Neutral Citation No:	*Ref:* KEE11379
*Judgment: approved by the Court for handing down (subject to editorial corrections)**	*Delivered:* 11/05/2021

IN THE MATTER OF THE CORONERS ACT (NORTHERN IRELAND) 1959

IN THE MATTER OF A SERIES OF DEATHS THAT OCCURRED IN AUGUST 1971 AT BALLYMURPHY, WEST BELFAST

Appearances on behalf of Properly Interested Persons:

Mr Sean Doran QC, Mr David Heraghty, Mr Michael McCartan, Ms Denise Kiley, (instructed by Ms Rosalind Johnston on behalf of the Coroner)
Mr Kevin Rooney QC, Mr Peter Coll QC, Mr Martin Wolfe QC, Mr Mark Robinson, Mr Joseph Aiken, Mr Andrew McGuinness, Mr Mark McEvoy (instructed by the Crown Solicitor's Office on behalf of the Ministry of Defence and Police Service of Northern Ireland)
Mr Michael Mansfield QC, Ms Karen Quinlivan QC, Ms Fiona Doherty QC, Ms Brenda Campbell QC, Mr Desmond Hutton, Mr Des Fahy, Mr Sean Devine, Mr Eugene McKenna (instructed by Ó'Muirigh Solicitors),
Mr Barry Macdonald QC and Ms Laura McMahon (instructed by Phoenix Law Solicitors) on behalf of the Next of Kin

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Sections **Paragraphs**

KEEGAN J

I. INTRODUCTION

[1] The series of inquests known as the Ballymurphy Inquests comprise five incidents. Therefore I heard this case in modular format. The inquest is a fact finding exercise, it is not a criminal or civil trial. Incident 1 concerns the deaths of Francis

Quinn and Father Hugh Mullan on 9 August 1971. Incident 2 concerns the deaths of Noel Phillips, Joan Connolly and Daniel Teggart on 9 August 1971 and the subsequent death of Joseph Murphy on 22 August 1971 (Mr Murphy having been shot on 9 August 1971). Incident 3 concerns the death of Edward Doherty on 10 August 1971. Incident 4 concerns the deaths of John Laverty on 11 August 1971 and of Joseph Corr on 27 August 1971 (Mr Corr having been shot on 11 August 1971). Incident 5 concerns the death of John James McKerr on 20 August 1971 (Mr McKerr having been shot on 11 August 1971). This chapter deals with some contextual background, case management issues and the legal issues which arise.

[2] As will be apparent, these incidents occurred over a three day period from 9 to 11 August 1971 in the Ballymurphy area. Incident 1 occurred in an area of waste ground that lay between Springfield Park and Moyard Park in this area. Incident 2 occurred at a location known locally as the Manse on the Springfield Road. Incident 3 occurred on the Whiterock Road. Incident 4 occurred in an area known as the Mountain Loney close to Dermot Hill Park. Incident 5 occurred on Westrock Drive close to Corpus Christi Church.

[3] These deaths are now in their 50th anniversary year and yet the effect of them remains stark for the bereaved families and the other persons involved. The context of this case is the so-called "Troubles" which were taking place in Northern Ireland at the time. That highly charged and difficult environment is something that the people of Northern Ireland still remember and hope is behind us. The Troubles are one aspect but the specific backdrop to Ballymurphy was the internment operation that was initiated by the British Government in 1971 and code named Operation Demetrius. That operation had been proposed by the Northern Ireland Executive at a meeting with the Prime Minister Edward Heath on 5 August 1971.

[4] This policy was designed to stymie the growth of paramilitary activity in Northern Ireland and as part and parcel of it the Government agreed to military support. Inevitably, the target of the operation was the Irish Republican Army

("IRA") which was active at the time. It was to be a planned operation carried out under Regulations pursuant to the Civil Authorities (Special Powers) Act (Northern Ireland) 1922. The aim was to take those suspected of being members of the IRA out of circulation and have them interned. This operation was enacted with military support and commenced at around 4.00am on 9 August 1971.

[5] The arrests that occurred on that day were widespread and spanned throughout Northern Ireland and not just West Belfast where these deaths occurred. However, there were a considerable number of arrests in West Belfast which was known to be an area of Republican activity. Following the introduction of internment there was a reaction from the local population throughout Northern Ireland. This manifested itself as disorder on the streets of Belfast and elsewhere. The RUC duty officers' reports for 9 and 10 August 1971 paint a picture of the scale of unrest and strife as follows. Across Belfast alone on 9 and 10 August 1971 it is recorded that there were approximately 12 explosions, 59 shooting incidents, 17 reported deaths, 25 reported injuries, 13 incidents of rioting, 18 reports of arson and other reports of civil disorder of various kinds. It is hard to imagine now the extent of the difficulties that the local people faced in Northern Ireland when all of this was at its height.

[6] This background provides the context in which these deaths occurred. However, whilst the broad background frames each incident, there are many different considerations and complexities in these cases. The deaths themselves occurred at different times and in different ways and in each of the inquests it is apparent that different questions are raised. For these reasons, I have prepared a specific set of narrative findings in each case.

[7] I heard oral evidence over 100 court sitting days making this the longest running inquest in Northern Ireland to date. I also read thousands of pages of evidence and detailed legal submissions which were filed at the conclusion of the evidence. All properly interested persons had the benefit of expert legal

representation and in addition I allowed lawyers to attend for certain individual military witnesses and some of these lawyers provided submissions to me when particular points arose.

[8] Before the inquest began, the Coroners Service for Northern Ireland made various public appeals for evidence. I repeated this at the start of this inquest by making a public statement which I attach at **Annex 0.1**. This resulted in additional witnesses coming forward to give evidence over the course of the year during which this inquest was heard. Therefore, I am satisfied that all those with relevant information have had ample opportunity to come forward to assist me.

[9] The inquest was open to the public. At times witnesses were screened and many witnesses were anonymous. I am happy to say that all parties abided by my directions in relation to this matter and I particularly thank the media who acted responsibly, raised queries when they were unsure and reported in an appropriate way.

[10] In all of these inquests I have had the benefit of substantial civilian evidence. I have had less military evidence before me in these cases. There are also different categories of evidence I have considered, namely contemporaneous statements, later interviews, and current statements. I have explained how I have assessed each category of evidence in my findings. I will come to that in due course. I have had to assess each incident on its own facts looking at the evidence that I heard and having considered the substantial amount of documentary evidence emanating from the police, Ministry of Defence ("MoD"), Historical Enquiries Team ("HET"), contemporaneous reporting and other evidence. I have been greatly assisted by the use of maps from the time and photographs. I have considered all of the above and pieced this evidence together to reach a verdict in each case.

II. SCOPE

[11] This inquest has looked at the deaths between 9 and 11 August on the basis of a scope document which was agreed in advance. This is in compliance with the requirements of the Coroners Rules I will refer to and also Article 2 of the European Convention on Human Rights. The scope that was agreed reads as follows:

1. This inquest will examine 10 deaths that occurred following shooting in Ballymurphy on 9, 10 and 11 August 1971, namely:

    (i) The deaths of Francis Quinn and Father Hugh Mullan on 9 August 1971.

    (ii) The deaths of Noel Philips, Joan Connolly and Daniel Teggart on 9 August 1971 and subsequent death of Joseph Murphy on 22 August 1971.

    (iii) The death of Edward Doherty on 10 August 1971.

    (iv) The deaths of John Laverty on 11 August 1971 and of Joseph Corr on 27 August 1971.

    (v) The death of John James McKerr on 20 August 1971.

2. The inquest will examine the deaths individually and, so far as is consistent with the objective of determining how the deceased came about their deaths, collectively. The above is suggested as the order in which the deaths should properly be considered and should not be regarded as according greater or lesser priority to any death or any incident.

3. The inquest proceedings will consider the four basic factual questions as required by Rule 15 and Rule 22(1) of the Coroners (Practice and Procedure) Rules (Northern Ireland) 1963 concerning:

(i) The identity of the deceased;

(ii) The place of death;

(iii) The time of death; and

(iv) How the deceased came about their deaths.

4. Further, related to the how question, the Coroner will examine in evidence the military operation(s) that culminated in the deaths with reference in particular to the following matters:

(i) the purpose of the operation(s);

(ii) the planning and control of the operation(s) on the part of the relevant authorities, including the management and deployment of any intelligence available to those authorities at the relevant time;

(iii) the actions of those involved in the operation(s) at all stages of the operation(s);

(iv) the training and experience of those involved in the operation(s) at stages of the operation(s);

(v) the state of knowledge of those involved at all stages of the operation(s);

(vi) whether in the planning and control of the operation or in the conduct of the operation, those involved sanctioned or engaged in the deliberate use of lethal force that was unjustified by reference to Article 2 of the ECHR and/or domestic law and whether, in any event, state authorities (including the military and the RUC) tolerated the deployment of unnecessary and unreasonable force by soldiers.

(vii) the nature and degree of force used;

(viii) issues concerning access to emergency medical care, including the actions of the military or any other relevant personnel in assessing, planning or delivering emergency medical care or arranging transfer for provision of such care; and the training and experience of those involved in such care;

(ix) any alleged acts or omissions on the part of those involved in the operation in the aftermath of the shootings, insofar as such alleged acts or omits are relevant to the consideration of how the deceased came by their death;

(x) the RUC/RMP Agreement and post incident procedures that were in existence at the time of the shootings, the effect of that agreement and those procedures on the investigation into the deaths and the extent, if any, to which the agreement and procedures bear upon the issues raised at 4(vi) above (including the question of whether the agreement and procedures impacted on any decision at any level to have recourse to lethal force).

5. The inquest will consider specifically whether the deployment of the military on the dates on which the shootings occurred was planned and controlled in such a way as to minimise to the greatest extent possible the need for recourse to lethal force and will consider whether the actual use of force was justified in the circumstances of each death.

6. In considering the planning and control of the operation(s), the inquests will examine:

(i) Decisions taken at all levels of authority that touched on the nature and degree of force to be used in operations of this kind at the relevant time; and

(ii) Such guidance as existed at the relevant time relating to the use of force in such operation(s).

7. The inquest will also examine, insofar as is necessary to address the above matters, such evidence as exists concerning the circumstances in which the deceased came to be at the locus of death at the relevant time.

8. The inquest will also examine, insofar as is necessary to address the above matters, the extent, if any, of any public disorder and/or paramilitary activity reported in the vicinity of each of the deaths on 9 to 11 August 1971.

9. The inquest will keep under consideration the question of whether the deaths were attributable to causes other than the use of force by members of the military, having regard to recent suggestions that a member of the UVF discharged rounds at the location of the shootings at the time of the incidents that culminated in the deaths.

[12] Counsel also referred me to a paragraph that was included at an early stage of preparation for these inquests which reads as follows:

> "The next of kin have invited the Coroner to examine whether those involved at any level in these incidents were engaged in a 'shoot to kill' operation. The Coroner is satisfied that this question is, in legal terms, addressed by paragraph 4(vi) above. The Coroner would emphasise that the preliminary definition of scope should not be narrowly construed. For the avoidance of doubt, the Coroner directs that the relevant authorities must disclose all relevant or potentially relevant material touching on the circumstances in which the deceased met their deaths,

including any material relevant to the question raised by the next of kin as to whether those involved at any level were engaged in what the next of kin have termed a 'shoot to kill' operation."

III. CASE MANAGEMENT

i. General

[13] I case managed this inquest upon becoming Presiding Coroner in Northern Ireland over the period of a year. Sometimes this involved hearings every week particularly on the issue of disclosure. I did this mindful of the need to have this case concluded notwithstanding the many issues which arose. I am indebted to all lawyers who worked hard during this period to ensure that my directions were followed. Without this application and energy this inquest would simply not have been possible and so it should be a template for other cases going forward. There are over 50 other legacy cases due to be heard as part of the 5 year plan which will also involve the robust case management that I have employed.

[14] Practitioners also have the benefit of the case management and witness protocols issued by the Coroners Service which guide good practice. There is a commonality of interest in doing this work efficiently otherwise these historical cases will drift for many more years without resolution, clog up the legal system and continue to cause distress and anguish due to the lack of certainty. To my mind that is not to the benefit of the people involved or Northern Ireland society as a whole. There are also European obligations to deal with these legacy cases within a reasonable time which the courts are committed to.

[15] I recognise that inquests must be conducted fairly, in line with domestic and European obligations provided by Article 2, however proportionality must also be applied particularly in historical cases. In inquests of this nature the Coroner must

undertake an effective investigation in a proportionate way, bearing in mind that in historical inquests not all questions can be answered and not all evidence can be found. There must be a realisation that in historical cases of this nature there are impediments which will arise and perfection is hard to achieve. Also, the obligation is investigative and it does not span into writing up an entire history of our past. The investigative obligation remains live whilst the inquest is ongoing and may change as the inquest develops and the issues become more apparent. If the option is to persist indefinitely or to decide on the basis of what is available the Coroner should at a certain point be able to draw a line. This consideration should of course involve input from all interested parties but the decision ultimately rests with the Coroner. That is the approach I have adopted in this inquest.

[16] I have also welcomed the collaboration between the parties in this case in dealing with a range of issues. Again, this approach will hopefully be utilised in cases going forward to ensure momentum with the engagement of all properly interested persons.

ii. Anonymity and Screening

[17] I have considered a number of cases which deal with this issue in particular *Re Officer L* [2007] UKHL 36 and a decision of the Northern Ireland Court of Appeal *In the matter of an application by Officers C, D, H and R for leave to apply for judicial review* [2012] NICA 47. The procedure for dealing with anonymity and screening has, it seems to me, become rather convoluted and last minute in this jurisdiction. Hence, I tried to streamline applications in this inquest for the benefit of future inquests as follows. The procedure is that there is an initial submission of an application which must be in writing. It is important that there is a separate application submitted for each applicant because along with objective evidence of risk for an applicant coming to give evidence in an inquest in Northern Ireland consideration must be given to subjective fears which an applicant may have. In fact

the latter category of evidence proved most persuasive in many of the cases I adjudicated on.

[18] In each case I requested a risk assessment relating to the applicant from the Police Service of Northern Ireland advising on the risk to the applicant of giving evidence at the inquest, being referred to in documentary or oral evidence, or otherwise without anonymity and/or screening as the case may be. Having dealt with over 100 applications I have found that the risk assessments are generic. Predictably the assessments have told me that the risk of attack from dissident elements in Northern Ireland remains. That of course is a matter of public record. However, in terms of military giving evidence in Northern Ireland the risk was largely described as low which could rise to moderate if someone attended in Northern Ireland to give evidence. Inevitably, and rather obviously, if a military person lived in Northern Ireland, that risk could increase due to potential identification in the community. The wording of the assessments is unavoidably couched in terms of possibility rather than certainty or even probability.

[19] In addition to these types of issues much of the subjective fears related to fear of identification in the community, particularly given social media methods for the spreading of information. I read with care the submissions made in all of the cases. They uniformly referred to the fear of attack in Northern Ireland. In this case there were a range of subjective fears put forward which were understandable particularly given the age of many of the witnesses and the fact that these events occurred some time ago and also that this inquest has a high public profile.

[20] I allowed representations in relation to these applications by the next of kin who also filed very helpful written arguments in relation to them. I then made decisions in relation to the cases, some were provisional decisions, some were final decisions but I tried to make decisions on a rolling basis to make sure that this inquest proceeded with the least amount of disruption. I did give separate

consideration to the facts and circumstances of each application bearing in mind the risk assessments which I have already described.

[21] Having regard to the observations of the Northern Ireland Court of Appeal on the engagement of Article 2 in *In the matter of an application by Officers C, D, H and R* [2012] NICA 47, the question arises as to whether the evidence before the Coroner establishes a real risk to life that is neither fanciful nor trivial and that is present or will be present if a particular course of action is or is not taken. In that case the decision was directed at police officers serving in Northern Ireland and whilst this may comprise a particular category the risk remains for military personnel who have served in Northern Ireland who may be asked to come to Northern Ireland and/or retired police officers.

[22] The law is quite clear in relation to the assessment of risk. Drawing from the cases I have mentioned, I rely on a particular passage as follows from *C and others* [2012] NICA 47 at paragraph [43]:

> "In the context of Northern Ireland which has been subjected to decades of homicidal attacks on individuals by organised terrorists the threat to life has been real, although for the bulk of the population it is not a threat directed at them individually so that for most the risk is not present and continuing in the sense of immediate to them. For some, such as members of the police force, the level of threat has been and continues to be at a much higher level and is much more immediate. It cannot be considered as anything close to fanciful and it is significant. The requirement to give evidence imposed on officers involved in this inquest will, according to the evidence, increase a present threat possibly significantly depending on the nature of the evidence and other

> unknown contingencies arising out of the inquest. The risk accordingly must qualify as real, continuous and present."

[23] Of course, the present evidence relates to an ongoing dissident threat that has been evidenced by a number of incidents in Northern Ireland and I was provided with press briefings in which that threat was very definitely described as real, continuing and present. So it is clear that Article 2 is engaged in these cases. In addition, there are common law powers to protect witnesses where appropriate which I utilised particularly when dealing with medical vulnerability.

[24] It is unnecessary to recount my decision in each and every case but I attach some decisions made during the course of the inquest which illustrate my methodology in **Annex 0.2**. Suffice to say I decided each case on its own facts and determined what proportionate protective measures should be adopted in consequence of the clear risks apparent to the military in this inquest. I also decided these cases in the open forum of the court having received written submissions from each interested party and upon hearing oral submissions.

[25] The grant of anonymity was a minimum protection which was afforded in most cases. Then the issue of screening arose and I looked at this in each case to decide whether it was proportionate. In some cases I did not allow screening because where anonymity has been granted, the risks to witnesses are alleviated and additional risks may be too remote to lead to the grant of screening. So there were some cases where screening was allowed and some cases where screening was not allowed. When I allowed for screening, I did not prevent the next of kin from seeing the witness because I considered it important that the next of kin should see the military witness and I had absolute confidence that there would be no difficulty in the next of kin engaging properly with that process.

iii. Use of live link evidence

[26] In addition, the issue of live link evidence arose and this was something that I granted in many of the applications as witnesses were outside the jurisdiction, fearful of coming to the jurisdiction and in some cases exhibited medical issues which would necessitate a provision of special measures. Of course this inquest occurred pre the Coronavirus Act 2020 which allows for live link but I applied my common law discretionary powers in the inquest to allow for live link. Subsequently I have also utilised this hybrid format in the *McElhone* inquest reported at [2020] NI Coroner 1 which I concluded in January 2021. This does involve preparation and testing as I set out in *Mc Elhone* as follows:

> "[12] When using remote technology there is a need to ensure that it works. Thus, I ran tests for each witness in advance. An agreed bundle of documents was sent to each witness in advance as I wanted to make sure that witnesses had access to the relevant papers. For some of the witnesses, representatives from the LIU were with witnesses in remote locations. We used a variety of locations including hotels and polices stations and private homes. When LIU representatives were not present I allowed family members to accompany witnesses or ensured they could manage without support. I record the high level of collaboration between the parties in relation to these issues which meant that this inquest could proceed as a hybrid hearing on schedule. In this case all interested parties agreed that the approach was the best to ensure that the inquest could proceed."

[27] I have no doubt that this method is a valuable tool in dealing with legacy inquests which will pertain after the Coronavirus Act 2020. There is a statutory regime regarding criminal trials in which live link is used, the test for special

measures being whether or not this would be "likely to improve the quality of the evidence given by the witness." This medium is frequently used in other jurisdictions including the civil and family jurisdictions with the main focus being to improve the quality of evidence. In all of these applications I allowed the views of the next of kin to be taken and then I considered each case on its own merits.

[28] I note the case of *R v Camberwell Green Youth Court* [2005] 2 Cr App R 1, albeit in the different context of criminal proceedings, where it was found that the notion of face to face confrontation whereby a defendant or his representatives were permitted to confront in person an accuser was not a right guaranteed by the Convention. In very many cases I did allow for witnesses to give evidence by live link. I should say that live link did not sit well with screening so in most cases where there was live link there was no screening of the witness.

[29] I should say that I also allowed some of the witnesses to have a family member with them or someone else to assist if they were vulnerable, hard of hearing, or had medical conditions. In very many of the cases I had to deal with persons who had early onset dementia and that led to them either not being able to give evidence, or giving evidence in writing only. In the most extreme cases this led to medical excusal. In each case I afforded all interested parties the opportunity to make submissions and I considered medical evidence. I also employed a range of options aimed at trying to obtain evidence if at all possible. This is an important issue and so I set out in some detail examples of the medical excusal applications that I heard and how I dealt with them in **Annex 0.3**.

[30] In all of these scenarios I heard from the representatives of the next of kin and in some cases I actually heard evidence from the medical professionals. I did this in particular to satisfy myself that someone was incapable of giving evidence and so should be excused. I did find in this case that the quality of the medical evidence provided varied and there was no clear view in some of the applications as to why someone would be incapable of giving evidence. But in very many cases there was a

clear diagnosis of dementia which inevitably led to a problem in giving direct evidence. I utilised a process whereby rather than immediately excuse I asked whether or not a witness could actually answer some questions in writing in advance and only then did I formally excuse the witness.

iv. Disclosure

[31] *In Chief Constable of the PSNI's Application* [2010] NIQB 66 Gillen J referred to the broad purposeful approach to disclosure and the inquiry being conducted. This theme is drawn from Lord Bingham's comments in *Jordan v The Lord Chancellor and another* [2007] UKHL 14 where he said (at paragraph 37):

> "The coroner must decide how widely the inquiry should range to elicit the facts pertinent to the circumstances of the death and responsibility for it. This may be a very difficult decision, and the enquiry may (as pointed out above) range more widely than the verdict or findings."

[32] It follows from the above that inquest practice in Northern Ireland has developed a flexible approach to disclosure. This approach is important to maintain public confidence and the confidence of the families who are bereaved. It is also vital to ensure that properly interested persons can participate in an informed, open and transparent manner and on an equal footing with other properly interested persons at all stages in the inquest process. The test the Coroner must apply in relation to disclosure is potential relevance. This approach also allows for a Coroner to apply pragmatism and proportionality during case management. In an inquisitorial process the Coroner has to manage the process within these boundaries.

[33] There were several occasions when material that had not previously been obtained emerged in the course of the inquest. This is not surprising in a case of this vintage and complexity. There were, for example, notes of interviews conducted by

a researcher in and around 1999 that only became available after the evidence had commenced and the material had to be assessed for relevance. Those parts of the notes that were relevant were processed for disclosure. There was also some material produced by witnesses, for example photographs from the relevant period in the possession of civilians and archive materials in the possession of military witnesses, that was provided in the course of the evidence.

[34] After the oral evidence had been completed, the Crown Solicitor's Office provided the Coroners Service with intelligence reports from the early 1970s relating to two men whom a witness had said were IRA members present at the time of the deaths and also with a note of an interview by the Historical Enquiries Team in respect of other incidents that touched on IRA activity in the area in 1972. The former material supported the proposition that the two named men were indeed members of the IRA, but the material did not relate to the deaths at Ballymurphy. Likewise, the latter material did not relate in any way to the deaths although it mentioned a location of Corry's yard that had featured in the evidence. Therefore, while the material was not relevant to the deaths, in the interests of transparency, I provided a gist to properly interested persons in correspondence from the Coroners Service.

[35] Accordingly, I am satisfied that all potentially relevant material was provided to properly interested persons in accordance with the approach of Gillen J as noted above, thereby ensuring that they through their representatives could participate fully in the inquest proceedings. I am also satisfied that my investigation was proportionate to the issues involved.

v. Obtaining the military statements

[36] In this case a particular difficulty arose concerning the identity of soldiers who had made statements after the incidents. Those soldiers were allocated cipher letters, but the cipher lists that would enable them to be identified have not been

made available to me. The system at the time involved Royal Military Police ("RMP") investigators in the Special Investigations Branch ("SIB") presenting the evidence to the original inquest. I was told that the Coroner would have been given a sealed envelope containing the original ciphered soldier names. I have however not been able to locate the ciphered soldier names and I have found that most frustrating in this inquest. It remains the fact therefore that many of the soldiers who made statements to the Royal Military Police at the time cannot positively be identified. In addition to this, it also transpired that some of the contemporaneous logs were missing.

[37] I ensured that this matter was investigated to the greatest extent possible. I required evidence from the Ministry of Defence about how this situation could possibly have come about and about the investigations that were undertaken to address the matter. In that regard I received a number of affidavits which I summarise as follows.

[38] First, the affidavits of Matthew Lewsey of 22 December 2017 and 5 November 2018. I should say that Mr Lewsey also attended and gave evidence on oath on my request as to the contents of this affidavit. In the affidavit Mr Lewsey described himself as the Head of Inquests, Judicial Review and Public Inquiries at the Ministry of Defence at the relevant time. He said that he had been in position since June 2017. In this affidavit he referred to the oral evidence that he gave on 25 May 2018 in relation to these disclosure issues. In his first affidavit at paragraph 9 Mr Lewsey averred that to his belief the cipher list had been destroyed by the Military of Defence. During his evidence he referred to a number of searches that could have been undertaken in relation to finding the cipher list and he clarified what he had done since that time in the November affidavit.

[39] In his affidavit Mr Lewsey said that he was asked about lists of statements held by the Central Criminal Records and Intelligence Office in London and no further information in relation to this had been forthcoming. In his evidence session

on 25 May 2018 Mr Lewsey was asked by Mr Mansfield QC about the issue of recording of the discharge of weapons and the outcome of the search for those records for the period 9 to 11 August 1971. In response, he reiterated that armoury logs had been searched for unsuccessfully in a number of repositories, and directed the court to the fact that this was set out in his previous affidavit of 22 December 2017, which included the substantive responses of Ministry of Defence to the extensive enquiries made by the representatives of the next of kin. In his evidence he also reiterated that the MoD had been unable to locate the regulations dealing with the maintenance and issue of weaponry in 1971.

[40] Mr Lewsey could not provide an explanation as to why statements which were un-redacted (and contained the names of the statement makers) in relation to the internment arrest operation in August 1971 were available but the other statements in relation to the shootings were not.

[41] There was a further affidavit of 28 May 2019 from a Lieutenant Colonel Nick Carroll S01 Operational Legacy Army Personnel Services Group dealing with the discovery of radio logs. He said that in 2015 MoD provided the inquest with available radio logs. In relation to the missing radio logs he said at paragraph 12:

> "From my own experience the way that material (such as radio logs) was preserved by the Army was unfortunately not uniform, and that the MoD does not, for instance have a complete set of radio logs in respect of its operation generally."

[42] This witness referred to specific requests that came to him in respect of missing logs. Ultimately, it was clear that these could not be found and the witness concluded by saying:

> "I have no doubt that it would be very much in the best interests of the MoD and the Army for these logs to be produced, especially given the time period that has elapsed since the events under investigation. Watch keeper or radio logs are real time contemporaneous records that can provide great assistance in understanding what has been reported at any given point in time. They are generally contributed to by multiple radio operators in multiple locations, reporting into a central watch keeper (who is not themselves present to witness the events but is tasked with the responsibility of recording what they are being told). Radio logs are operation material, as opposed to some form of historical record (like an operations report on events). The obligation for the radio logs to be an accurate record is perhaps increased by the fact that operational decisions by the chain of command have to be taken on foot of the information received and recorded."

[43] It will be apparent from the above that there have been difficulties in securing all information, in particular, the cipher lists. It has been suggested by the Ministry of Defence that it was the practice of the RMP at the relevant time to destroy the information for security reasons. The MoD represented to the HET in and around 2007 that this was done in accordance with standing instructions in place at the relevant time. This explanation was also given to the Coroners Service in correspondence of 12 April 2017. As yet, however, no such standing instructions or other regulations appear to have been located save a chapter of a document entitled "The Provost Marshall Instructions for RMP Case Papers." These instructions do not address the specific matter of retention or destruction of cipher keys which has given rise to the difficulty in this case. This issue has also been addressed in evidence by the witness from the Ministry of Defence as I have recounted, Mr Lewsey. He said

that former members of the Special Investigations Branch had been spoken to about this matter but no further information was forthcoming. The witness also confirmed that it had not been possible to locate the nominal roll for the battalions involved at the relevant time.

[44] So, whilst it was possible to identify some of the soldiers who made statements at the time, the identities of many of those soldiers remain unknown. A particular challenge therefore was the gathering together of statements from relevant military witnesses to assist in these inquests. Understandably, the next of kin wanted to ensure that all efforts were made to address this issue. The key regiments were identified as 2 Para B Company, 2 Para Support, 2 Queen's and 1 Para C Company.

[45] Faced with these challenging circumstances, I should say that as of June 2019 the Coroners Service had identified around 800 soldiers as *potentially* able to assist this inquest and it had obtained contact details for 567 soldiers (168 were confirmed as deceased). A number of those witnesses were identified, by means of a review of all the documentation available to the Coroners Service, as having been at Ballymurphy or as being in a position to assist the coroner's examination of the deaths. This group, which initially comprised 60 individuals, was described as the core or target group of military witnesses.

[46] I appointed Fieldfisher Solicitors to take statements from these witnesses. In addition to that, questionnaires were issued to all of the other living military witnesses for whom contact details had been obtained. The objective of the questionnaires was to identify further witnesses who might be able to assist and from whom statements should be taken. The response rate to the questionnaires was in the region of 70%.

[47] Then, in July 2019 the solicitor to the Coroners Service was invited to view further MoD materials that might be capable of assisting this inquest. Those

materials included lists of soldiers who had been involved in the internment operation in Belfast in the early hours of the morning of 9 August 1971. The materials also included statements from those soldiers, relating to the arrests on internment day. An examination of that material revealed 77 further potential witnesses who had not previously been identified. When contact information relating to those individuals was obtained they too were issued with questionnaires.

[48] In late August 2019 the MoD also furnished the Coroners Service with a further source of potential witness details. The source was described as Data Preservation Repository Records or DPRR. Unfortunately, this had the potential to totally unravel the listed inquest because of the nature in which this information was presented and the extent of it. These records presented at such late notice contained no information about Ballymurphy. There was nothing in the records to indicate where the named soldiers were posted at any given time. There were details such as names, service number and regiment of thousands of soldiers who served in Northern Ireland in the 1970s. The initial figure was 4,773.

[49] It was frustrating to receive this un-paginated, ill-defined bulk of disclosure at such a late stage. Again, the Coroners Service had to undertake a considerable amount of work to actually decipher this information. The Coroners Service was committed to doing this within a relatively short period of time otherwise this inquest would have been thrown off track for many months, if not years. It was possible to narrow down the information through the removal of duplicate entries, members of regiments who were not involved at Ballymurphy and individuals who had already been traced by the Coroners Service.

[50] The Coroners Service also cross-referenced personnel files to obtain confirmation of whether individuals were actually serving in Northern Ireland at the time of Ballymurphy. As it transpired, notwithstanding the huge initial number of 4,773, the "filtering" exercise resulted in the issue of several hundred further

questionnaires to soldiers who may potentially have been in a position to assist the inquest.

[51] I deployed a novel approach whereby I convened a joint meeting of all counsel in the case and asked that counsel look collaboratively at the tracing of relevant military witnesses and the identification of witnesses from whom statements should be taken. I must say this was incredibly productive because counsel pooled their knowledge and resources to come up with lists of potentially relevant soldiers.

[52] As a result of the above exercises, the core or target group from whom statements would be sought developed through the course of the inquest and was not a closed group. Initially comprising 60 military witnesses, the group increased to 127 from whom statements were taken during the inquest. This meant that various statements came in during the course of the inquest but I consider that this was a fair and proper approach. Given that the inquest lasted for 100 sitting days (extending over the course of a year), everyone was able to adapt to the statements coming in on a parallel basis. In other words, I started the inquest whilst this parallel process of obtaining additional information was ongoing. The core or target group was augmented by reference to the questionnaire responses and an ongoing review of the materials available to me on a regular basis. I appreciate that this was a novel approach but it seemed necessary to me to meet the justice of the case and to get the case heard but also to try to get best information on an ongoing basis.

[53] I fully engaged the MoD and counsel for the next of kin in this exercise and I developed as effective a process as I could of identifying soldiers from the relevant battalions. It is of course right to say that some people may have been missed but I consider that the process I undertook was proportionate within the reasonable timeframes and having exhausted all other avenues. It should also be noted that this inquest was widely publicised and repeated requests were made for all witnesses to come forward. I was asked to consider at various stages the use of a tracing agency.

However, in my view, that was not going to solve the foundational problem of missing cipher lists. In fact, through the efforts of counsel, many additional witnesses were identified through the course of the inquest and were verified as being present through P files. Ultimately, while the process I adopted may not have been perfect, I considered at a certain stage that I had done all I could to trace witnesses who were in Northern Ireland and Ballymurphy at the relevant time.

[54] I commend the Coroners Service for undertaking this extensive work upon receipt of the various strands of information to obtain accounts from military witnesses for the purposes of this hearing. As I have said, this was a collaborative exercise: the Coroners Service and the coroner's legal representatives engaged fully with next of kin and MoD representatives to ensure to the greatest extent possible that relevant military evidence was obtained for these inquests.

[55] As a result of the above exercise, the inquest heard from a much larger number of military witnesses than might at one stage have been anticipated. A small number of witnesses did not ultimately attend, which is unfortunate, however I have proceeded to make my findings without their attendance. In particular I mention two military witnesses, who reside outside Northern Ireland. They are M57 who may have had something to say about Incident 2 and M171 who may have had something to say about Incident 4. I made every effort available to me to secure the attendance of those witnesses, including the obtaining of a subpoena pursuant to Section 67 of the Judicature Act (Northern Ireland) 1978. Following their initial default, a further date was set for their attendance, but they did not comply.

[56] Therefore I have not had the opportunity to hear from these witnesses which is unfortunate. I cannot be sure what those witnesses might have said at the inquest under questioning and of the precise extent to which they may have been in a position to assist me in examining the deaths. It is clear that neither wishes to cooperate and therein lies the difficulty as pursuant to the rules I cannot compel them to provide evidence to the inquest in this jurisdiction. Having now had the

opportunity to consider all of the evidence I have proceeded to give my findings rather than delay indefinitely for these and other potential witnesses to cooperate.

[57] It is important to stress that my powers as a Coroner are limited in relation to potential witnesses who reside outside the jurisdiction of Northern Ireland. The power to require evidence from a person in Northern Ireland is found in sections 17A and 17B of the Coroners Act (Northern Ireland) 1959. Section 17A contains a specific power to require evidence to be given or produced and a notice may be issued to that effect which must be complied with unless revoked or varied. A person failing, without reasonable excuse, to comply with a notice can be subject to a fine.

[58] Where the witness resides in the United Kingdom but outside Northern Ireland, the coroner can seek to obtain a subpoena pursuant to Section 67 of the Judicature Act (Northern Ireland) 1978. As I have said, I did this in the case of M57 and M171 and the necessary applications were granted by another High Court Judge. Following the failure of the witnesses to attend, the Coroners Service requested that certificates of default be issued by the High Court in Belfast in accordance with section 67(5) of the 1978 Act. The certificates were duly granted, leave was obtained to transmit the certificates to the High Court in London and the certificates were duly transmitted. That is the current position.

[59] During the course of the inquest I was also made aware of material circulated by some veterans suggesting that military witnesses should not cooperate and put the coroner's letters "in the bin." That was most unfortunate because it could potentially mean that some relevant military points have not been made. Flowing from this there was one issue of social media comment which I referred to the Attorney General however happily no other action needed to be taken in relation to this as an apology was given and the actions were not repeated.

[60] The flip side of this is that many military witnesses did come forward and I thank them for that as I have been able to consider their testimony. In some of the incidents I have not head a full military account and I have had to proceed on that basis as I allowed ample time for relevant witnesses to come forward. I did not see that it was purposeful or proportionate to delay this case further.

IV. LEGAL CONSIDERATIONS

[61] In Northern Ireland inquests are governed by the Coroners Act (Northern Ireland) 1959. Section 14 frames this inquest because it has been heard on the direction of the Attorney General. Section 14(1) states:

> "Where the Attorney General has reason to believe that a deceased person has died in circumstances which in his opinion make the holding of an inquest advisable he may direct any coroner (whether or not he is the coroner for the district in which the death has occurred) to conduct an inquest into the death of that person, and that coroner shall proceed to conduct an inquest in accordance with the provisions of this Act (and as if, not being the coroner for the district in which the death occurred, he were such coroner) whether or not he or any other coroner has viewed the body, made any inquiry or investigation, held any inquest into or done any other act in connection with the death."

[62] The rules governing coronial proceedings are contained within the Coroners (Practice and Procedure) Rules (Northern Ireland) 1963. Rule 15 states that the proceedings and evidence at an inquest shall be directed solely to ascertaining the following matters, namely: (a) who the deceased was; (b) how, when and where the deceased came by his death; (c) the particulars for the time being required by the

Births and Deaths Registration Acts (Northern Ireland) 1863 to 1956 to be registered concerning the death. Rule 16 states that neither the coroner nor the jury shall express any opinion on questions of criminal or civil liability or on any matters other than those referred to in Rule 15, provided that nothing in Rule 16 shall preclude the coroner or the jury from making a recommendation designed to prevent the recurrence of fatalities similar to that in respect of which the inquest is being held.

[63] I have heard this case without a jury and I am empowered to do that by virtue of Section 18(2) of the Coroners Act. This was by agreement of the next of kin, the Ministry of Defence and the Police Service of Northern Ireland.

[64] In addition to the domestic legislation inquests are also subject to the European Convention on Human Rights ("ECHR") which is part of the law of the United Kingdom by virtue of the Human Rights Act 1998. In particular, Article 2 of the Convention 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 the penalty is provided by law."
>
> 2. Deprivation of life shall not be regarded as inflicted in contravention of this Article when it results from the use of force which is no more than absolutely necessary:
>
> (a) in defence of any person from unlawful violence;
>
> (b) in order to effect a lawful arrest or to prevent the escape of a person lawfully detained;

(c) in action lawfully taken for the purpose of quelling a riot or insurrection."

[65] The ECHR has had a significant effect upon the conduct of inquests. In addition to the substantive effect of Article 2, there is also a clear procedural obligation upon coroners to make sure that an inquest is Convention compliant. This is explained in cases starting with *McCann v United Kingdom* [1995] 21 EHRR 97 which highlighted the procedural obligation on the State to carry out an effective official investigation into the circumstances of the deaths. Within this procedural obligation there are additional duties to consider planning and control and protection against real and immediate risks to life. An Article 2 compliant inquest must examine the how, why, where and by what means a death came about but also "in what broad circumstances" it occurred: see *R (Middleton) v West Somerset Coroner* [2004] 2 AC 182.

[66] The requirements of an Article 2 compliant investigation were considered by the Strasbourg Court in *Jordan v UK* [2003] 37 EHRR 2 and in *Nachova & others v Bulgaria* [2006] 42 EHRR 43. As a result of the decision of the Supreme Court in *In the Matter of an application by Brigid McCaughey and another for Judicial Review* [2011] UKSC, those procedural requirements must be adhered to in this inquest notwithstanding that the deaths preceded the coming into effect in this jurisdiction of the Human Rights Act 1998. In this jurisdiction, Stephens LJ has summarised the relevant principles in *Jordan* [2014] NIQB 11 as follows (at paragraph [78]):

(a) The essential purpose of an investigation is "to secure the effective implementation of the domestic laws which protect the right to life and, in those cases involving State agents or bodies, to ensure their accountability for deaths occurring under their responsibility."

(b) The form of such an investigation may vary in different circumstances. The Strasbourg Court did not specify in any detail which procedures the authorities should adopt in providing for the proper examination of the circumstances of a killing by State agents. The aims of fact finding, criminal investigation and prosecution can be carried out or shared between several authorities, as in Northern Ireland, and the requirements of Article 2 may nonetheless be satisfied if, while seeking to take into account other legitimate interests such as national security or the protection of material relevant to other investigations, they provide for the necessary safeguards in an accessible and effective manner. However, the available procedures have to strike the right balance.

(c) Whatever mode of investigation is employed, the authorities must act of their own motion, once the matter has come to their attention. They cannot leave it to the initiative of the next of kin either to lodge a formal complaint or to take responsibility for the conduct of any investigative procedures.

(d) For an investigation into alleged unlawful killing by State agents to be effective, it may generally be regarded as necessary for the persons responsible for and carrying out the investigation to be independent from those implicated in the events. This means not only a lack of hierarchical or institutional connection but also a practical independence. That in order for the investigation to be effective, "the persons responsible for and carrying out the investigation must be independent and impartial, in law and in practice" (paragraph 112 of *Nachova*).

(e) The investigation is also to be effective in the sense that it is *capable of leading to a determination* of whether the force used in such cases was or was not justified in the circumstances and to the identification and punishment of those responsible. This is not an obligation of result, but of means. The authorities must have taken the reasonable steps available to them to secure

the evidence concerning the incident, including inter alia eye witness testimony, forensic evidence and, where appropriate, an autopsy which provides a complete and accurate record of injury and an objective analysis of clinical findings, including the cause of death. Any deficiency in the investigation which undermines its ability to establish the cause of death or the person or persons responsible will risk falling foul of this standard. (emphasis added)

(f) A requirement of promptness and reasonable expedition is implicit. It must be accepted that there may be obstacles or difficulties which prevent progress in an investigation in a particular situation. However, a prompt response by the authorities in investigating a use of lethal force may generally be regarded as essential in maintaining public confidence in their adherence to the rule of law and in preventing any appearance of collusion in or tolerance of unlawful acts.

(g) There must be a sufficient element of public scrutiny of the investigation or its results to secure accountability in practice as well as in theory. The degree of public scrutiny required may well vary from case to case.

(h) In all cases the next of kin of the victim must be involved in the procedure to the extent necessary to safeguard his or her legitimate interests. In respect of this matter I would add that the next of kin must be involved regardless as to their personal circumstances or attributes.

[67] To this comprehensive and instructive summary of principle provided by Stephens LJ I would simply add another point which is this : legacy inquests in Northern Ireland should be conducted in a proportionate way. The Coroner must decide what enquiries are required to answer the core questions, with reference to *inter alia* the scope of the inquest, the feasibility of the investigation, and the need to conclude investigations of a historical nature within a reasonable time.

[68] The inquest also has to reach conclusions on major issues canvassed at the inquest: *R v Her Majesty's Coroner for the Western District of Somerset ex parte Middleton* [2004] UKHL 10, at paragraph [18]. One of the functions of the inquest is to allay rumour and suspicion: *In the Matter of an Application for Judicial Review by Siobhan Ramsbottom* [2009] NIQB 55, at paragraph [11]. Also, the evidence at the inquest may range more widely than the verdict or findings: *Jordan v Lord Chancellor* [2007] UKHL 14, at paragraph [37].

[69] In practical terms, there will be cases where, no matter how thoroughly all relevant primary evidence is secured and available and then comprehensively examined, including by the examination of witnesses (publicly and with the involvement of the next of kin), it is difficult to reach a clear conclusion as to what has occurred or for instance whether the use of lethal force was justified. This might arise by virtue of a lack of evidence or by reason of a conflict of evidence which is simply impossible to resolve decisively one way or the other. The European Court of Human Rights has recognised that "there may be cases where the facts surrounding a deprivation of life are clear and undisputed and the subsequent inquisitorial examination may legitimately be reduced to a minimum formality"; but that, "equally, there may be other cases, where a victim dies in circumstances which are unclear" (see *Taylor, Crampton, Gibson and King v United Kingdom* [1994] 79-A DR 127 at 136). The jury verdict questionnaire in the inquest in relation to the death of Jean Charles de Menezes, in England and Wales, included provision for a jury response to each question that they "cannot decide" (2/417-419). The obligation on the State is not to provide a particular result in a given case but to provide a system of investigation which is capable in principle of giving rise to clear findings where they are warranted by the evidence.

[70] In *Jordan* [2018] NICA 6, the Court of Appeal recognised that whilst a coroner must strive to reach findings, it may not be possible, and if that is explained, the inquest verdict is lawful in a particular case. The court referred to the decision in

Coroner for the Birmingham Inquest v Julie Hambleton and others [2018] EWCA Civ 2018 and reiterated the difference between other proceedings and inquests. In summary, the court found at paragraph 112:

> "The obligation on a coroner in an inquest under Section 31 of the Coroners Act (Northern Ireland) 1959 is confined to setting forth in his verdict particulars so far as such particulars have been proven to him.
>
> The statutory obligation on the coroner is to consider whether a particular fact has not been proved on the balance of probabilities. This must also involve consideration as to whether the coroner is undecided as to whether the particulars did or did not occur. In this way the decision is not as between one or two possible outcomes that is the particular did occur or the particular did not occur, but includes the third possible outcome in which the coroner states that he is undecided or, as in this case, profoundly unsure as to whether it did or did not occur. We agree with the coroner that it was not and could not be said to be a binary decision and we consider that the coroner was positively obliged to consider the third possible outcome as to whether he was undecided provided that he gave his reasons for being undecided. We conclude that insofar as any particular was not proved to him his verdict represented the proper discharge, rather than the abrogation of Section 31 of the Coroners Act 1959."

[71] In *R v South London Coroner ex parte Thompson* [1982] 126 SJ 625 Lord Lane CJ also referred to the nature of inquest proceedings when he said:

> "… it should not be forgotten that an inquest is a fact finding exercise and not a method of apportioning guilt. The procedure and rules of evidence which are suitable for one are unsuitable for the other. In an inquest it should never be forgotten that there are no parties, there is no indictment, there is no prosecution, there is no defence, there is no trial, simply an attempt to establish facts. It is an inquisitorial process, a process of investigation quite unlike a criminal trial where the prosecutor accuses and the accused defends, the judge holding the balance or the reins whichever metaphor one chooses to use."

[72] In *R (Amin) v Secretary of State for the Home Department* [2003] UKHL 51 Lord Bingham expressed the purpose as follows:

> "… to ensure so far as possible that the full facts are brought to light; that culpable and discreditable conduct is exposed and brought to public notice; that suspicion of deliberate wrongdoing (if unjustified) is allayed; that dangerous practices and procedures are rectified; and that those who have lost their relative may at least have the satisfaction of knowing that lessons learned from his death may save the lives of others."

[73] The standard of proof in inquests has come to the fore in this case but it has helpfully been clarified by the Supreme Court in the recent decision of *R (On the application of Maughan) v Her Majesty's Senior Coroner for Oxfordshire* [2020] UKSC 46. This appeal arose out of the death of a person in prison by suicide. Of note at the

outset is the fact that the court considered the use of narrative conclusions as follows at paragraph 8:

> "Longer, more judgemental narrative conclusions, as used by the coroner's jury in this case, are relatively new. They result from the recent transformation of many inquests from the traditional inquiry into a suspicious death into an investigation which is to elicit the facts about what happened, and in appropriate cases identify lessons to be learnt for the future. This is the position in inquests which the state is now required to carry out because of the European Convention on Human Rights. Article 2 of the Convention protects the right to life. One of the consequences of this is that there must generally be an effective investigation of deaths which occur while a person is in the custody of the state ("state-related deaths"), and one of the ways in which this obligation may be discharged is by holding a coroner's inquest, in which the next of kin of the deceased can participate. The relevant principles of domestic law have been established by decisions of the courts, including, in particular, the decision of the House of Lords in R (Middleton) v West Somerset Coroner [2004] UKHL 10."

[74] The *Maughan* case arose in the context of a jury inquest, the applicable rules in England and Wales (which date from 2013) and the guidance of the Chief Coroner. Whilst *Maughan* was a suicide case the court also looked at the issue in the context of unlawful killing. The court recognised the changing role of inquests and changing societal attitudes and expectations which confirmed the need to review the standard of proof in the case of suicide. The court also considered whether the criminal standard should be retained for the issue of unlawful killing. It decided against that

argument drawing upon authority from the civil field including family law: *Re H (Minor) (Sexual Abuse: Standard of Proof)* [1996] AC 563 and *Re B (Children) (Children Proceedings: Standard of Proof)* [2008] UKHL 35. The Supreme Court said that:

> "Those cases make it clear that there is not a sliding scale of probability to be applied, commensurate with the seriousness of the subject-matter or the consequences of the decision. The only question is whether something is more likely than not to have happened." (See *Braganza v BP Shipping Ltd* [2015] 1 WLR 1661)

[75] This issue had been examined by the Northern Ireland Court of Appeal by Stephens LJ in the case of *Jordan* [2018] NICA 34. In that case, which was an application for leave to apply for judicial review of a coroner's ruling, the court considered the standard of proof as the balance of probabilities and there was no argument to the contrary. Post *Maughan* Morgan LCJ has said that the civil standard applies in *Hura Steponaviciene* [2020] NICA 6. In that case the LCJ referred to the issue as follows:

> "[7] It was submitted that Maughan was wrongly decided but the learned trial judge in his careful judgment rejected that submission. Maughan was appealed to the Court of Appeal and eventually to the Supreme Court [2020] UKSC 46). By a majority the Supreme Court decided that the standard of proof in a coroner's inquest on the question of suicide or unlawful killing was the balance of probabilities.
>
> [8] Suicide requires proof and should not be presumed. That principle was supported by all of the Justices. There is, however, no basis upon which this

> court could distinguish this case or fail to follow this binding authority from the Supreme Court despite the persuasive judgment in dissent by Lord Kerr with whom Lord Reed agreed. Accordingly, it must follow that the appeal should be dismissed."

[76] I have also considered this issue in the *McElhone* inquest. In that case I said that I considered myself bound by these decisions and previous judicial decisions in Northern Ireland which apply the civil standard of proof to inquests of this nature. It is also worth restating the fact that the law in Northern Ireland does not provide for a verdict of unlawful killing unlike England and Wales. I have received some further submissions on the point which I have considered. In the submissions of the MoD I am invited to apply a criminal standard of proof however I am not attracted to that argument given the cases I have already referenced and because of the nature of the inquest.

[77] The civil standard of proof is very much tied to the nature of an inquest as it is not a criminal trial and should never be thought to be. The outcome of an inquest may have serious consequences but whatever that may be it is not a criminal conviction or a finding of civil liability. In *Serious Organised Crime Agency v Gale* [2011] UKSC 49 the Supreme Court held that the application of the ordinary civil standard of proof in relation to allegations of criminal conduct in civil recovery proceedings is compatible with Article 6(2) of the ECHR. In this case there is no argument before me that the process is not itself Convention compliant. So, I reject the suggestion that the criminal standard should apply and I have applied the civil standard in this inquisitorial process.

[78] Given the nature of these proceedings there is no formal burden of proof, save that when Article 2 is engaged there is an onus on the State to establish that the use of lethal force is justified. In *Jordan* [2018] NICA 34 the Court of Appeal referred (at paragraph [116]) to the coroner's acknowledgement of this obligation upon the

"State in general and the police in particular" to provide a satisfactory and convincing explanation on the balance of probabilities to justify the death of the deceased. The State thus "bears the burden of adducing evidence to provide a convincing explanation for the killing under Article 2."

[79] In relation to the use of force Section 3 of the Criminal Law Act (Northern Ireland) 1967 provides:

> "(1) A person may use such force as is reasonable in the circumstances in the prevention of crime, or in effecting or assisting in the lawful arrest of offenders or suspected offenders or of persons unlawfully at large."

[80] The use of force is also governed by the common law defence of self-defence. In *Beckford v The Queen* [1988] AC 130 Lord Griffith said:

> "… the test to be applied for self-defence is that a person may use such force as is reasonable in the circumstances as he honestly believes them to be in defence of himself or others."

[81] In *Armani Da Silva v UK* (Application No. 587808), the European Court addressed the question of whether the domestic UK law governing self-defence conformed to the requirements of Article 2 of the ECHR and found in summary that the domestic law in terms of the use of force in self-defence was compliant with Article 2.

[82] In *Jordan* Horner J summed up the test to be applied in that case (which involved the use of lethal force by police) as follows:

> "[187] Accordingly, the task for this inquest in conducting an Article 2 complaint inquest must be to ask whether Sergeant A had an honest and genuine belief that it was necessary for him to open fire. Whether that belief was subjectively reasonable, having regard to the circumstances pertaining at the time, is relevant to the question of whether it was honestly held. I should not examine A's belief from the position of a detached observer but from a subjective position consistent with the circumstances in which he found himself and which will necessarily also involve taking into account his training, experience and his knowledge and awareness of the RUC Code of Conduct. I have to consider whether his decision to open fire was "absolutely necessary." To put it another way, whether in all the circumstances it was proportionate, that is "reasonable, having regard to what the person honestly and genuinely believed."

[83] In addition to the legal issues I have set out there is an obvious issue in this type of case about the cogency of evidence given that these events occurred 50 years ago. Girvan LJ highlighted this in the context of historical sexual abuse in *R v JW* [2013] NICA 6 when he said:

> "[14] What has been said in the context of the prejudice created by delay in the context of civil litigation applies with even greater force in the context of criminal proceedings for the outcome of criminal proceedings may subject the defendant to potentially severe penal consequences and to extensive damage to his private life and reputation. In Birkett v James [1978] AC 297 in the

context of a civil case of alleged want of prosecution Lord Salmon said:

> 'When cases (as they often do) depend predominantly on the recollection of witnesses, delay can be most prejudicial to defendants and to the plaintiff also. Witnesses recollections grow dim with the passage of time and the evidence of honest men differs sharply on the relevant facts. In some cases it is impossible for justice to be done because of the extreme difficulty in deciding which version of the facts is to be preferred.'"

[84] In this series of inquests I have been mindful of these issues. I understand that people may have a false memory of events or a memory of events which is coloured by a narrative that is part and parcel of the community consciousness. A witness may have a vision of events which the witness thinks is entirely accurate but in fact has been recreated from various different memories. This case has also been the subject of media debate in the past and other information sources and that may have coloured evidence. So the frailties of memory and the frailties of historical evidence are something I bear in mind. What is also obvious is that witnesses have come forth who are trying their best to help but may in fact be asked to piece together matters that they really do not know anything about.

[85] In addition to the oral evidence there are contemporaneous accounts. It will be apparent that I have taken into account contemporaneous records and relied upon them in some of the circumstances. There is no bright line rule in relation to this because I am mindful that contemporaneous accounts may have been fabricated or have been part of propaganda or inaccurate. However, they may also provide the most authentic account from some witnesses given that they were made at the time.

With all of this in mind I have analysed all sources of evidence in these inquests to try to piece together as accurate a picture as possible.

V. RULES OF ENGAGEMENT AND RULES FOR INVESTIGATION AT THE RELEVANT TIME

[86] I have also considered the rules of engagement at the particular time. These are comprised in what is known as the Yellow Card. At the outset I bear in mind that these were guidelines, created pre the Human Rights Act 1998 and are not a binding legal code. The Yellow Card was a set of instructions to the military on the circumstances in which it would be appropriate to open fire. During the evidence various military witnesses referred to this as an important document which they kept on their person, often in their uniform in a pocket, and it was guidance which would have been explained to the soldiers at the outset. The military witnesses told me that realistically they would not be opening the Yellow Card whilst out on operational duties but they were to a man familiar with its contents and understanding of its main precepts.

[87] It became apparent during the inquest that several versions of this document were issued throughout the time that the military were deployed in Northern Ireland. The version that appears to have been in existence at the time of the Ballymurphy deaths is dated January 1971 and is attached hereto at **Annex 0.4**. As will be seen from this the card was entitled "HQ Northern Ireland Instructions for Opening Fire in Northern Ireland." It was issued by the Director of Operations and it provided instructions on the resort to force, namely that the use of force should be the minimum necessary to enable soldiers to carry out their duties. The card also gave instructions on warnings before fire. The card included specific instructions on when a soldier may fire against a person with a firearm, or a petrol bomber, or a person attacking property. Essentially, the soldier was required to act in an appropriate manner and was only permitted to open fire if it was felt in the circumstances that his life was under threat.

[88] At the time at which the deaths at Ballymurphy occurred, post-incident investigative procedures were subject to an agreement made in 1970 between the Chief Constable of the RUC and the General Officer Commanding of the British Army in Northern Ireland. There was a Force Order in existence at the time which effectively allowed the Royal Military Police to have command of investigations rather than the RUC. This was superseded by a further Force Order in 1973. I enclose both Force Orders in the schedule attached hereto at **Annex 0.5**. The applicable Force Order from 1970 was entitled "Instructions regarding Complaints against Military Personnel." The instructions stated:

> "Where a Complaint involving Military personnel is received by the police the following instructions will be complied with:
>
> (1) A report will be made immediately to the Commander of the Division concerned who will obtain, or cause to be obtained, statements from the complainant and any civilian or police witness involved and will investigate any criminal aspect of the matter.
>
> (2) On completion of the police investigation, the Divisional Commander will forward the police report to the Royal Corps of Military Police, who will interview and obtain statements from Military personnel involved or who can assist in the investigation …"

[89] In this case the accounts of soldiers following the deaths were gathered by the RMP and not by the RUC. This practice was subsequently criticised by the then

Lord Chief Justice Lord Lowry, who said in 1974 (in the Court of Appeal judgment in *R v Foxford* [1974] NI 171 at 180): "we deprecate this curtailment of the function of the police and hope that the practice will not be revived." This issue of the military personnel investigating other military personnel was also criticised in *Re Marie Thompson's Application for Judicial Review* [2003] NIQB 80. I bear this in mind, but I have received the material produced by those investigations in evidence and have assessed that material as appropriate in conjunction with all other evidence in the case, having regard to the investigative and procedural obligations of Article 2 ECHR as outlined above.

VI. CONCLUSION

[90] I have applied the legal tests set out above to the evidence which I have considered and I have reached findings which I explain in narrative form in relation to each death. I thank all legal representatives, court staff, media, families of the deceased and witnesses for their assistance during this inquest. What follows are my narrative findings in each case.

ANNEX

INTRODUCTION

0.1 Coroner's public statement

0.2 Examples of anonymity and screening decisions

0.3 Examples of excusal applications

0.4 Yellow Card January 1971

0.5 Force Orders relating to post-incident investigative procedures

0.1 Coroner's public statement

Judicial Communications Office

13 November 2018

STATEMENT MADE BY PRESIDING CORONER MRS JUSTICE KEEGAN

It is very clear that yesterday marked an important day for all of those present in court, given that we started these inquests and we have now heard the opening and some of the family statements. I am grateful to the family members who have prepared the statements and come to court. That can't have been easy to do. I will hear the remaining family statements during the remainder of this week and next Thursday.

I have reflected on some of the matters that have been raised in relation to progress of the inquests. You have already heard through the course of the opening that further work is ongoing. However I do want to formally record that it is a credit to **all** involved in these inquests, including the parties, the legal representatives and the witnesses who have come forward, that the cases have been ready to commence this week.

These cases go back a considerable period of time as we all know. Looking back at my records the families in the cases met with the Lord Chief Justice and previous Presiding Coroners in February 2016 and at that stage no date was set for an inquest. So, we have moved on.

Some issues have been raised by counsel about those who will be giving evidence. I have listened to that and reflected on this over lunchtime.

It is important to state that **all** of those involved with these incidents which occurred in Ballymurphy in August 1971 have an interest in having the facts surrounding these events established in court at the inquests.

As Mr Doran in his opening pointed out, there are a number of narratives in relation to what occurred and I, as the Coroner want to hear **all of the evidence** in relation to this that might be relevant to the proceedings.

All those who have information or who may have information also have an obligation to co-operate with these inquests. I want to re-state that position today as we embark upon these inquests. I am concerned therefore to hear that there may be difficulties. I have read the media reports that Mr Mansfield provided to me and I thank him for drawing them to my attention. These are of concern because the issue has been raised before and I asked that correspondence be sent by the Ministry of Defence and I understand that it was. So I am concerned that this has come back at what is clearly a critical time in these inquests.

I want to remind everyone that co-operation is key to my role. Also, as Mr Doran has pointed out, if people refuse to co-operate I have the power to subpoena witnesses. I can also draw an adverse inference if someone refuses to co-operate or furnish the court with

evidence they may have in their possession. That has already been set out in correspondence but it is important that I put this fact on the record today.

It is also not permissible for people to discourage those who might have relevant information to come forward. As I have said I want to hear all of the evidence to make an informed decision about the very important issues that I have to decide as part and parcel of these inquests.

NOTES TO EDITORS

This press release will be available on the Judiciary NI website (https://judiciaryni.uk).

ENDS

If you have any further enquiries about this or other court related matters please contact:

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0.2 Examples of anonymity and screening decisions

Annex 0.2

Inquest into the deaths at Ballymurphy, August 1971

Anonymity and Screening Applications Soldiers M152, M249, M170, M270, M226, M154, M118

Provisional Ruling, 4th February 2019

KEEGAN J

[1] I have received eight applications on behalf of the military witnesses M152, M249, M170, M270, M154 and M118 who are due to give evidence at the inquest in the coming weeks.

[2] The applications all request relief from (a) to (f) of paragraph 1, broadly that is anonymity and screening and other associated protections.

[3] Various common documents are provided in support of all of the applications;

(i) Police recorded security situation statistics 1 June 2017 to 31 May 2018.

(ii) List of terrorist incidents in Northern Ireland since January 2011.

(iii) An extract from the House of the Oireachtas of the Garda Commissioner, 11 November 2015

(iv) An extract from the Northern Ireland Affairs Committee, 25 October 2017

(iv) A report of the Independent Reviewer, Justice and Security (NI) Act 2007, dated April 2018.

(v) An extract from the Guardian newspaper re Republican dissident terror threat level in Britain.

[4] In addition I have read personal statements from the witnesses, threat assessments and in some cases medical evidence. I note that some of the witnesses refer to the recent activity of dissident republican terrorists.

[5] I have read the legal submission presented in support of the applications which deal with Article 2 of the ECHR and common law. I previously considered the main authorities in this area in relation to another application; *Re Officer L* UKHL 36, *Regina (T) v West Yorkshire (Western Area), Senior Coroner* [2018] 2 WLR 211, *Re C and Others* [2012] NICA 47, *Rabone v Pennine Care NHS Trust* [2012] UKSC 2. Of course

each case is fact sensitive and so I have been careful to apply the law to the specific facts of this case.

[6] As I have said before in dealing with this type of application, I start from the position that an application of this nature represents derogation from the principle of open justice and the need for transparency in these proceedings. I also bear in mind that the proceedings must be effective, particularly as regards participation of the next of kin. In addition, there is a particular context to this inquest. It comes 47 years after events which have high public profile and which clearly engender strong feelings in the community some of which are directed against the British Army. The overriding objective is to proceed with this inquest and have as effective a process as possible in those circumstances.

[7] *Re C* (which considered *Re L*) does not require extensive repetition as it is the leading authority in Northern Ireland on anonymity and screening and is binding upon me. The question which needs to be asked when considering the engagement of Article 2 is to whether the evidence before the Coroner establishes a real risk to life that is neither fanciful nor trivial and that is present or will be present, if a particular course of action is or is not taken. I bear in mind the unique circumstances in Northern Ireland and the threat which pertains, see paragraph [43] of the judgment of Girvan LJ. I also bear in mind the contextual references in paragraph [74] of this judgement. This case dealt with police officers but in my view the sentiments have equal application to the situation of military witnesses in the exceptional facts of this high profile and controversial case.

[8] In each case the threat is described as low in the threat assessments. They also state that "should M be denied the benefit of anonymity at the Ballymurphy Inquest the threat to M while in NI from dissident republicans could potentially rise above the low threat band." It also states that "whilst the threat to M in GB also has the potential to increase should anonymity at the inquest be denied, the current assessment is that it is unlikely to rise above the low threat band." I understand that this remains the position.

[9] In a previous application concerns were expressed regarding the wording of the threat assessment and so I have applied particularly anxious scrutiny to this issue. I note that the threat assessments are couched in terms that they could *potentially* rise. In truth that is probably the most that can be said given the uncertain nature of what might transpire in evidence.

M152

[10] I note that M152 is retired and resides in Northern Ireland. In his personal statement he says that "I would consider myself extremely vulnerable to an attack by paramilitaries due to the nature of my role in both the Armed Forces and the Northern Ireland Prison Service if my identity was known." He refers to the fact that in the late 1980's he was forced to leave his home due to a paramilitary threat

and he was subject to a general threat whilst working in the prison service. The medical report refers to an increased risk of high blood pressure. In my view Article 2 is engaged in this case and so anonymity and screening should be provided. This applicant also satisfies the common law tests.

M249

[11] M249 is retired and living in the UK. He says that he has not visited Northern Ireland due to ongoing concerns regarding security. He refers to the fact that his daughter has a sister in law who lives in Northern Ireland. He refers to the fact that several years ago she was forced to leave her home due to threats because her brother was identified as a serving officer in the army. He states that "my ongoing worries regarding my personal security have been further heightened with the recent bomb explosion outside the courthouse in Derry on the 19 January 2019." In my view Article 2 is engaged in this case and so anonymity and screening should be provided. This applicant also satisfies the common law tests.

M170

[12] M170 is retired living in the UK. He states that he considers that he and his family are "extremely vulnerable to an attack" due to his former career within the armed forces. He states that "the possible threat of attack from dissident paramilitaries remains a real and serious concern to me." M170 also refers to the fact that he underwent surgery for a cyst that developed on his brain and he has mobility problems and high bold pressure. M170 attaches a letter from his GP and states that he is "particularly concerned that the possibility of my identity being made public will have an adverse effect upon my health and wellbeing." In my view Article 2 is engaged in this case and so anonymity and screening should be provided. This applicant also satisfies the common law tests.

M270

[13] M270 is retired and living in the UK. He refers to a previous experience when giving evidence at an inquest when he did not have the benefit of screening. He states that since receiving notification of having to come and give evidence that "I have been unable to sleep properly and my appetite has been affected. Further, I have been having traumatic flashbacks to events. He states that he does not wish to talk to his GP about this as he does not want anyone to know about his military background." In my view Article 2 is engaged in this case and so anonymity and screening should be provided. This applicant also satisfies the common law tests.

M226

[14] I have not received any personal statement from M226. I cannot consider an application such as this without evidence. This may be an oversight but if not I will allow 1 week for further evidence to be provided.

M154

[15] M 154 is retired and living in the UK. He states that he maintains connections in Northern Ireland due to a sailing pastime. He states that he is concerned that "the stress of having to attend will adversely affect both my health and wellbeing and that of my wife". No medical evidence is provided. I will allow 1 week for that at which stage I will adjudicate upon this application.

M118

[16] M 118 is retired and lives in the UK. He states that he held the role of chaplain, was well known and has worked with the army extensively until 2002. He states that one member of his family continues to serve in the army. He also refers to a medical diagnosis of ME he has and prostate cancer. He says that he wife suffers from heart problems and is partially sighted. He argues that refusal of the application would have a negative effect upon his health and wellbeing and that of his wife. A GP letter is filed in support. In my view Article 2 is engaged in this case and so anonymity and screening should be provided. This applicant also satisfies the common law tests.

[17] The above is my provisional ruling. I will allow all parties to address me on Thursday morning in relation to this if they wish to do so.

Inquest into the deaths at Ballymurphy, August 1971

Anonymity and Screening Applications Soldiers M152, M249, M170, M270, M226, M154, M118

Ruling, 28th February 2019

KEEGAN J

[1] I issued a preliminary ruling on 5th February 2019 in relation to applications on behalf of the military witnesses M152, M249, M170, M270, M226, M154 and M118 who are due to give evidence at the inquest in the coming weeks. The representatives of the next of kin provided written submissions. On 7th February 2019 I heard oral submissions from counsel for the next of kin and counsel for military personnel. I record that the next of kin have raised an objection to my provisional ruling granting anonymity and screening. There was however no issue raised about the legal principles that I applied in particular the Court of Appeal ruling in *RE C and others* (2012) NICA 47. I will therefore not repeat what I said in my provisional ruling as to the law.

[2] Counsel for the next of kin referred me to the fact that these measures represented derogations from natural justice and offend openness and transparency. I referred to that principle in my provisional ruling and I appreciate the strength of it. Counsel also argued that the threat in these cases was so low and remote that Article 2 was not engaged. They referred to the fact that there is no evidence of a witness ever being threatened or attacked. They also highlighted the fact that these witnesses do not have a pivotal role in events. They pointed out that any medical issues could be facilitated by assurance or support measures. Finally, counsel stressed that a proportionate course needed to be adopted and so if I maintained my provisional ruling the witnesses should not be screened from the families. Counsel for the MoD agreed with my provisional ruling.

[3] In reaching my conclusion I have reflected on the argument that the threat level is described as low however in my view it is sufficient that this could potentially rise. Also, the fact that nothing has happened to military personnel in the past does not mean that something could happen in the future. In this regard I bear in mind recent events in Northern Ireland and the nature and profile of this inquest. Having considered all of the above I am satisfied that Article 2 is engaged in each of these cases and it follows that the bare minimum of anonymity should be afforded to all of these applicants. If I am wrong about that I consider that anonymity should be granted on the facts of these cases as a common law protection.

[4] The next question is whether I should also allow screening in each case on the basis of Article 2 and/ or common law. I understand where anonymity has been granted, the risk to the witness is alleviated to an extent and any additional risk may be too remote. I must also bear in mind that anonymity may be undermined if

screening is not provided. I have anxiously considered this taking into account the need to act in a proportionate manner and having re-examined the individual circumstances of each case. I have also considered the medical evidence provided in some of the cases. My conclusions are therefore as follows.

[5] In relation to M152, M170 and M118 - I maintain my provisional ruling regarding screening as it is a proportionate response given the circumstances of each applicant supported by evidence.

[6] In relation to M249, M270 the personal averments are also sufficiently strong to merit screening and so I confirm my provisional ruling

[7] In relation to M226 - I have now received a personal statement. Anonymity is granted. I will allow 1 week for any additional evidence to be provided before I decide on screening.

[8] In relation to M154 - Anonymity is granted. I have not received any medical evidence as directed. This must be provided within 1 week before I decide on screening.

[9] Tow other applications have come in recently namely those regarding M45, M97. My provisional ruling is to allow screening and anonymity in each of these cases. I will allow the next of kin to make any representations on these and any other cases going forward if they wish to do so having acknowledged their objection in principle to all of these applications.

[10] Where I allow for screening I entirely agree with the next of kin that in each case they should have the opportunity to view the witness. Therefore, the screening will be adapted to facilitate the full participation of the next of kin.

[11] Counsel should discuss the other ancillary measures and consequential orders which I trust are capable of agreement and which should provide reassurance to the witnesses attending court.

[12] I hope that there can be purposeful discussion of these applications going forward because a large number of military witnesses are scheduled to give evidence in the coming weeks. I am also conscious that counsel for the next of kin informed me that some of the military witnesses are not pivotal or are peripheral. Following from this helpful observation I encourage counsel to have a discussion about how best to facilitate this evidence going forward (one suggestion I have is that we could maybe utilise a video link in some cases). Or, if there are witnesses who, on a consideration of their statement, will not realistically be in a position to assist the inquest they could be dealt with by way of Rule 17.

[13] Finally, I stress that all of these matters will be kept under review in these proceedings.

Inquest into the death of Edward Doherty, 10th August 1971

Anonymity and Screening Application Soldier M3

Provisional Ruling, 23rd November 2018

KEEGAN J

[1] I have received an application dated 16 November 2018 on behalf of a military witness known as M3 who is due to give evidence before this inquest in the week after next.

[2] The application requests relief from (a) to (f) of paragraph 1, broadly that is anonymity and screening and other associated protections.

[3] Various documents are provided in support namely at Annex 1.

(i) Police recorded security situation statistics.

(ii) Policing matters, Garda Commissioner extract.

(iii) An extract from the NI Affairs Committee.

(iv) A report of the Independent Reviewer, Justice and Security Act 2007, dated April 2018.

(v) An extract from the Guardian newspaper re Republican dissident terror threat level in Britain.

(vi) A personal statement of witness M3.

(vii) A threat assessment.

(viii) Some medical statements/letters dated 20/11/18 – provided to me on the morning of hearing, 22/11/18.

[4] I have also had the benefit of written legal submissions on behalf of the applicant and from the next of kin. I have considered a file of authorities provided by the next of kin which contains the following cases; *Re Officer L* UKHL 36, *Regina (T) v West Yorkshire (Western Area), Senior Coroner* [2018] 2 WLR 211, *Re C and Others* [2012] NICA 47, *Rabone v Pennine Care NHS Trust* [2012] UKSC 2. Of course each case is fact sensitive and so I have been careful to apply the law to the specific facts of this case.

[5] There was no apparent dispute in relation to the law in this area. I start from the position that an application of this nature represents derogation from the principle of open justice and the need for transparency in these proceedings. I also

bear in mind that the proceedings must be effective, particularly as regards participation of the next of kin.

[6] In reaching my conclusion I have taken into account the following facts which I extract from the materials:

(i) The applicant is a retired soldier living in GB.

(ii) In his personal statement he has set out his subjective fears of a risk to his life and his family. At paragraph 6 of his statement he says that: "I fear for my own safety and the safety of my family from attack both during and after the inquest. As a result of this process my wife has already asked for measures to be taken to increase the security around our home. I live on a quiet street and my house is easily accessible from the road."

(iii) The threat assessment is framed as low however it states that "should M3 be denied the benefit of anonymity at the B/M inquest the threat to M3 while in Northern Ireland from dissident Republicans could potentially rise above the low threat band."

(iv) This soldier has accepted his involvement in the death of Mr Doherty but the circumstances surrounding that are highly contentious, likely to be controversial and have been and will be subject to intense scrutiny and interest in the media. In his personal statement at paragraph 9 the witness says of the threat assessment that it..."takes no account of the fact that emotions can be expected to rise as the inquests progress, particularly in the light of the recent cinema release of a documentary on Ballymurphy deaths, which was subsequently released as a Channel 4 television documentary." He states that a reconstruction of the incident he was involved in the documentary does not accord with his account and that he considers that "the version portrayed is highly inflammatory and must have the effect of raising the potential threat to me. There is already significant media coverage both locally and nationally. I understand that there may be further media coverage during the inquest and at its conclusion, including information put on the internet which would always be there. He concludes by stating; "As far as I know, I am the only soldier who has stated that I discharged my firearm in a fatal incident which is the subject of this inquest and this factor must be of particular interest to the media I fear that this status will make me a particular target."

(v) The applicant describes himself as disabled and the medical now filed sets out that he was a chronic demyelinating disorder of the nervous system (similar to the effects of multiple sclerosis). He has chronic pain and mobility problems requiring him to use two sticks and for longer

distances he may require a wheelchair. He is reported as having high blood pressure and is taking a range of medications. In his personal statement he says that he may need breaks during the proceedings.

(vi) A medical statement in relation to the applicant's wife states that she has a history of heart failure and COPD and that she was on the palliative care register but was removed in April 2017. This states that her husband is her main carer and also that "I feel that any increased stress that M may be placed under would undoubtedly impact on her mental and physical health."

[7] In addition, there is a particular context to this inquest. It comes 47 years after events which have high public profile and which clearly engender strong feelings in the community some of which are directed against the British Army. There are a number of narratives which have to be considered which were outlined in the opening to the inquest. After all of the efforts to set up this inquest it is still faced with challenges including a perceived failure of military witnesses to come forward. The overriding objective is to proceed with this inquest and have as effective a process as possible in those circumstances.

[8] *Re C* (which considered *Re L*) does not require extensive repetition as it is the leading authority in Northern Ireland on anonymity and screening and is binding upon me. The question which needs to be asked when considering the engagement of Article 2 is to whether the evidence before the Coroner establishes a real risk to life that is neither fanciful nor trivial and that is present or will be present, if a particular course of action is or is not taken. I bear in mind the unique circumstances in Northern Ireland and the threat which pertains, see paragraph [43] of the judgment of Girvan LJ. I also bear in mind the contextual references in paragraph [74] of this judgement. This case dealt with police officers but in my view the sentiments have equal application to the situation of military witnesses in the exceptional facts of this high profile and controversial case.

[9] I understand the concerns already expressed regarding the wording of the threat assessment and I have applied particularly anxious scrutiny to this issue. I note that the threat is couched in terms that it could *potentially* rise. In truth that is probably the most that can be said given the uncertain nature of what might transpire in evidence. What is clear is that the evidence of M3 is highly controversial and also that the applicant is in a unique position. Having considered the particular facts I am satisfied that there is a real risk which could potentially rise upon the giving of evidence at this inquest. The extent of that is incalculable but there is enough material to lead me to the view that it is not trivial or fanciful or not present. I am of the view that Article 2 is engaged and so the issue is what protective measures should be adopted in consequence.

[10] If I am wrong about Article 2 it seems to me that given the particular circumstances and context of this case and M3's personal circumstances and those of

his family the balance would fall in his favour in common law to have some protective measures put in place in fairness to him and to ensure the effective progress of this inquest.

[11] I have balanced the fact that this soldier has retired and is living in Great Britain and will return there. He has also partaken in a Panorama interview at the time of events but he says that is not widely publicised. Nonetheless, he was prepared to speak about events in the public gaze at that time. However, the issue must be judged as of today. And so, against these points I balance M3's particular circumstances which I have already referred to.

[12] In view of the above, I have concluded that the minimum degree of protection is appropriate namely anonymity. This is a ruling which on the particular facts of this case will be subject to ongoing review.

[13] On the basis of the evidence I am also of the view that if screening is not allowed it will undermine the grant of anonymity and that it is proportionate to protect against the risk to life. If I am wrong about that it is clear that M3's medical condition is something I am entitled to take into account at common law. The current medical evidence does not address the issue of the effect upon him of giving evidence. This is surprising and potentially prejudicial to M3. In fairness to him, I will allow any additional evidence to be filed by 12.00 noon Tuesday.

[14] I will also allow all parties to address me on Wednesday morning in relation to this provisional ruling if they wish to do so.

[15] A final word. This is the first of a number of anticipated applications of this nature I will have to deal with. I am concerned that a practice has emerged that they are brought very late in the day and that documents are illegible or incomplete or filed late. That makes the judicial task all the more difficult. A better practice needs to be developed going forward.

0.3 Examples of excusal applications

M12 - Company Commander of 2 Para Support Company (Incident 1)

M12 was diagnosed in September 2017 with probable Alzheimer's type dementia. An opinion was provided by a Consultant Psychiatrist which concluded that M12 retained capacity to provide written and oral evidence subject to special measures and a reassessment prior to providing oral evidence. Written statements were recorded with appropriate support in September 2018 and November 2018. The witness indicated his willingness to co-operate further by agreeing to attend to give oral evidence.

An updated medical assessment based upon a physical and mental state examination was provided in February 2019, in advance of oral evidence. His condition had deteriorated from September 2017 to an extent that reliable oral evidence could not be provided, even if special measures were to be adopted.

Given the importance of the witness and the progressive nature of his condition, a relevant GP report was disclosed in order to provide reassurance around the basis for the expert medical assessment provided. (Somewhat uniquely, the medical expert's identity had been initially been redacted. It was later provided to allow for a proper assessment to be made of relevant qualifications and expertise).

On the basis of the expert evidence and GP report the witness was medically excused from providing oral evidence.

M1011 – 2 Para B Coy - possibly Soldier B (Incident 2)

M1011 was an important witness from whom written and oral evidence would be required. M1011 applied for excusal from giving evidence orally or in writing.

Two disaccording expert opinions were received. Both experts gave evidence which led to a degree of consensus. The excusal application was refused, however, in

recognising the medical vulnerabilities of the witness, it was directed that a short, concise statement be taken, focusing on a number of specific matters regarding the death of four civilians in Incident 2. These matters were outlined in a series of questions to be put to the witness.

The witness subsequently felt unable, even with the assistance of a psychiatrist and legal representation, to assist the Coroner. Further medical evidence addressing a deterioration of his condition was provided. In the circumstances it was decided that the issuing of a subpoena would be disproportionate – the excusal application was granted with the caveat that the failure to answer questions would be taken into consideration when weighing up the evidence.

M206 – 2 Para Support Coy, Anti-Tank Platoon (Incident 1)

M206 applied for excusal from providing evidence. The excusal application was refused.

Similar to M1011, the Coroner acknowledged the medical vulnerabilities of the witness and directed that a short, concise statement be taken, focusing on a number of specific matters. After the statement was recorded, the witness indicated he felt able to provide oral evidence. In recognition of the medical vulnerabilities of the witness, the Coroner ensured that he was afforded regular breaks during the course of providing oral evidence. He was also supported throughout by his legal representative.

M151 – CSM 2 Para B Coy (Incident 2)

M151 provided a written statement in question-and-answer format recorded with appropriate support for his hearing and eyesight impairments. The Coroner also ensured that appropriate measures were in place to accommodate M151's diagnosis

of mild cognitive impairment. Medical opinion indicated the witness had mental capacity to engage in the process of providing oral evidence.

Special measures including video link, large font documents, along with legal and family support were in place for the witness to provide oral evidence. Shortly into his evidence it became apparent the witness was not able to adequately comprehend the questions being asked, resulting in his evidence being halted. The Coroner allowed for the preparation of a set of questions to be put to the witness in a more relaxed atmosphere with appropriate support mechanisms in place.

Unfortunately, subsequent correspondence from the witness's family indicated he was not fit to assist the inquest any further – there was no objection to the Coroner medically excusing the witness from any further participation in the Inquest.

M167 – 1 Para C Coy, 9 Platoon (Incident 4)

M167 was excused from giving oral evidence on the basis of medical evidence indicating that to do so would greatly risk exacerbating a serious existing medical condition. Special measures to support the giving of oral testimony would not have provided sufficient mitigation of the risk.

The witness had forwarded a pre-prepared written statement to the Coroner. Further medical opinion approved the provision of questions for the witness to answer, with appropriate support in a neutral environment. In the end, none of the interested persons felt this course of action would supplement, in any meaningful way, the evidence from M167 already available to the Coroner.

0.4 Yellow Card January 1971

Action by guards and at road blocks/checks

13 Where warnings are called for they should be in the form of specific challenges, as set out in paragraphs 14 and 15.

14 If you have to challenge a person who is acting suspiciously you must do so in a firm, distinct voice saying "HALT—HANDS UP" Then:

a. If he halts yes are to say "STAND STILL AND KEEP YOUR HANDS UP"

b ask him why he is there and, if not satisfied, call your Commander immediately and hand the person over to him.

15 If the person does not halt at once, you are to challenge again saying "HALT—HANDS UP" and if the person does not halt on your second challenge, you are to cock your weapon, apply the safety catch and shout: "STAND STILL I AM READY TO FIRE."

16 The rules covering the circumstances for opening fire are described in paragraphs 7-12. If the circumstances do not justify opening fire you will do all you can to stop and detain the person without opening fire.

17. At a road block/check, you will NOT fire on a vehicle simply because it refused to stop. If a vehicle does not halt at a road block/check, note its description, make, registration number and direction of travel.

18 In all circumstances where you have challenged and the response is not satisfactory you will summon your Commander at the first opportunity.

Revised January 1971

RESTRICTED

RESTRICTED

IV= 3

Instructions by the Director of Operations for Opening Fire in Northern Ireland

1 These instructions are for the guidance of Commanders and troops operating collectively or individually. When troops are operating collectively soldiers will only open fire when ordered to do so by the Commander on the spot

General Duties

2 Never use more force than the minimum necessary to enable you to carry out your duties

3 Always first try to handle a situation by other means than opening fire. If you have to fire:

a. Fire only aimed single shots.

b Do not fire more rounds than are absolutely necessary to achieve your aim.

4 Your magazine must always be loaded with live ammunition and be fitted to the weapon but unless you are about to open fire no live round is to be carried in the breech and the working parts must be forward

Warning before firing

5. A warning must always be given before you open fire. The only circumstances in which you may open fire without giving warning are described in para 12 below.

6 A warning should be as loud as possible, preferably by loudhailer. It must

a Give clear orders to stop attacking or to halt, as appropriate.

b. State that fire will be opened if the orders are not obeyed.

You may fire after due warning

7 Against a person carrying a firearm, but only if you have reason to think that he is about to use it for offensive purposes

and

he refuses to halt when called upon to do so, and there is no other way of stopping him.

8 Against a person throwing a petrol bomb if petrol bomb attacks continue in your area against troops and civilians, or against property, if the action is likely to endanger life.

9 Against a person attacking or destroying property or stealing firearms or explosives, if his action is likely to endanger life.

10 Against a person who, though he is not at present attacking, has

a. in your sight killed or seriously injured a member of the security forces or a person whom it is your duty to protect

and

b. not halted when called upon to do so and cannot be arrested by any other means.

11 If there is no other way to protect yourself or those whom it is your duty to protect from the danger of being killed or seriously injured.

You may fire without warning

12 Either when hostile firing is taking place in your area, and a warning is impracticable, or when any delay could lead to death or serious injury to people whom it is your duty to protect or to yourself; and then only:

a. against a person using a firearm against members of the security forces or people whom it is your duty to protect

or

b. against a person carrying a firearm if you have reason to think he is about to use it for offensive purposes

Note: "Firearm" includes a grenade.

0.5 Force Orders relating to post-incident investigative procedures

Royal Ulster Constabulary

For Police Use Only

HQ Ref.	Force Order No.	Date
C.277 122	148/70	8.9.70

Div Ref. Part 1

PART I.

Cancelled per F.O. 131/73

Instructions regarding Complaints against Military Personnel

Where a complaint involving Military personnel is received by the police the following instructions will be complied with:-

(1) A report will be made immediately to the Commander of the Division concerned who will obtain, or cause to be obtained, statements from the complainant and any civilian or police witness involved and will investigate any criminal aspect of the matter.

(2) On completion of the police investigation, the Divisional Commander will forward the police report to the Royal Corps of Military Police, who will interview and obtain statements from Military personnel involved or who can assist in the investigation. When this work will have been completed the R.C.M.P. will return the papers, which will include the Military report, to the Divisional Commander.

(3) The Divisional Commander will consider the matter and if he decides that criminal proceedings will be instituted he will notify the complainant without disclosing any particulars which should not be made public before the court hearing. At the termination of such proceedings, or when he decides that such proceedings will not be instituted, the Divisional Commander will return the papers to the R.C.M.P. for such action as the Military Authorities may deem necessary.

(4) Decisions by the Military to take disciplinary proceedings, result of proceedings, decision to take no proceedings, etc., will be notified by the R.C.M.P. to the complainant and the Divisional Commander.

Should there be a series of complaints following a particular military operation, special joint police and military arrangements will operate.

W. M. WILLIAMS

Assistant Chief Constable 'A'

Distribution: All Chief Superintendents, Superintendents, Offices, Stations and Departments.

Index Entries: "C"- Complaints involved Military personnel
"M"- Military personnel, complaints involving

See Part I 26/74 dated 26 2 74 Cancelled
" " " 50/74 " 22 6 74
" " " 33/75 " 13 3 75

Royal Ulster Constabulary

For Police Use Only

Code See 35/22-46 Cond.

H.Q. Ref. C89

Force Order No. 131/73

Date 27th September 1973

Div. Ref. 9

Part I

Ser Pt. III 167/76

INSTRUCTION REGARDING INVESTIGATION OF ALLEGED OR SUSPECTED OFFENCES BY MILITARY PERSONNEL

With a view to improving methods of recording, investigating, and reporting on alleged or suspected offences by Military Personnel whether on or off duty, and to facilitate more expeditious submission of the case file, the following requirements are to be met:-

I The proper co-ordination of RUC/RMP investigations with an RUC member responsible from the outset and throughout the investigation.

II The RUC/RMP to interview soldiers as proper co-ordinated investigation requires; suspects to be interviewed as such.

III Adequate police (RUC/RMP) comments on the veracity and reliability of military and civilian witnesses to assist in the assessment of the case and as to the cogency and sufficiency of the evidence.

IV Investigation files to be submitted expeditiously to the Director of Public Prosecutions.

To fulfil these requirements the following instructions will be complied with:

(i) The member of the RUC who receives a complaint or allegation that a soldier has committed a criminal offence will immediately complete a Complaint Form - copy attached. Sufficient copies are being distributed to all Stations.

(ii) If the complainant or person making the allegation is present he will record that person's statement and attach a copy to the Complaint Form.

(iii) The completed Complaint Form, together with copy statment if any, will be given to the person-in-charge of the Station.

(iv) The person-in-charge will inform immediately per phone the Divisional Commander of the complaint/allegation and forward to him the Complaint Form and copy statement, if any.

(v) The person-in-charge will immediately inform per phone the RMP. In Divisions A - M and P and R the RMP Duty NCO at Lisburn 5111 ext 2214 or 2547 will be informed. In Divisions N and O the RMP Duty NCO at Londonderry 4142 will be informed.

(vi) RMP will report immediately to the appropriate RUC Division whenever evidence tending to disclose the commission of a criminal offence is discovered in cases which they are investigating. RMP will similarly report all cases of shooting incidents in which civilian casualties occur. Such a report from RMP will be duly recorded on a Complaint Form by the person receiving such a report.

(vii) Upon receiving a report as provided for by Paragraphs iv and vi above, the Divisional Commander will instruct a member of the RUC to take charge of investigations and be responsible for preparing and furnishing an Investigation File with supporting statements.

When detailing either a member of the CID or uniformed officer to take charge of an investigation the Divisional Commander will take into account the seriousness of the offence alleged.

Shooting incidents resulting in death or injury, or serious assaults should be investigated by a member of the CID.

RMP personnel on permanent attachment to RUC CID should not be employed in lieu of RUC on the investigation of cases involving the Military personnel.

(viii) In all cases involving Military personnel, other than minor traffic accidents and trivial complaints of a non-criminal nature, RMP will asign an investigational team to report to the RUC Station concerned and work with the RUC personnel assigned to the case.

It is important that cases should be pursued without delay; where in any insta RUC personnel are not immediately available, RMP will commence the investigation but will at the first opportunity communicate with the member of the RUC who has been assigned by the Divisional Commander to take charge of the investigation and will inform him of the steps which they have taken.

(ix) The RUC member in charge of the investigation will insure that the alleged or suspected offence is investigated with all despatch, that all the statements are properly taken, and, if relevant, medical evidence obtained, due regard being given to the points set out at i, ii, iii and iv above.

(x) In the case of shooting incidents involving civilian casulaties, statements obtained from the soldiers involved will first have the soldier's particulars expurgated from their statements by RMP before being circulated.

These particulars will not be divulged by RMP unless and until such time as the Director of Public Porsecutions requires the names of soldier(s) for the purpose of directing a prosecution.

In any case where it appears to the RUC investigator that a question of security may be involved, he will liaise with the officer commanding 178 Provost Company (Investigators) with a view to avoiding unnecessary breaches of security.

(xi) In all serious cases including shooting incidents involving civilian casualties Military suspects/firers must be interviewed by a member of the CID, and the RMP will make the appropriate arrangements for this to be done.

per Part III 182/73

Otherwise, however, interviews may be conducted by whichever member of the joint investigation team the RUC member in charge of the investigation considers appropriate. ~~Whilst it will be usual for RUC to interview civilian witnesses and for RMP to interview soldier witnesses~~ there is no bar to RUC members interviewing soldiers and no bar to RMP interviewing civilians.

Provision of the R.U.C. (Discipline and Disciplinary Appeals) Regulations 197 Sch 1 para (

(xii) Irrespective of the ~~contents of RUC Code Regulation 696(6)~~ RUC and RMP investigators will freely exchange all evidence and information obtained during the course of an investigation at the earliest opportunity. The senior RMP investigator in each case will submit to his Company Commander for transmission to the Divisional Commander, RUC, his report based on the evidence obtained.

This report will be sent to the RUC member in charge of the investigation for inclusion in the RUC Case File.

(xiii) Should any difficulties arise with regard to the conduct of joint RUC/RMP inquiries, RUC officers should contact the Officer Commanding 178 Provost Company (Investigations) on Lisburn 5111 ext 2256.

(xiv) On completion of inquiries an investigation file will be prepared and furnished in accordance with the instruction re papers for directions of the Director of Public Prosecutions by the RUC member in charge of the case to his Divisional Commander.

(xv) The Divisional Commander will consider the matter and will forward the file to this Headquarters giving his recommendations. The file will be sent to the Director of Public Prosecutions for his direction.

(xvi) The Divisional Commander will cause the decision of the Director of Public Prosecutions to be communicated to the person who made the initial complaint or allegation.

Force Order, Part 1, No 148/70 of 8 September 1970 is hereby cancelled.

Distribution/

All Chief Officers, Chief Superintendents, Superintendents, Offices, Stations and Departments.
Director of Public Prosecutions - 8 copies
RPM Headquarters NI - 6 copies

Index Entries/

'I' - Instructions regarding alleged or suspected offences by Military Personnel.

'M' - Military Personnel - Instructions regarding investigation of alleged or suspected offences by.

'O' - Offences, alleged or suspected by Military Personnel - Instructions regarding investigation of.

Amended per Part I 135/73

Amended per Part III 182/73.

COMPLAINTS AGAINST ARMY

COMPLAINANT'S NAME				
COMPLAINANT'S ADDRESS				
BY WHOM RECEIVED	Name	Rank	Reg No	Station
MEDIUM OF COMPLAINT (LETTER, TELEPHONE or PERSONAL) DATE and TIME				
DATE, TIME and PLACE OF ALLEGED OCCURRENCE				
NATURE OF OCCURRENCE (ATTACH COPY OF STATEMENT OR ORIGINAL LETTER, IF APPLICABLE) NAME OF ALLEGED OFFENDER(S), IF KNOWN				
CRIMINAL CHARGE(S) IF ANY ALREADY PREFERRED AND DATE OF HEARING, IF KNOWN				
RMP INFORMED	Date	Time	Name of RMP representative informed	

Divisional Commander

Submitted. *Letter of Complaint/Copy of Statement/Copy of Acknowledgement attached.

*Delete as necessary

Person-in-Charge Rank Reg No

~~Form 1772~~