Neutral Citation No: [2023] NICoroner 9	***Ref:*** **HUM12203**
Judgment: approved by the court for handing down (subject to editorial corrections)*	***Delivered:*** **12/01/2023**

IN THE CORONER'S COURT IN NORTHERN IRELAND

IN THE MATTER OF AN INQUEST INTO THE DEATHS OF LAWRENCE JOSEPH McNALLY, ANTHONY PATRICK DORIS AND MICHAEL JAMES RYAN

RULING ON SPECIAL MEASURES APPLICATION IN RESPECT OF SOLDER F

HUMPHREYS J

Introduction

[1] Before the court is an application on behalf of Soldier F, a PIP in this inquest, seeking special measures in respect of his giving of evidence. Initial medical evidence suggested that Solider F may be unable to give evidence at all to the inquest. This is no longer the position and the question which essentially arises for determination is the extent to which special measures are required to address his particular medical condition.

[2] Soldier F provided a witness statement to the inquest dated 10 November 2022. He now seeks a direction of the court that he be excused giving oral evidence to the court but rather addresses any issues arising by way of written answers to questions.

[3] At common law, a coroner has power to put in place special measures, where appropriate, to mitigate against the risk of harm to any witness. In this inquest, I have already ruled on the issue of the anonymity and screening of military witnesses on foot of the PII certificate – see [2022] NI Coroner 8. As a result of that ruling, the other soldiers have been afforded:

(i) Anonymity by use of ciphers;

(ii) The right to give evidence by live link from outside the jurisdiction; and

(iii) The protection of being screened from public view.

[4] These measures all represent a departure from the general principle of open justice but have been justified for the reasons set out in my previous ruling. I have determined that, as a minimum, the same measures should be afforded to Soldier F. The court must now decide whether additional special measures are necessary and proportionate in his case.

The Evidence of Soldier F

[5] It is apparent from his witness statement that Soldier F is an important and central witness whose evidence is directly relevant to a number of issues which must be decided by the court. He was involved in the planning of the operation which led to the events of 3 June 1991 and he was one of the soldiers on the ground who opened fire.

[6] The statement which he has given is a detailed one, indicative of a good recollection of events. In particular, he recounts:

(i) He was ground commander at the time of the first deployment on 31 May 1991;

(ii) He attended TCG South with Soldier M in order to discuss the task;

(iii) He undertook a 'recce' of the car park and surrounding area in Coagh to work on the plan;

(iv) He identified the location for the arrest group behind the Hanover House Hotel, recognising the time gap this would create between the arrival of the terrorists and the reaction of the arrest group;

(v) He was involved in the decision to place the cover group in the Bedford lorry close to the car park;

(vi) He was also involved in the placement of the OP in the hotel overlooking the car park;

(vii) He gave the briefing prior to the 31 May deployment;

(viii) He watched the video of the events of 31 May;

(ix) He gives evidence about the events of 3 June, including his own firing of shots at an individual in the Cavalier from the location shown on Plan B;

(x) He was aware of the existence and destruction of the video taken on 3 June.

[7] The evidence of Soldier F therefore speaks directly to many of the issues which have to be determined in this inquest. Absent any medical issues, he is a

compellable witness who would be subject to oral examination by all PIPs in order to test the reliability and credibility of his evidence.

The Medical Evidence

[8] The court had the benefit of reports from Professor Fox, Consultant Psychiatrist, dated 15 July 2022 and 20 September 2022 and from Dr Armstrong dated 13 December 2022. The psychiatrists also produced a joint statement dated 22 December 2022 distilling their respective positions and the court heard oral evidence from both the experts on 6 January 2023.

[9] Soldier F has been diagnosed with complex post traumatic stress disorder (PTSD) and has other psychiatric issues, namely a moderately severe depressive illness and a mild neurocognitive disorder.

[10] In his first report, Prof Fox concluded that his mental condition was such that he would not be able to provide a statement or give evidence in these proceedings. He did not consider any of the range of mitigating measures which may be available to assist a vulnerable individual to give evidence.

[11] This report and its findings were subjected to significant criticism by the legal teams acting for the next of kin.

[12] In his second report, Prof Fox has performed a volte face and concluded that Soldier F could provide a written statement and answer questions furnished to him in writing. However, it is explicitly stated in his second report that the witness "will not cope with in person evidence whether in court or by video" and that live evidence would be "overwhelming" for him. The risk of 'decompensating', ie of a deterioration in the witness's mental health condition is identified.

[13] The reason for the change of opinion from the expert is addressed in the following terms:

> "I have changed my view from my July assessment as I am now aware of the type of questioning which Soldier F may have endure [sic]. I have had the benefit of further information including details relating to the subject incident, pathology report and photographs to assist with my evaluation which were not previously available to me."

[14] This represents something of a non sequitur. Either a witness has capacity or he does not. There was no satisfactory reason given for the change of opinion when he was asked in the course of oral evidence. The answer may be found in the question which the expert was asked to address as set out at paragraph 1.6 of the second report:

> "I have been requested to provide an addendum report expressly addressing the question whether F could provide a written statement with the assistance of Devonshires solicitors, and/or could answer questions in writing, and/or whether special measures may assist in the provision of oral evidence by F at the inquest."

[15] Both doctors agreed that Soldier F had an increased risk of suicide compared to some notional average, but this was not something which could be accurately predicted.

[16] In their joint statement, the psychiatrists agreed that Soldier F had capacity but disagreed on the issue of his fitness to give oral evidence.

[17] I note that Soldier F was able to co-operate fully with two examinations with Prof Fox and to give a lengthy and detailed account of the events at Coagh over the course of several consultations with his legal team. There is no suggestion that there was any decompensation on the part of the witness during the course of these meetings, nor that there was any adverse impact on his mental health.

[18] I heard submissions to the effect that the witness would be restricted in travelling any significant distance by reason of both mental and physical issues and have taken these into account.

[19] I am not persuaded that the conclusions of Prof Fox are based on an evidential substratum aside from the subjective wishes of Soldier F himself.

The Legal Test

[20] The scope of this inquest makes it clear that article 2 ECHR is in play. The inquest is obliged to conduct an inquiry which is sufficient to meet the state's investigatory obligation. The particular interests of this individual must be considered alongside the requirement to investigate whether the use of lethal force by soldiers in the circumstances prevailing in Coagh was justified, and whether the operation was planned so as to minimise the need to use lethal force. There is a strong public interest in the best possible evidence being received relevant to both these questions.

[21] Rule 7 of the Coroners (Practice and Procedure) Rules 1963 provides that PIPs are entitled, at an inquest hearing, to examine any witness either in person or by solicitor or counsel. Following the judgment in *Jordan v UK* the Rules were amended to provide that a person suspected of causing a death was a compellable witness before an inquest.

[22] I have considered the position of the witness in light of the jurisprudence on the issue of articles 2 & 3 ECHR and 'real and immediate risk', as analysed by Lord Carswell in *Re Officer L* [2007] UKHL 36 and Girvan LJ in *Re C's Application* [2012] NICA 47. On the basis of the evidence, I am not satisfied that this threshold is met in the case of Soldier F. I acknowledge fully his medical issues and the risk of harm which is inherent in the giving of evidence (in common with many other witnesses) but do not accept that the high threshold is met in this case.

[23] There is no authority for the proposition advanced by counsel for Soldier F that the operational duty found to exist in *Rabone v Pennine Care NHS Foundation Trust* [2012] UKSC 2 exists in the case of a witness appearing before an inquest or other court. It cannot be said that such a witness is "under the care of the state" in the manner of a detained psychiatric patient or prisoner (see the judgment of Lord Dyson at para [33]).

[24] In any event, the coroner's court must still apply the common law requirements of fairness in determining the appropriate approach to the evidence of this witness, taking into account, inter alia, the subjective feelings of the witness and the objective evidence of risk.

[25] As the Court of Appeal in England & Wales recognised in *R (Maguire) v The Assistant Coroner for West Yorkshire* [2018] EWCA Civ 6, procedural safeguards are available in coroners' courts, just as they are in other courts, to mitigate against the trauma and harm potentially caused by giving evidence.

[26] Practitioners across all fields now need to be aware of the provisions of the Equal Treatment Bench Book and the Advocates' Gateway in relation to the treatment of vulnerable witnesses. Not only does the sensitive treatment of such witnesses reduce the risk of harm, it serves to improve the chances of the decision maker receiving the best evidence.

Potential Special Measures

[27] The Bench Book sets out a range of measures which a court may engage in order to address the risk of harm to a witness or to satisfy the requirement to make reasonable adjustments to accommodate the needs of a disabled witness. It states that in severe cases a person may be permitted to provide written answers to written questions [see pages 385 & 386].

[28] The court proposed and explored a range of potential measures which could be put in place with the medical experts, including:

(i) The use of a registered intermediary;

(ii) The attendance of a family member or other individual trusted by the witness;

(iii) The use of regular breaks;

(iv) The provision of questions in advance;

(v) Limitations on the length and complexity of the questions to be asked.

Consideration

[29] It is clear that Soldier F has established a degree of trust and rapport with particular professionals. This is also indicative that, in the right environment, the witness would be able to answer questions put to him by other professional persons.

[30] After careful consideration of the evidence of the expert witnesses, and the legal submissions made to me, I have concluded that Solider F should be required to give oral evidence subject to the following conditions:

(i) He will be entitled to anonymity and screening;

(ii) He should give evidence by livelink from his own home if possible or from another location suitable for the provision of a secure link;

(iii) He should be attended by his solicitor and also, if he desires and circumstances permit, by a medical professional;

(iv) He should be provided, 72 hours in advance, with a list of topics to be addressed in questioning together with a schedule of any documents which counsel intend to rely upon;

(v) Regular breaks should be afforded to the witness, as and when required;

(vi) The court should be configured in such a way as to limit the number of persons visible to the witness to the coroner and the counsel asking questions.

[31] I am not satisfied that it is necessary or proportionate for Soldier F to receive copies of questions in advance. The court will always exercise control both in relation to the content and tone of any questions which are asked of the witness.

[32] I have considered the use of a registered intermediary in this case but accept that this may only serve to introduce another individual who will not be known to the witness. The type of role carried out by an RI can be exercised by the solicitor who has already developed a relationship with Soldier F.

Conclusion

[33] I have concluded that the requirement to answer questions orally, in conjunction with the special measures set out above, represents the fairest and most

proportionate response to the situation faced by Soldier F and by the other PIPs in the inquest.

[34] I bear in mind the comments of Leggatt LJ in relation to demeanour of a witness in *R (SS) v SSHD* [2018] EWCA Civ 1391 but it remains the case that the 1963 Rules foresee evidence being given on a face to face basis. The best way to assess the reliability and credibility of a witness remains oral questioning but the common law duty of fairness, recognising the particular vulnerability of Soldier F, gives rise to the requirement to afford the special measures.

[35] I will hear counsel as to the logistics of implementing this ruling.