will be an increased or heightened risk to him".

The same 5 criteria at paragraph 11 as in all the other cases were contained in K's decision.

The Decision in N

[20] N had been employed by NIPS between August 1993 and June 2006 and is still employed as a Civil Servant in Northern Ireland. He is not and has never been a serving Prison Officer. He based his application on a fear that if he gives evidence at the Inquiry he and his family will be exposed to "a significantly greater level of risk to his personal safety than he is at present." He adopted the general arguments put forward by his employers on his behalf and again as with the others had provided the Inquiry with some details of his personal circumstances. He was being called to speak principally as to the implementation of the document disposal policy for NIPS in 2004 and it was anticipated that he would be required to testify at the substantive hearing. A similar basis for the decision in his case as in the others was recorded at paragraph 18 where the decision states:

> "Disclosure of his involvement as a Civil Servant associated with NIPS on the Web has had the effect that his anonymity has been 'lost'. This issue for the Panel in this case, therefore, is whether by requiring this witness to give evidence to the Inquiry openly and without protection of identity, there is a serious possibility that any present risk to him will be increased or heightened."

The same 5 criteria at paragraph 11 as in all the other cases were contained in N's decision.

The Applicants' Case

[21] In a clear and skilfully presented skeleton argument, augmented by oral submissions, Mr Maguire made the following points:

Misdirection as to the correct test

(1) The Panel had been in error and had applied the incorrect test of law in the quest to discover whether Article 2 of the ECHR was engaged in this case. Article 2 of the Convention, as relevant, provides:

> "1. Everyone's right to life shall be protected by law. No one shall be deprived of his life intentionally save in the execution of a sentence of a court following his conviction of a crime for which this penalty is provided by law."

In Osman v United Kingdom [1998] 29 EHRR 245 ("Osman's case") the European Court of Human Rights, at paragraph 92, defined the nature of the risk as follows:

> "The extent of the obligation to take preventive steps may however increase in relation to the immediacy of the risk to life. Where there is a real and imminent risk to life to an identified person or group of persons, a failure by State authorities to take appropriate steps may disclose a violation of the right to protection of life by law."

In Re Officer L & Others' Application [2007] NICA 8 ("Re L") the Northern Ireland Court of Appeal reviewed a number of the authorities upon which the Panel relied at paragraph 10 of all of its decisions and in particular the Court of Appeal in Northern Ireland in Re Donaghy [2002] NICA 25(1). Mr Maguire submitted that Re L had not followed the earlier decisions and that this court was bound by the approach adopted in that case. Inter alia, Mr Maguire relied upon paragraph 42 of Re L where Kerr LCJ stated:

> "We consider, however, that the issue is more properly addressed by asking the simple question `will the requirement to give evidence give rise to a real risk to life'. To express the matter in terms of an increased risk implies that the existing threat could not play a part in the assessment and that a risk of a greater order of magnitude or of a different character was needed to engage article 2.

> But if a real risk to life from giving evidence eventuates from the matters that underpin the existing threat without there being an increase in the level of that threat, it nevertheless engages article 2.
>
> [43] We are fortified in our view that the proper question to ask is the simple one, 'is there a real risk' rather than 'is there an increase in the risk' by the consideration that there is an obvious difficulty in establishing an increase in a risk which is, of its nature, unspecific."

[22] Earlier in the judgment at paragraph [33] Kerr LCJ had said:

> "To attempt an answer to the question `is there a risk to life' by expressing the query in terms of whether there are subjective fears which are objectively justified risks distraction from the simple issue whether a risk exists. The question whether fears are genuinely felt and whether they are justified is obviously relevant in the common law context but an examination of whether there are subjective fears does not assist in determining whether article 2 is engaged. Put simply, the existence of subjective fears is not a prerequisite to the engagement of article 2. If a risk to life exists, article 2 will be engaged even if the person affected has no subjective fears. As the Court of Appeal in *Bloggs* (*R (Bloggs) v Secretary of State for the Home Department [2003] 1 WLR 2724)* said, all that is needed is a risk to life. This is an objective question."

[23] Mr Maguire's submission was that self-evidently the questions posed in paragraph 11 of all of the decisions had reverted to the earlier authorities which predicated an approach based on a subjective and objective test. Further, the Inquiry had also fallen into error in all of the cases except B where they had referred to the issue as being:

> "The issue for the Panel in this case, therefore, is whether by requiring this witness to give evidence openly and without protection of identity, there will be an increased or heightened risk to him."

Mr Maguire asserted that this was clearly contrary to the test outlined by the Court of Appeal in Northern Ireland in Re L. In the case of B, a different test had been applied at paragraph 17 namely:

> "The issue for the Panel in this case, therefore, is whether by requiring this witness to give evidence openly and without protection of identity, there is a serious possibility that any latent risk to her will become real".

It was Mr Maguire's submission that this was yet a further variation on what the real test ought to be and served to conflate the common law principle of fairness with the obligation under Article 2 of the Convention. Counsel argued that only the purity of the test set out in Re L should be adopted.

Failure to carry out an Inquiry

[24] Mr Maguire also relied on Kilic v Turkey 33 EHRR 1357. The facts of that case were that the brother of the applicant had been killed with the connivance of the security forces because he was a journalist. In particular he complained of the lack of a proper and effective investigation into the death of this brother. At page 1358 paragraphs H17 and H18 the ECtHR court stated:

> "2. Alleged failure to protect right to live: failure in protective measures; adequate investigation (Art 2).
>
> (a) The court recalls that the first sentence of Article 2(1) enjoins the State not only to refrain from the intentional and unlawful taking of life, but also to take appropriate steps to safeguard the lives of those within its jurisdiction. This involves a primary duty on the State to secure the right to life by putting in place effective criminal law provisions to deter the commission of offences against the person backed up by law enforcement machinery for the prevention, suppression and punishment of breaches of such provisions. It also extends in appropriate circumstances to a positive obligation on the authorities to take preventive operational measures to protect an individual or individuals whose life is at risk from the criminal acts of another.

> (b) … The scope of the positive obligation must be interpreted in a way which does not impose an impossible or disproportionate burden on the authorities. Not every reclaimed risk to life therefore can entail for the authorities a Convention requirement to take operational measures to prevent that risk from materialising. For a positive obligation to arise, it must be established that the authorities knew or ought to have known at the time of the existence of a real and immediate threat to the life of an identified individual or individuals from the criminal acts of a third party and that they failed to take measures within the scope of their powers which, judged reasonably, might have been expected to avoid that risk."

(2) Relying on that proposition, Mr Maguire submitted that in this case once the threshold risk had been found the Inquiry was obliged to take reasonable steps to inquire into the risk when confronted with it. It was his submission that no such steps had been taken in this case.

[25] It was Mr Maguire's submission that the Panel had failed to discharge its duty of inquiry and failed to take relevant considerations into account by failing to seek or receive from the PSNI an individualised risk assessment in relation to each of the applicants. Only a generic assessment had been sought. The police had not been asked to look at individual circumstances or any particular vulnerability to attack. It had failed in its duty to make adequate investigation where a risk arose from a third party. In R (on the application of F) v. Chief Constable of Norfolk Police and Another (2002) AER (D) 56 ("the Norfolk case") a prisoner who had given evidence against a co-accused complained that his right to life under Article 2 of the European Convention on Human Rights had not been protected when he was in prison by virtue of a failure to relocate him to a protected unit. The court held in that case that the risk assessment had not directly addressed the question of whether the claimant's co-accused had the will or desire to harm him. The police had been unable to comment on whether those individuals had the necessary abilities to infiltrate the prison system and in light of those flaws a new decision and a new risk assessment was required. It was counsel's submission that a generic assessment was inadequate in the instant case.

The Meaning and Effect of the Independent Monitoring Commission Reports

(3) Counsel submitted that on assessing the risk to the applicants from paramilitary organisations, the Panel took into account certain reports of the Independent Monitoring Commission (IMC). He submitted that the 11th report had been summarised in a way that did not accurately reflect the full nature of the threat which still exists in relation to Prison Service staff. He instanced this with reference to paragraph 3.4 of Chapter 3 of the 11th report which noted that IMC's assessment of the military threat was dealt with "only in so far as it bears directly on the implementation of the security normalization programme". The IMC continues that the assessment made in that report therefore "is necessarily narrower than it is in the reports (it makes) on paramilitary activity as a whole". Mr Maguire argued that heavy reliance on this report as a means of determining the threats to Prison Service staff was clearly misplaced.

[26] The 12th report is allegedly simply sidelined. The Panel had reported that this 12th report did not contain any information which caused them to reconsider their decision that they had reached in the case of A whereas it was Mr Maguire's submission that the report for example had referred to the LVF as a deeply criminal organisation to which some threats are attributable and which still exists as a paramilitary organisation in mid Ulster. Dissident Republican groups were described, inter alia, as continuing to commit acts of violence and being ready to use extreme violence. Mr Maguire asserted that the Panel either misunderstood or chose to ignore the true nature and effect of the 11th and 12th reports.

[27] I pause at this stage to observe that I found this ground of the applicant's singularly unpersuasive. It has often been observed that judicial review is unsuitable for resolving disputes of fact. Although it may well be appropriate in certain instances, in essence judicial review is not a fact finding exercise. It is an extremely unsatisfactory tool by which to determine matters of dispute when factual issues arise. (See R v Chief Constable of Warwickshire Constabulary ex parte Fitzpatrick [1999] 1 WLR 564 at 579d). Moreover it is appropriate to highlight that this is species of litigation in which the court exercises a supervisory jurisdiction and does not substitute its opinion for that of the Panel. As a result, it is generally unnecessary for the Judicial Review Court to become embroiled in fact finding and resolution of factual disputes between the parties. Thus where the matrix before the Judicial Review Court consists of "a welter of fact and judgment of fact" (a description which might aptly be applied to this present aspect of the case) it is appropriate for the relevant decision-maker, rather than the Judicial Review Judge, to make the relevant assessments and findings (see Anufrigeva v London Borough of Southwark [2004] 2 WLR 603 at paragraph 53). There is a further well-established principle that where the parties respective affidavit evidence discloses contentious issues of facts which it is appropriate for the court to resolve, the court should take the evidence where it stands against

the applicant. (See May LJ in Regina (Laporte) v Chief Constable of Gloucestershire [2004] 2 AER 874).

[28] It is clear to me from the decisions in these cases that the Panel had considered the 11th report and had made a value judgment on it. Similarly specific references are made to the 12th report and to the consideration given to it by the Panel e.g. paragraph 6 of each decision of 9 October 2006 states:

> "The Panel has studied that report (the 12th) and considers that it does not contain any information which might give them cause to reconsider the decision they have reached".

[29] A similar reference is made in paragraph 6 of witness N's decision of 26 October 2006. I find nothing to suggest that a proper appraisal was not made of the 11th and 12th reports within the broad ambit of discretion which the Panel has to consider such reports. I find nothing to suggest that the Panel failed to make a proper appraisal of these reports. It is a matter of judgment as to the appropriate weight to be attached to such reports and I am unconvinced that the Panel acted irrationally or unreasonably in the conclusions it reached.

Procedure unfairness

[30] Mr Maguire submitted that the Panel had received materials which were taken into account by it in making the decision but that neither the documents themselves nor even the gist of them were furnished to the applicants so that they could make comment thereon (see paragraphs 10 and 11 of this judgment). In particular the PSNI threat risk assessment, which has now been provided to the applicants and to the court, was not provided to them prior to the decisions being taken.

[32] Mr Maguire relied upon an extract from Wade and Forsyth Administrative Law 9th Edition 2004 ("Wade") at page 512 wherein the author states:

> "A proper hearing must always include `a fair opportunity to those who are parties for correcting or contradicting anything prejudicial to their view'."

In Kanda v Government of Malaya (1962) AC 322, Lord Denning said:-

> "If the right to be heard is to be a real right which is worth anything, it must carry with it a right in

> the accused man to know the case which is made against him. He must know what evidence has been given and what statements have been made affecting him and then he must be given a fair opportunity to correct or contradict them."

The text refers to instances where a tribunal decides a case on some point which has not been argued before it, without giving the party an opportunity to comment thereon. Wade at page 514 refers to Mahon v Air New Zealand Ltd [1984] AC 808 where at an inquiry, any person who might be affected by adverse findings should be given fair warning so that he can defend himself against them at the hearing.

The Respondent's Case

[33] Mr Larkin, in the course of his well-structured skeleton argument and oral submissions, made the following arguments:

Was there a misdirection in law?

Counsel submitted that the real issue is not whether the correct test was applied by the Inquiry Panel to the applications by the applicants for anonymity and/or screening but whether the decisions of the Inquiry Panel have violated the Convention rights of the applicant under Articles 2 and/or Article 8 of the ECHR. The test for State intervention is whether or not there is a real and immediate threat to life. It cannot be right that every Prison Officer and every Civil Servant in the Prison Service is entitled to the measure of protection sought by these applicants. It was Mr Larkin's argument that too much emphasis was placed by the applicants on the means of arriving at the decision and not the result. In the context of this argument, Mr Larkin relied upon the decision of the House of Lords in R (on the application of Begum) v Denbigh High School [2006] 2 WLR 719. ("Begum's case"). In that case the House of Lords reversed a decision of the Court of Appeal which had adopted a highly formalistic approach in ruling that a school had acted in breach of Article 9 in refusing to allow the 16 year old claimant to wear the stricter Jilbab form of dress which contravened its uniform policy. At paragraph 29 Lord Bingham said:

> "I am persuaded that the Court of Appeal's approach to this procedural question was mistaken, for three main reasons. First, the purpose of the Human Rights Act 1998 was not to enlarge the rights or remedies of those in the United Kingdom whose Convention rights have been violated but to enable those rights and remedies to be asserted and enforced by the

> domestic courts of this country and not only by resource to Strasbourg … But the focus at Strasbourg is not and never has been on whether a challenged decision or action is a product of a defective decision-making process, but on whether, in the case under consideration, the applicant's Convention rights have been violated. In considering the exercise of discretion by a national authority, the court may consider whether the applicant had a fair opportunity to put his case, and to challenge an adverse decision … . But the House has been referred to no case in which the Strasbourg Court has found a violation of Convention right on the strength of failure by a national authority to following the sort of reasoning process laid down by the Court of Appeal. This pragmatic approach is fully reflected in the 1998 Act."

Lord Bingham went on to say at paragraph 31:

> "Thirdly, … I consider that the Court of Appeal's approach would introduce `a new formalism' and be a recipe for judicialisation on an unprecedented scale.
>
> The Court of Appeal's decision-making prescription would be admirable guidance to a lower court or legal tribunal, but cannot be required of a head teacher and governor, even with a solicitor to help them. If, in such a case, it appears that such a body had conscientiously paid attention to all Human Rights considerations, no doubt a challenger's task will be the harder. But what matters in any case is the practical outcome, not the quality of the decision-making process that led to it."

Mr Larkin further relied on what Lord Hoffman said at paragraph 68:

> "In domestic judicial review, the court is usually concerned with whether the decision-maker reached his decision in the right way rather than whether he got what the court might think to be the right answer. But article 9 is concerned with the substance, not procedure. It confers no rights

> to have a decision made in any particular way. What matters is the result: was the right to manifest a religious belief restricted in a way which is not justified under article 9.2? The fact that the decision-maker is allowed an area of judgment in imposing requirements which may have the effect of restricting the right does not entitle the court to say that a justifiable and proportionate restriction should be struck down because the decision-maker did not approach the question in the structured way in which a judge might have done."

[33] It was Mr Larkin's submission that in the circumstances of this case there was no evidence upon which a tribunal could have come to the conclusion that there was a real and immediate threat under Article 2 and contrasted the circumstances of this case with the clear risk of threat illustrated in the Kilic and Norfolk cases.

The Failure to Carry out an Individual Threat Assessment

[34] Mr Larkin asserted that what is fair depends on context and on individual circumstances. This case did not involve a lis between two parties but rather involved a number of parties including the Wright family, Mr David Wright, the State agencies as well as the applicants. In the case of witness A, as evidenced in paragraph 2 of the decision by the Panel, although he had submitted with the application further confidential papers, these were to be for the eyes of the Inquiry Panel only and accordingly they were not submitted to the police for comment. Similarly Mr Wright did not see any confidential information. The police material was disclosed after the event and the essence of it was in any event contained within the decision. Mr Larkin stated that there was a multiplicity of parties in this matter, a pressure to move the case along in the administrative process and it was open to the applicants to make fresh applications at any time.

Failure to Disclose Materials to the Applicants

[35] Mr Larkin argued that on this topic, the police possessed a monopoly of information. It would have been impossible for the applicants to stand against the information supplied by the police. Moreover, as the Protocol Anonymity of Witnesses document indicated, an application for anonymity required the witness to set out in full the reasons in support of that claim. They made no case other than the generic case. The only other material therefore was the police documentation and since the police had a monopoly

on the information it would have been impossible to gainsay it. So far as the failure to permit the applicant to address the Panel on the 12th IMC report was concerned, these documents are in the public domain and they could have been addressed at any time by the applicants.

Conclusion

[36] My conclusions on these matter are as follows:

(i) Although I have been informed that the approach adopted by the Northern Ireland Court of Appeal in Re L is the subject of an appeal to the House of Lords to be heard in May 2007, the doctrine of precedent applies. This court is bound by the result and decisive reasoning in the Court of Appeal in Northern Ireland in Re L. Whilst I recognise that in judicial review the law is evolving and contextual so that much depends on the particular facts of the case, nonetheless I am satisfied that the reasoning in Re L should govern my approach in this case. Accordingly the indispensable first step in the quest to discover whether Article 2 was engaged in this case was for the Panel to address the question whether there is a risk to life. In my view the Panel did not do this.In all cases except that of B not only did they express the query in terms of whether there were subjective fears that were objectively justified, but the matter was also visited in terms of an increased risk implying that the existing threat could not play a part in the assessment and that a risk of a greater order or magnitude of a different character was needed to engage Article 2. In my view this approach runs contrary to the reasoning in Re L. The issue should have been dealt with by posing the simple question "will there be a real risk to the life of the applicant if he/she is required to give evidence under his/her own name and unscreened" Simple forms often provide the ideal lexicon and this is a sound example of this principle. Insofar as applicant B's request was met by the Panel asking whether there was a serious possibility that any latent risk to her would become real, I consider that constitutes a forbidden variation on the simple question that needs to be addressed namely whether there is a risk to life irrespective of whether there is any pre-existing latent risk or not. I recognise that the Panel did not have the advantage of the decision in Re L at the time that it made its decisions. I venture to suggest that had that decision been before it, the approach adopted would have been a different one.

(ii) I am not persuaded, despite Mr Larkin's eloquence, that the ratio decidendi in Begum's case relegates the approach of the Panel to a mere matter of procedural propriety in circumstances where in substance the test of real and immediate threat to life was dealt with by the Panel. I distinguish this instant case from Begum's case for two reasons:

(a) The issue being dealt with by the Panel in this instance was a matter of substance. It was seeking to determine whether Article 2 was engaged if the

threshold criteria were passed. The question which they failed to ask in my view was neither a procedural matter nor a method of arriving at the right question. It was a substantive ruling of law about the threshold test. I respectfully borrow again the approach adopted by Lord Bingham of Cornhill in Begum's case at paragraph 68 where he said:

> "In domestic judicial review, the court is usually concerned with whether the decision-maker reached his decision in the right way rather than whether he got what the court might think to be the right answer. But Article 9 is concerned with the substance, not procedure. It confers no right to have a decision made in any particular way. What matters is the result: was the right to manifest a religious belief restricted in a way which is not justified under article 9.2? The fact that the decision-maker is allowed an area of judgment in imposing requirements which may have the effect of restricting the right does not entitle a court to say that a justifiable and proportionate restriction should be struck down because the decision-maker did not approach the question in the structured way in which a judge might have done."

The Panel was not dealing merely with the way the decision was to be made. On the contrary it was dealing with the substantive decision itself In my view it fell into error in the result it reached because it failed to appreciate the decision it was being called upon to make .

(b) No question of proportionality arises in this case and, unlike the situation in Begum's case, the Panel was dealing with the unqualified right of Article 2. Moreover it should be borne in mind that the Panel was making a judicial decision which does perhaps require a somewhat more structured approach than was necessary in the case of laypersons in Begum's case.

[37] These conclusions are sufficient to grant the relief sought to the applicants. These findings in my view justify an Order of Certiorari to quash the decision of the Panel made on 9 October 2006 whereby it refused to grant the applicants anonymity and/or screening in the course of the Inquiry proceedings. For the reasons set out I consider that each such decision was unlawful and I make an Order of Mandamus requiring the Panel to reconsider each of the applicants' applications in accordance with this judgment and the law as set out in Re Officer L and Others for Judicial Review [2007] NICA 8.

[38] In these circumstances I intend to confine my observations on the remaining aspects which I have not yet determined to relatively brief comments. I should not wish sitting at first instance to attempt to effect definitive resolution of such matters in circumstances where the case does not affirmatively require it:

(i) The failure to carry out or procure an individual threat assessment.

In this context it is important to remind the parties of the role of judicial review. The courts have invented the remedies of judicial review not to provide an appeal machinery but to ensure that the decision-maker does not exceed or abuse his powers. Only if the decisions given by the decision-maker disclose illegality, irrationality or procedural impropriety can the decision be open to judicial review. An applicant for judicial review must show more than a mistake on the part of the decision-maker or his advisers. Where a decision is made in good faith following a proper procedure and as a result of conscientious consideration, an applicant for judicial review is not entitled to relief save on the grounds established in Wednesbury (see Lord Templeman in Regina v ITC ex parte TSW Broadcasting Limited [1994] 2 LRC 414 at 424).

The issue here is whether or not the Panel ought to have obtained personalised risk assessments in relation to each individual applying for anonymity or screening. The case made by the applicants is that the police were not presented with the applicants' application including all of the relevant personal circumstances on which he or she relied and they were not asked to give a predictive judgment expressly related to each applicant's case. In essence the case made on behalf of the applicants is that the decisions were based on a generic assessment by reference to categories into which the witnesses might fall. In an affidavit made by Mr Palin, Solicitor to the Inquiry, dated 7 December 2006 he said at paragraph 8:

> "A specific threat risk analysis in respect of the applicants was not sought from the PSNI as none of the applicants in their application had made any suggestion that they were subject to any specific threat or risk. The nature of their application was that a risk or threat existed solely by virtue of their employment with NIPS. In other cases, where witnesses who sought anonymity or screening have specifically raised the question of a threat or risk to them, a specific threat risk analysis was requested from the PSNI by the Inquiry."

Mr Maguire had argued that at least in the case of witness A, a specific threat in the past which meant that he was never assigned to an LVF wing had been made.

Whilst a plausible argument has been raised by Mr Maguire that the rudimentary step of informing the police of the names of the applicants, their functions and/or where they lived might have been a step that the Panel could have considered, nonetheless I am not persuaded that the generous ambit of discretion which must be vested in the fact finding and decision-making body has been exercised in this instance in such an irrational or unreasonable manner so as to invoke the Wednesbury principle. It would seem obvious that if there was some specific risk, the applicants would have been aware of it and were therefore in a position to draw the attention of the Panel to it in the circumstances where they were afforded the opportunity to so do.Thereafter the PSNI could have been requested to assess the specific risk. Indeed Mr Larkin made the point that in the case of A he had specifically indicated that certain confidential papers upon which he relied were for the eyes of the Inquiry only and thus specifically removed the possibility of independent scrutiny by outside bodies of his claim .In the event therefore no specific risk surfaced from any of the applicants which the Panel was called upon to furnish ot the police . This factually distinguishes the case from Norfolk's case. Had I been required to determine the case on this basis therefore I would have refused the relief sought.

Failure to Disclose Materials to the Applicants

(ii) Insofar as the Panel received materials which were taken into account by it in its anonymity and screening decisions but were not provided to the applicants, either by way of documentation themselves or the gist thereof (see paragraphs 10 and 11 of the judgment), the Panel risks offending he principle of procedural fairness. In the context of the court refusing a remedy if it is established that an irregularity makes no difference to the outcome of the process, Bingham LJ (as he then was) set out certain comments which I consider relevant to this case in an article headed `Should Public Law Remedies be Discretionary' (1999 PL64 at 72) –

> "(1) Unless the subject of the decision has had an opportunity to put his case, it may not be easy to know what case he could have or would have put if he had had the chance.
>
> (2) As memorably pointed out by Megarry J in John v Ross [1970] Ch 345 at 402 experience shows that that which is confidently expected is by no means always that which happens.

> (3) It is generally desirable that the decision-maker should be reasonably receptive to argument and it would therefore be unfortunate if the complainant's position became weaker as the decision-maker's mind became more closed.
>
> (4) In considering whether the complainant's representations would have made any difference to the outcome, the court may unconsciously stray from its proper province of reviewing the propriety of the decision-making process into the forbidden territory of evaluating the substantial merits of the decision.
>
> (5) This is a field in which appearances are generally thought to matter.
>
> (6) Where a decision-maker is under a duty to act fairly the subject of the decision may properly be said to have a right to be heard, and rights are not to be lightly denied."

[39] Accordingly the approach to such decisions must reflect and facilitate the applicant's right to participate in the decision-making process. This is a judicially manageable empirical question. The Panel must have due regard to the substantive and procedural norms that exist in the administration of justice. If there is a lack of structure in the approach – whereby for example certain matters are revealed to the applicants and certain are not, it can result in an absence of clear channels within which fairness can be seen to operate. I find little attraction in the suggestion by Mr Larkin that issues such as this need to be seen in the context of the need to press the administrative process along and the right of the applicants to make a fresh application. I find similarly unpersuasive the suggestion that the police must have a monopoly on the topic of information and that it would not avail of the applicants to attempt to gainsay any information that the police might give secrets to the Panel. At the very least applicants must be afforded the right to make this concession.

[40] What fairness demands is dependent on the context of the decision and this has to be taken into account in all its aspects. However I consider it is a fundamental principle of fairness that a person who may be adversely affected by the decision should have the opportunity to make representations on his own behalf concerning material which is commanding the attention of the decision maker . Otherwise he may be deprived of the opportunity to make effective representations in the decision-making process. Wherever possible decision makers should facilitate participation and involvement in

the decision making process. I conclude by adopting the general principles expounded in the landmark speech of Lord Mustill in Doody v Secretary of State for the Home Department and Others [1994] 1 AC 531 p560d/g:

> "What does fairness require in this case? My Lords, I think it is unnecessary to refer by name or to quote from, any of the often-cited authorities in which the courts have explained what is essentially an intuitive judgment. They are far too well known. From them I derive that …
>
> (2) The standards are fairness are not immutable. They may change with the passage of time, both in the general and in their application to decisions of a particular type.
>
> (3) The principles of fairness are not to be applied by rote identically in every situation. What fairness demands is dependant on the context of the decision, and this is to be taken into account in all its aspects.
>
> (4) An essential feature of the context is the statute which creates the discretion as regards both its language and the shape of the legal and administrative system within which the decision is taken.
>
> (5) Fairness will very often require that a person who may be adversely affected by the decision will have an opportunity to make representations on his own behalf either before the decision is taken with a view to producing a favourable result; or after it is taken, with a view to procuring its modification; or both.
>
> (6) Since the person affected usually cannot make worthwhile representations without knowing what factors may weigh against his interests fairness will very often require that he is informed of the gist of the case which he has to answer."

[41] I conclude that these words yield important insights into the concept of fairness. They accommodate the strong impulse for practical justice. Accordingly it is my view that the Panel risks offending against these

principles if applicants are deprived of the opportunity, wherever possible, of viewing documentation or information which is likely to influence the decision-maker's mind absent some issue of confidentiality or public interest immunity.