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*(subject to editorial corrections)**

IN HER MAJESTY'S COURT OF APPEAL IN NORTHERN IRELAND

ON APPEAL FROM THE HIGH COURT OF JUSTICE IN NORTHERN IRELAND QUEEN'S BENCH DIVISION (JUDICIAL REVIEW)

IN THE MATTER OF AN APPLICATION BY OFFICERS C, D, H & R SERVING AND RETIRED MEMBERS OF THE ROYAL ULSTER CONSTABULARY AND THE POLICE SERVICE OF NORTHERN IRELAND FOR LEAVE TO APPLY FOR JUDICIAL REVIEW

AND IN THE MATTER OF AN APPLICATION BY OFFICER A FOR LEAVE TO APPLY FOR JUDICIAL REVIEW BOTH IN RESPECT OF DECISIONS OF THE CORONER FOR BELFAST IN THE INQUEST TOUCHING ON THE DEATH OF PATRICK PEARSE JORDAN

AND IN THE MATTER OF AN APPLICATION BY HUGH JORDAN FOR LEAVE TO APPLY FOR JUDICIAL REVIEW OF DECISIONS TAKEN BY THE CORONER IN RESPECT OF AA, AB, B, E, F, M & Q FORMER OFFICERS OF THE ROYAL ULSTER CONSTABULARY

MORGAN LCJ

[1] These 2 appeals arise out of rulings by the Coroner on procedural issues in relation to an inquest into the death of Patrick Pearse Jordan who was shot dead by a police officer at Falls Road Belfast on 25 November 1992. The areas which the jury will be asked to address include the circumstances in which the fatal shot was fired by the relevant police officer, Sergeant A, the manner in which the police operation was planned and controlled so as to minimise the risk of the use of lethal force, the extent to which the arrangements for debriefing may have prevented individual officers from providing their independent accounts of what occurred and whether that prevented the truth about the incident emerging.

[2] The Coroner intends to call a number of serving and retired police officers. Those officers sought anonymity and screening to protect them against the risk to their lives if they were identified at the inquest as persons involved in the death of Mr Jordan. In a series of Rulings commencing in June 2012 the Coroner decided that in some cases the degree of risk was sufficient to engage the threshold established by

Article 2 of the ECHR requiring the State to consider positive action to protect the individual. In those cases he ordered anonymity and screening of the witnesses. He also found that in those cases the common law fairness test for the provision of protective measures because of a risk to life was met and on that ground also justified the making of the Orders. He also made similar Orders in relation to two police officers in respect of whom the risk did not reach the Article 2 threshold but for medical reasons the Coroner concluded that the common law test for the provision of anonymity and screening was met. The deceased's father, Hugh Jordan, issued judicial review proceedings to challenge those Rulings on 11 July 2012 and that application was dismissed by Deeny J on 17 September 2012.

[3] A number of the serving and retired police officers who were not successful in their applications also sought judicial review of the Coroner's decision. Those applications succeeded before Deeny J and he made Orders on 18 September 2012 granting anonymity and screening several cases and remitting other cases for determination by the Coroner in accordance with the law as set out in the judgment. The Coroner has now dealt with those cases. The jury for the inquest was sworn on 24 and 25 September and the inquest is now proceeding.

The appeal of Mr Jordan

[4] The coroner granted anonymity and screening to Officers AA, AB, B, E, F, M and Q. The next –of- kin opposed all of these with the exception of anonymity for AA. This was an issue which had been the subject of considerable debate at preliminary hearings before the Coroner and a Protocol which was accepted by all of those participating in the inquest was circulated initially in June 2009. The relevant procedure is:-

(i) A risk assessment in relation to any applicant for anonymity or screening is to be provided by the Security Service;

(ii) A written statement of the grounds of the application is to be provided by the applicant;

(iii) A redacted copy of the written statement is to be prepared by the applicant for transmission to other parties to the inquest;

(iv) Where the Coroner concludes that any redaction is unnecessary he can require a revised copy to be prepared after hearing representations from the applicant for anonymity;

(v) Where he is minded to grant the application in whole or in part the Coroner is required to ensure that his Provisional Decision with reasons is made available to interested parties;

(vi) The interested party may make representations in writing and the Coroner may confirm, review or amend his Provisional Decision which is then sent with reasons to each party;

(vii) Any party who disagrees with the decision may make oral representations after which the Coroner will issue his Reviewed Decision with reasons;

(viii) If there are new grounds or grounds that could not reasonably have been advanced the Decision may be reviewed.

[5] The Coroner made his determinations of these applications taking into account the guidance given by the House of Lords in Re Officer L [2007] UKHL 36. He indicated that in order to maintain public confidence he considered that the inquests should be as open and transparent as possible within the law. In the cases of B, E, F and M the threat level assessments indicated that should they give evidence openly the potential risk to them would increase from moderate (an attack is possible but unlikely) to substantial (an attack is a strong possibility). The Coroner concluded that this was sufficient to engage the Article 2 threshold and that he should order anonymity and screening in order to avoid the risk to their lives. In each case he noted their subjective fears and the objective basis for those fears. He considered that it would be unfair at common law to require them in those circumstances to give evidence without the protection of anonymity and screening.

[6] AA suffers from a chronic debilitating illness which originates in his experiences in the course of his work. The threat assessment indicated that his risk would rise from low (an attack is unlikely) to moderate. The Coroner concluded that a moderate risk did not meet the threshold for Article 2 but concluded that in light of his illness it would not be fair to require him to give evidence without anonymity and screening. He reached the same conclusion on Article 2 in relation to Q for the same reason but ordered anonymity and screening on the basis of fairness. The applicant had submitted a general practitioner's report diagnosing acute anxiety requiring medication and counselling.

[7] The appellants criticised the Coroner's reasoning on a number of grounds. It was submitted that the Coroner erred in concluding that the assessment by the Security Service that the giving of open evidence would have the potential to give rise to a substantial risk was insufficient to give rise to a real and immediate risk so as to engage Article 2 ECHR. In Re Officer L Lord Carswell at paragraph 20 described this criterion as having a high threshold and as one that should not be readily satisfied.

[8] These appellants further submitted that the decision to grant anonymity and screening on common law grounds was contrary to the presumption of open justice which was supported by cases such as AG v Leveller Magazine [1979] AC 440. This inquest was the method by which the State had to account for the action of its police

officers in using lethal force. Any derogation from the principle of open justice reduced public scrutiny of the actions of individual officers. Even if anonymity was appropriate the screening of the officers was not separately considered. Public involvement in the inquest included the right to see the appearance and demeanour of the witnesses when giving evidence.

[9] The appellants further contended that the process which the Coroner had devised and to which the appellants had assented for determination of the issues of anonymity and screening were unlawful at common law in light of the decision of the Supreme Court in Al Rawi v Security Services [2011] UKSC 34. In Al Rawi the claimants alleged that the Security Service and other organs of the state had been complicit in their detention and ill-treatment at various locations including Guantánamo Bay. The respondent contended that they needed to rely upon more than 140,000 sensitive documents which would take years to process under PII. They submitted that the court should utilise its court management powers to conduct a closed hearing at which the documents would be seen by the judge but the claimant's interest would be protected by a special advocate. The issue was whether the common law could ever countenance such an approach. Four members of the Supreme Court concluded that such a procedure was incompatible with the common law's requirement for open justice and could only be achieved by statutory intervention. Lord Phillips concluded that the issue did not need to be addressed in that case and three members of the Court saw some role for a special advocate when PII issues had been addressed. In Home Office v Tariq [2011] UKSC 35, decided on the same day, the Supreme Court held by a majority that a statutory scheme providing for consideration by a decision maker of closed material with the benefit of a special advocate did not offend Article 6 of the Convention.

[10] In answer to these submissions the respondents point out that Al Rawi was concerned with inter partes litigation whereas the Coroner's task is inquisitorial. It was described by Lord Lane CJ in a passage in R v South London Coroner ex parte Thompson [1982] 126 SJ 625 which was approved by Lord Bingham in R v Davis [2008] UKHL 36.

> "Once again 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 the facts. It is an inquisitorial process, a process of investigation quite unlike a trial where the prosecutor accuses and the accused defends, the judge holding the balance or the ring, whichever metaphor one chooses to use."

In R v Davis Lord Bingham also noted without adverse comment that the House had approved the admission of anonymous statements by a coroner in Devine v AG for Northern Ireland [1992] 1 All ER 609.

[11] The appellants argued that the provision of anonymity and screening breached the Article 10 rights of the next- of- kin on the basis that the next- of- kin had a right to ascertain from the proceedings the identity of the police officers and disseminate that information. The basis on which Article 10 would have that reach was not explained but in any event even if the submission had substance it is difficult to see how it adds anything to this case where the Coroner had expressly taken into account the need to make the inquest as open as possible within the law and the reason for the anonymity and screening was to take the reasonable steps necessary under Article 2 to protect life or to ensure fairness to the witness.

[12] The appellant submitted that the difficulty with anonymity is that it can inhibit the gathering of information about a witness that might be material. The point was developed in relation to M, V and AB. In these cases it was eventually established shortly before the inquest that each of these witnesses had been involved in other incidents in which members of the public had been shot by police officers. The conduct of the operations in those incidents had been the subject of critical comment and none of this had been disclosed to the appellant by the Chief Constable who is the holder of the information but also a party representing two of the officers participating in the inquest. We acknowledge that there is a need to scrutinise carefully the process of disclosure in these circumstances. As a result of the representations made by the appellant the Coroner has now given a direction that the involvement of police witnesses in other incidents be disclosed and that process is now taking place.

[13] The appellant expressed concern that the protocol on anonymity and screening had not been complied with by the Coroner in relation to the redaction of personal statements by the officers. By accident the appellant's counsel was forwarded a copy of the unredacted statement of Officer E. She returned the document but it became apparent to her that the redactions seemed to be excessive. In a letter of 18 July 2012 the Coroner explained that in relation to those statements he had taken the view that he should state in his preliminary decision any material matter mentioned in the personal statement which bore on the question of anonymity or screening. He also disclosed a generic list of the issues raised in the personal statements. He expressed the view that this was a reasonable and pragmatic compromise which respected the interests of all parties.

The context of this appeal

[14] In the course of this hearing we were advised that the preparations for this inquest hearing had provoked more than 20 judicial review applications together

with several visits to the Court of Appeal, two appeals to the House of Lords and one reference to the ECHR. The inquest had started in 1995 but was abandoned after three days because of a legal challenge. These proceedings were launched on 11 July 2012 at a time when the inquest was due to start on 12 September and the notice of appeal was lodged on 18 September 2012, six days before the jury was actually sworn. We heard the argument on 28 September and 2 October 2012. While preparing this judgment a further notice of appeal in relation to the scope of the inquest was lodged on 4 October 2012.

[15] The task of the Coroner is to ensure that the inquest provides the degree of participation for the next of kin set out by the ECHR in Anguelova v Bulgaria para 140.

> "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, maintain public confidence in the authorities' adherence to the rule of law and prevent any appearance of collusion in or tolerance of unlawful acts. The degree of public scrutiny required may well vary from case to case. In all cases, however, the next-of- kin of the victim must be involved in the procedure to the extent necessary to safeguard his or her legitimate interests"

Issues of anonymity and screening can of course be material to whether this obligation is fulfilled but they are not decisive. In order to determine whether the Anguelova test is fulfilled, it is necessary to review all aspects of the preparation for the hearing, the mechanisms employed during the hearing to satisfy the obligation and the steps taken after the hearing if necessary. The manner in which the Coroner disseminates information during this inquisitorial process is but a part of the material to be considered.

[16] The overriding objective in Rule 1A of the Rules of the Court of Judicature requires the court to deal with cases justly. What is just in any case will depend upon the context but it clearly includes avoiding, if possible, a proliferation of litigation which is likely to cause delay in the vindication of substantive rights and considerable cost to the participants or the public purse. In criminal proceedings this principle is the basis for the strong presumption against a judicial review application to the Divisional Court where the issue can be raised in the substantive criminal proceedings (See R v DPP ex p Kebilene [2002] 2 AC 326).

[17] This court touched on the application of this principle to inquests in Re McLuckie [2011] NICA 34 where Higgins LJ said at paragraph 26:-

> "The application for judicial review in this case and the appeal therefrom are a further example of satellite litigation in relation to inquest proceedings. Such satellite litigation has caused many delays in the inquest system. A culture has developed whereby decisions by coroners in preparation for and during the conduct of inquest proceedings are frequently and immediately challenged by way of judicial review. On occasions this can lead to protracted delays in the inquest process frustrating the purpose of an inquest. In this instance the Inquest was about to commence with witnesses assembled, some coming from overseas, and time had been set aside for the inquest to be conducted. In the context of criminal proceedings the law and the practice of the court in judicial review proceedings have been to discourage satellite judicial review proceedings, leaving challenges to decisions made during the course of the criminal proceedings in the main to be considered at the conclusion of the trial process. We feel compelled to question why different considerations should apply in the context of coroners' inquests. When an inquest results in a verdict that verdict may itself be challenged in an application for judicial review but that will be at a time when the court will have the benefit of appreciating the whole context of the inquest. What may appear to be of potential or theoretical importance during preliminary hearings or inquest proceedings before the Coroner, and which often leads to satellite litigation, may turn out to be of no such importance in the overall context of the inquest. Procedural errors during the course of the inquest, if and when they occur, may not undermine the ultimate integrity of the inquest or the ultimate verdict."

[18] I accept that there can be exceptions to the general rule against satellite litigation. It may be that a particular point will give guidance generally on a fundamental issue as to the manner in which inquests should proceed without interruption to the timescale for the hearing. If there is a compelling case that the course proposed by the Coroner is highly likely to lead to a requirement for a fresh inquest it might be appropriate to entertain a challenge. Re Brigid McCaughey and another [2011] UKSC 20 is an example of a case that could have required determination under either test. I also accept that this rule cannot inhibit the entitlement of those whose rights, whether under the convention or common law,

would be immediately infringed by the ruling to pursue a challenge. I consider, however, that absent some exceptional circumstance of this nature leave should not be granted to issue judicial review proceedings in relation to procedural or preliminary matters relating to the conduct of an inquest. It follows, of course, that the same principle applies with even greater force where the issue arises in the course of the inquest. If there is any defect in the procedure which affects the integrity of the outcome that can be assessed at the end of the inquest where all relevant factors can be taken into account. The next-of-kin will have every entitlement to vindication in any challenge, if necessary, at that stage.

[19] In my view this principle is directly applicable to this appeal. I accept that some of the criticisms made by the appellant are arguable but I do not accept that individually or collectively they constitute an exceptional circumstance which justifies departure from the general rule. I express no view on the procedural points raised. The relevance of those points and their importance will only become apparent at the end of the inquest when everything can be taken into consideration. At that stage the shape of the arguments in relation to these points may well have changed. Accordingly I would dismiss this appeal.

The appeal by those refused anonymity and screening

[20] I have had the advantage of reading a draft of the judgment of Girvan LJ. I agree with the disposal proposed by him and the broad reasons for it. I merely wish to add a few words of my own.

[21] The most recent Supreme Court analysis of the circumstances in which a positive operational duty arises under Article 2 of the ECHR is Rabone v Pennine Care NHS Trust [2012] UKSC 2. The leading judgment with which the other members of the court agreed was given by Lord Dyson. In paragraph 12 of his opinion Lord Dyson recognises that the positive duty to protect life has two distinct elements. The first is a general duty on the state to put in place a legislative and administrative framework designed to provide effective deterrence against threats to the right to life. The second, the operational duty, requires the state in well-defined circumstances to take appropriate steps including preventative operational measures to protect an individual whose life is at risk from the criminal acts of another.

[22] At paragraph 15 of his opinion Lord Dyson recognises that the operational duty has been held to exist where a member of the public was vulnerable to attack by a third party. In his search for a principle underlying the identification of the "well-defined circumstances" he identifies the nature of the risk as a factor and asks whether it is a risk that "individuals in the relevant category" should reasonably be expected to take or is it an exceptional risk. In Stoyanovi v Bulgaria the ECHR drew a distinction between the risk to life inherent in carrying out duties as a member of the armed forces and dangerous situations of specific threat to life which arise exceptionally from risks posed by the violent, unlawful acts of others.

[23] The argument that the positive operational duty only arises in such exceptional circumstances gains some support from the observations of the court in Van Mechelen v Netherlands [1998] 25 EHRR 647 although that was a criminal case and the issue was concerned with an alleged breach of Article 6. Neither arises in this case. That case does, however, recognise the importance of anonymity for the protection of a witness or his family.

[24] The issue in this case is whether the well-defined circumstances referred to in Osman apply to serving and retired police officers who are called to give evidence in this inquest which is a non-criminal, inquisitorial, investigative proceeding such as that considered by the House of Lords in Officer L. I accept that the positive operational duty does not arise where the risk to which the witness is exposed is no higher than the risk which is inherent in either carrying out his duties as a police officer or being retired from that office. Such risks do, of course, give rise to the legislative and administrative obligations discussed earlier. I do not accept, however, that the risk to a police officer in Northern Ireland arising from a threat to his life by well organised and resourced terrorists is inherent in the duties which such an officer is required to perform. The fact that a terrorist group chooses to target and attack a particular sector of public servants is a threat which is separate and distinct from the risks associated with the duties of a police officer. Where, therefore, there is a real and immediate risk to the life of a witness beyond the inherent risk emanating from the criminal acts of a third party of which the state is aware or ought to be aware I consider that the positive operational duty is engaged.

[25] Even if I were wrong about the nature of the inherent risks in carrying out duty as a police officer, I consider that the risks associated with giving evidence in this inquest are not on any view part of the risks inherent in carrying out police duties in Northern Ireland or being retired from such duties. This inquest is part of the method by which the State is addressing a legacy of communal violence which was at its height many years ago as well as addressing the particular interests of the next-of-kin. The events with which the inquest is concerned took place 20 years ago. These are exceptional circumstances unparalleled in any other part of the United Kingdom. That exceptionality lifts these proceedings and the risks to officers associated with them out of the ordinary inherent risks of office.

[26] In a passage in the opinion of Lord Carswell in Re Officer L he said that the criterion of real and immediate risk described in Osman had a high threshold and was not easily satisfied. To deduce from this passage that there is some high threshold of risk which has to be satisfied would, as Lord Hope said in Van Colle, place a gloss on the test described in Osman and in any event the observation does not help with an understanding of the real and immediate risk test. As the cases reviewed by Girvan LJ demonstrate, if there is a risk to life from a well organised and resourced terrorist group which, objectively verified, is neither fanciful nor negligible that is a real risk for the purpose of the Osman test. In Officer L the Inquiry asked whether there was a material increase in risk as a result of the police

officers giving evidence. Although there is a difference in the way the question is posed I consider that these tests are in substance the same.

[27] What Osman and Van Colle establish, however, is that there are very limited circumstances in which it will be possible to conclude that the authorities knew or ought to have known of a risk to life. In that sense the test has a high threshold and is not easily satisfied. In Northern Ireland there is, however, a particular context. Police officers have been subject to threats, targeting and attacks by well organised and resourced terrorist organisations using lethal force for many years. It is hardly surprising, therefore, that where the threat emanates from such a group the Osman test should be more frequently satisfied.

[28] I agree that the determinations by the Coroner in this appeal must be quashed because his approach to the Article 2 test was wrong. I would allow the appeal to the extent that the determinations made by the learned trial judge should be set aside and the matters remitted to the Coroner to determine, in accordance with these judgments, the proportionate measures, if any, which he should take bearing in mind the nature and extent of the risk and any other material factors. It is the Coroner who is best placed to carry out the balancing of competing interests. In the interim the appellants should be entitled to retain both anonymity and screening.

Girvan LJ **GIR8596**

Introduction

[1] Throughout history and in many legal systems delays in the legal process have been a matter of concern. The scandalous delays of 19th century Chancery litigation formed the backdrop to "Bleak House" in which Charles Dickens excoriated the courts and lawyers of his time in relation to the handling of the celebrated fictional but prototypical case of Jarndyce v Jarndyce ("*Jarndyce v Jarndyce drones on. This scarecrow of a suit has, in the course of time, become so complicated that no man alive knows what it means. The parties to it understand least, but it has been observed, that no two Chancery lawyers can talk about it for five minutes without coming to a total disagreement as to all the premises. … The legion of bills in the suit have been transformed into mere bills of mortality … Jarndyce v Jarndyce still drags its dreary length before the court, perennially hopeless.")* As Dickens implicitly points out, unless properly regulated and controlled litigation will generate unconscionable quantities of documentation, relevant and irrelevant *("We stood aside, watching for any countenance we knew, and presently great bundles of paper began to be carried out – bundles and bags, bundles too large to be got into any bags, immense masses of papers of all shapes and no shapes, which the bearers staggered under and threw down for the time being, anyhow, on the hall pavement while they went back to bring out more".)* The needless proliferation of papers and documents in litigation, frequently the subject of adverse judicial comment, is clearly no new phenomenon. Furthermore, unless controlled

and regulated litigation can consume large quantities of money and dissipate fortunes. In Jarndyce v Jarndyce it was the fact that the legal costs had devoured the entire estate in dispute that ultimately led to the end of the case. In publicly funded litigation such as the present the ready availability of public funding sets no monetary limit to the litigation.

[2] The conduct of inquests into contentious deaths occurring during Northern Ireland's troubled times and the seemingly endless satellite litigation generated in relation to them call to mind aspects of Jarndyce v Jarndyce which Dickens so graphically described in his novel. When questions arising in the inquest into the death of the deceased Patrick Pearse Jordan (who died as long ago as November 1992) were before the House of Lords in 2007 the inquest, which had opened in January 1995, was described by Lord Bingham as "lamentably delayed." A further five years have elapsed. There appears to have been a large number of judicial review applications generated in the proceedings. There have been on-going delays in the furnishing of material and interminable interlocutory disputes in relation to the proposed conduct of the inquest. Delay in any inquest may well lead to the unavailability of witnesses and inevitably will lead to the actual or claimed fading of witnesses' memories in relation to significant facts. Huge quantities of documents have been generated in the course of procedural wrangles in these cases quite apart from the investigation of substantive issues. Enormous amounts of public funds have been spent in the pursuit of issues subsidiary to the central questions to be determined in the inquests. Coroners have been frustrated in their attempts to get the inquests up and running. Ironically the pursuit of procedural correctness in such inquests by parties intent on ensuring that they are compliant with Article 2 requirements has resulted in delays which themselves undermine the very object which the satellite litigation has sought to achieve. Sometimes, as Voltaire said, the best can be the enemy of the good.

[3] The question arises as to how and why the law has developed in this way. One of the reasons is that the law of inquests and coroners has developed in an unstructured and piecemeal way, particularly following the incorporation of the European Convention of Human Rights and the need to ensure that inquests comply with the state's article 2 obligation to ensure proper investigation into deaths involving state agencies. The underlying statutory provisions and rules governing inquests are outdated and were clearly not drafted with the Convention in mind and they have not been properly updated to be made fit for purpose in the new Convention world. The state authorities have effectively allowed costly litigation to take the place of sensible, rational and structured reform of coronial law. Another reason for the problem lies in the fact that coroners and the courts have been unable to grapple with the inevitable problems engendered by allowing free rein to be given to satellite litigation around the coronial process. In the field of criminal law and procedure the courts have quite properly set their face against satellite litigation recognising, as they do, the self-evident dangers of such litigation – the consequent delays to the criminal process, the unacceptable interruptions in the normal court

process, the encouragement of technical points which have the tendency to divert attention from the real or central issues, and the waste and dissipation of public funds in the pursuit of issues which may well turn out to be of little or no practical relevance in the case when properly viewed at the end of the process. While in some jurisdictions such satellite litigation has been permitted in the criminal law context, the resultant problems that this creates have been recognised. English law has gone down a different and more wisely chosen route. The dangers of satellite litigation in the coronial process exist with equal force in the context of coroners' inquests. This brings us to the third reason for the proliferation of satellite litigation, namely the fact that insufficient attention has been given to establishing the proper basis upon which a party to such litigation should be entitled to challenge by judicial review procedural rulings made by a coroner who is attempting to run an inquest.

[4] Had the law in relation to the courts' oversight of inquest proceedings developed along similar lines to public law developments in the context of criminal law and procedure a more robust approach by the courts to judicial review challenges in respect of coronial procedural decisions would have avoided at least some of the current problems. The situation has admittedly been rendered more complex by the consequences of the Human Rights Act 1998 and the effects which it has had on the subsequent substantive and procedural law relating to inquests. On the one hand the next-of-kin of a deceased person, who has died as a result of the actions of state agents, have a right to an inquest compatible with article 2 and, consequently, that entitlement gives rise to expectations on the part of next-of-kin in relation to certain procedural protections. On the other hand, witnesses compelled to give evidence in such inquests themselves may have substantive article 2 or article 8 rights or common law rights to fair treatment which entitle them to challenge decisions of the coroner which involve exposing them to increased risks to their life and well-being. Where such rights are arguably infringed there must exist an appropriate mechanism to vindicate and make good those rights, if established.

[5] It is well established that the criminal courts have power to make provision for special measures such as the grant of anonymity to witnesses or their screening when testifying. The common law powers of courts to accede to applications for such measures became well established and are now put on a statutory footing. In R v Mayers [2009] 1 WLR 1915 it was stressed that anonymity orders should be regarded as special measures of last practical resort but that in such circumstances the relevant legislation represented the legislature's view as to how best to address the countervailing interests of the accused, the victim and the public. In R v C [2008] EWCA Crim 3228 the Court of Appeal stressed that anonymity orders should not be made the subject of interlocutory appeals as only at the trial could their impact be assessed. If an anonymity order is shown to have rendered the verdict unsafe, the appeal can rectify the position. Latham LJ VP said in C:

> "16. The witness anonymity orders that are in place here are orders that may or may not at the end of the day

> produce the results which the prosecution hopes and the defence fears. The witness anonymity orders – unless it is quite apparent that they are orders which should not have been made – should not be the subject matter of interlocutory appeals. *The problem is that until the trial is underway and it can be seen what the real issues are, and the way in which the defendants are affected in their ability to deal with evidence by the anonymity orders, there is no proper way in which that assessment can be made.*
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> 17. But the fundamental question – which counsel quite rightly identifies – is the fairness of the trial. That is something which the judge will have to evaluate as the trial proceeds. *He will have ample powers if, ultimately, he concludes that there is such unfairness that he should intervene; he can do so either by stopping the trial or by revoking the anonymity orders, whichever is the more appropriate step to take in all the circumstances of the case.* If after the trial there is a conviction and there is an appeal against that conviction this court can then be in a position itself to evaluate the extent to which a fair trial has been possible.
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> 18. *To be asked to pre-empt the process of trial and appeal is, in our judgment, an inappropriate way of dealing with this sort of case unless it is quite apparent from the circumstances that a witness anonymity order was wrongly made.* It would be best for us to say nothing further than that in relation to particular orders in this case. It is fair to say that they do not fall into that category." (Italics added)

[6] An inquest differs from a criminal trial in that it is an inquisitorial process. No one is facing a criminal charge, no finding of guilty can be made and no penalty can be imposed. These differences strengthen rather than weaken the argument that a similar approach to satellite litigation should be taken in the inquest situation. While there is no appeal mechanism as such in relation to inquest verdicts, an inquest verdict can be challenged by an application for judicial review after the conclusion of the inquest. If an inquest was not conducted in such a way as to constitute an article 2 compliant investigation into the death in question, it may be liable to be quashed. If one were to apply the same rationale as applies in the criminal context in relation to anonymity and other procedural orders such as screening orders, it can equally be said that until the inquest is under way and it can be seen what the real issues are and what way the interested parties are affected in their ability to deal with the evidence affected by the anonymity orders there is no proper way in which that assessment can be made. It must be for the coroner to

evaluate the fairness of the inquest as it proceeds. The coroner has ample powers if he concludes that there is such unfairness that he should intervene. This he can do by revoking the anonymity order or stopping the inquest, whichever is the more appropriate step to take in the circumstances. If, after the conclusion of the inquest, there is a challenge to the verdict the High Court will be able to evaluate the extent to which the continued anonymity and/or screening has led to a verdict which should not stand. When inquest proceedings are viewed in their overall context an inquest verdict may stand even if some procedural mistake occurred in the course of the inquest. For the verdict to be quashed the court must be persuaded that the process was flawed to such an extent that the verdict should not be allowed to stand and should be quashed.

[7] The duty of a coroner in an inquest into a death of a person which raises questions of state involvement or responsibility was expressed by the court in Ex Parte Jamieson [1995] QB 1 as a duty

> "to ensure that the relevant facts are fully, fairly and fearlessly investigated. He is bound to recognise the acute public concern rightly aroused where deaths occur in custody. He must ensure that the relevant facts are exposed to public scrutiny, particularly if there is evidence of foul play, abuse or inhumanity. He fails in his duty if his investigation is superficial, slipshod or perfunctory …"

This approach was considered by the House of Lords to be the correct one in R (Middleton) v West Somerset Coroner [2004] 2 AC 182. In the course of that case the House of Lords gave guidance as to the conduct in future of inquests on deaths engaging article 2. The question "how" a person comes to die should be interpreted in the broader sense previously rejected namely as meaning not simply by what means but by what and in what circumstances. A coroner conducting an inquest to which article 2 applies must conduct the inquest in the light of that wider question and it must be carried out in a full, fair and fearless manner. In Anguelva v Bulgaria the European Court of Human Rights points to the need for the inquest to have a sufficient element of public scrutiny to ensure accountability in practice as well as in theory and to prevent any appearance of collusion or tolerance of unlawful acts. The degree of scrutiny required may well vary from case to case. The next-of- kin of the victim must be involved in the procedure to the extent necessary to safeguard his or her legitimate interest. Provided that the coroner conducts the inquest with proper regard to those principles and ensures that the inquest does address the wider question the inquest will be Convention compliant. In Amin v Secretary of State for the Home Department [2004] 1 AC 653 Lord Bingham said:

> "The purposes of such an investigation are clear; to ensure as far as possible that the full facts are brought to light; that culpable and discreditable

> wrongdoing 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."

While the ECtHR recognises that the next-of- kin have a legitimate interest in the inquest proceedings this does not mean that the inquest is a lis inter partes between the next- of- kin and the state. There is a clear danger of this principle being lost sight of in a contentious inquest such the present one which the parties may come to feel is adversarial whereas in fact it is inquisitorial. The interests of the next-of-kin are legitimate but not paramount. The coroner's function is to ensure a full, fair and dispassionate investigation but it is not the function of the coroner and jury to resolve a dispute or to determine the civil rights or criminal liability of any participant.

[8] In his conduct of the inquest the coroner will be called on from time to time to make procedural rulings. Unless it is apparent that a procedural ruling should not have been made the High Court exercising its supervisory jurisdiction should not intervene. It is not the function of the High Court to micromanage an inquest or to act as a forum for a de facto appeal on the merits against a coroner's procedural ruling. A coroner will have only acted unlawfully if he has exceeded the generous width of the discretion vested in him to regulate the inquest in the interest of what he considers to be a full, fair and fearless inquiry. The coroner will have much greater awareness of the issues involved and the evidence likely to emerge in the course of the inquest. He must, accordingly, be accorded a wide margin of appreciation and the High Court must recognise that aggrieved parties alleging procedural unfairness will have an ultimate remedy at the end of the inquest if there is a case that the verdict should be quashed because the inquest has fallen short of proper standards to such an extent as to call into question the lawfulness of the resultant verdict. Any other approach would encourage the proliferation of wholly undesirable judicial review challenges to coroner's procedural rulings in the course of an inquest. As experience shows in relation to any disputed procedural ruling it is frequently possible to produce plausible arguments to support a complaint that the coroner has got it wrong. Different coroners might decide the same procedural question differently, each one acting within the parameters of his powers and discretions. This applies equally in the course of procedural rulings in the course of civil and criminal trials. In the context of civil and criminal litigation it is recognised that it would be a recipe for chaos if there was a general right for litigants to seek to stop a trial mid flow to take a procedural question on appeal. It would be contrary to the interests of justice which can be properly protected and vindicated at the end of the process. Taken to its logical conclusion if a party in inquest proceedings can challenge by judicial review any and every procedural ruling or, since a coroner will be keeping all his rulings under review in the course of the inquest, any and every

revised ruling made in the course of the inquest there would be no end to the matter. The case would become, to use Dickens' words, "perennially hopeless."

[9] In the present appeals the judicial review challenges brought by the next-of-kin on the one hand and by the police officers on the other raise different legal questions which must be kept distinct. They may call for a difference of approach by the court in the context of judicial review challenges. The substance of the next-of-kin's challenge is that the coroner's ruling will result in an inquest that is not article 2 compliant and/or is procedurally unfair to the interests of the next-of-kin. There is no question of their right to life under article 2 or rights under article 8 being directly affected. On the other hand the substance of the police officers' challenge is that the refusal of anonymity infringes their individual article 2 rights because the coroner as a relevant state authority is exposing them to an increased and unjustifiable risk to their lives and is thereby infringing their article 2 rights. They also challenge his rulings in relation to common law fairness in refusing anonymity and screening on the assumption that they cannot rely on article 2. In the case of an established breach of article 2 the court is bound to intervene in order to fulfil its Convention obligations. In the case of an alleged breach of common law fairness to a witness not involving a breach of article 2 the aggrieved witness has a right to be protected against procedural unfairness directly impacting on him.

The next-of-kin's challenge to the grant of anonymity and screening

The parties' contentions

[10] The appellant challenged the coroner's decision to grant anonymity and screening to a number of the police officers on a number of different grounds. Firstly, it was contended that the procedure adopted was procedurally unfair and unlawful and involved (a) the improper use by the coroner of undisclosed material; (b) a breach of the coroner's own anonymity and screening protocol ("the Protocol"); (c) reliance by the coroner on threat assessments which lacked independence and which were improperly framed. Secondly, the Coroner allegedly erred in concluding that to require the witnesses to give evidence without anonymity or screening would breach their article 2 rights. In particular, he erred in his conclusion that the potential for a threat to a witness moving from a *moderate* categorisation to a *substantial* categorisation (applying the nomenclature adopted by the Security Service in assessing risk) equated to a "real and immediate risk" sufficient to require action under article 2 of the Convention. Thirdly, he was wrong to conclude that the witnesses should have anonymity applying common law principles of fairness and he failed to give adequate reasons to justify such a conclusion. Fourthly, he failed to consider anonymity and screening applications separately and distinctly. Fifthly, it was argued that the grant of anonymity and screening breached article 10 of the Convention. Counsel argued that in Guardian News v Media Limited, HM Treasury v Ahmed [2010] UKSC 1 the Supreme Court deprecated the frequency with which

anonymity applications were granted. There was a powerful general public interest in identifying parties and witnesses to ensure openness and transparency. The Coroner and the judge had failed to properly address the Article 10 issue.

[11] On the procedural aspects of the coroner's decision-making Ms Quinlivan QC who appeared with Ms Doherty strongly relied on statements by the Supreme Court in Al Rawi and Others v Security Service [2012] 1 AC 531. She argued that the coroner's anonymity/screening procedure permitted the presentation of secret applications for anonymity and screening on both article 2 and common law fairness grounds. The risk assessments were substantially secret. The coroner had sight of this material and made decisions based on material withheld from the next-of-kin who did not have the protection of even a special advocate's procedure such as was proposed by the proponents of the closed material procedure condemned in Al Rawi. It was further submitted that in the light of Al Rawi the Coroner's anonymity and screening protocol unlawfully permitted the reception of secret evidence unsupported by a PII Certificate. The whole procedure failed to comply with the article 2 obligations arising under the Convention for a proper and fair investigation of the unlawful death. The judge erred in refusing leave to apply for judicial review challenges to that procedure and was wrong in holding that Al Rawi principles did not apply where the decision related to an ancillary procedural question arising in an inquest. It was further argued that the independence of the Security Services in providing the assessment had not been evaluated or established. The risk assessments under the Protocol had to be accepted at face value. They are expressed in the language of possibility and potentiality and that did not form a sound evidential basis on which to conclude that article 2 rights were engaged. They do not contain any evaluation of the nature of the evidence which the witness is due to give. The coroner had accorded undue deference to the conclusions reached in the threat assessments. He was bound to engage in some evaluation or scrutiny of the threat assessments and could not effectively delegate his decision-making on the issue of anonymity and screening. The appellants also criticised the failure to follow proper procedures in this case. The inadvertent disclosure of unredacted material relating to Officer E showed that redacted material supplied had been over redacted, a fact that the judge found had indeed occurred. It could not be known or said that similar over redaction had not occurred in relation to other officers. Thus in the result there had been a demonstrable breach of the Protocol that called into question the entire process and all the decisions would have to be quashed.

[12] Mr Scoffield QC and Mr O'Hare on behalf of the relevant officers, Mr Montague QC and Dr McGleenan QC on behalf of the Chief Constable and Mr Simpson QC and Mr Doran on behalf of the coroner all opposed the appellant's arguments on these issues. On the Al Rawi issue counsel argued it dealt with a quite different type of proceeding. Inquests are not adversarial. The coroner's consideration of the question of anonymity was not in any sense the resolution of a *lis inter partes*. As a matter of common sense the nature of an application for anonymity necessitated the adoption of a procedure which protected the applicant

witness's identity until the matter was determined. It was argued that the judge correctly held that the appellants did not have the status of a victim under article 10 and it was further argued that the article 10 argument added nothing of substance to the debate. It was perfectly legitimate for the officers in question to wish to restrict disclosure of their roles as police officers in various operations as a means of avoiding a risk to their lives. While the judge was entitled to conclude that the coroner had permitted over redaction in relation to Officer E he was right to conclude that there was no proper basis for suggesting that de-redaction would have made any difference to the outcome of the coroner's decisions in relation to the officers who had been granted anonymity and screening. The criticism on the part of the appellant was misconceived in that most of the redacted paragraphs now disclosed were either in the public domain already, in the officer's statements or were matters which were anodyne. This being so, no prejudice from their non-disclosure arose. The next-of-kin had in fact made all the points they wanted and needed to make. No prejudice could in fact have arisen. In relation to the use of threat assessment provided by the Security Service neither the officers concerned nor the next-of-kin could go behind what the security sources said. The coroner was bound to make his determinations on the basis of the material presented to him. He had to scrutinise that material with care and if necessary it was open to him to request that further information be furnished. Risk assessment is an inexact science. In relation to the anonymity and screening protocol, counsel argued that a protocol provided a fair mechanism with safeguards for interested parties. A breach of the protocol would not itself ground a challenge by way of judicial review unless the breach further entailed an infringement of rights and procedural fairness. In fact the Coroner did not act in breach of the protocol.

[13] On the article 2 issue counsel argued that the focal point of the appellant's attack on the coroner's reasoning was that "the increase in the level of risk from a situation where an attack is possible but not likely to a situation where attack is a strong possibility was insufficient to reach to the high threshold imposed by Article 2." This approach was wrong. Faced with an assessment that the threat to an individual was such that an attack was a strong possibility a ruling that the threshold of a real and immediate risk had not been met would arguably be susceptible to challenge as perverse. The coroner's rulings were entirely correct. Mr Scoffield further rejected as entirely fallacious the appellant's argument that if an individual's convention rights are not engaged in an application for anonymity he could not succeed in an application for anonymity or screening under common law principles. The coroner had correctly and separately addressed the question of screening and there was no basis for the submission that the coroner had failed to properly consider the issues separately. Counsel did argue that the coroner was wrong to have refused anonymity and screening to a number of officers who were, it was argued, facing threats which engaged the duty for preventative action on the part of the state under article 2.

The judge's conclusion

[14] The judge refused the next-of-kin leave to challenge the legality of the procedure followed by the coroner and he rejected the argument mounted in reliance on Al Rawi. The judge concluded that that authority had no application in relation to inquest proceedings and in particular where the coroner was dealing with procedural issues which he had to address. He rejected the contention that the coroner was obliged to look behind the risk assessments conducted by the Security Service. He found that in the case of one applicant there had been over-redaction of a personal statement (inadvertently revealed to the solicitors for the next-of- kin) but he found no unfairness to the next-of-kin in the final result. The coroner had properly concluded that where the threat assessment indicated that the threat to officers consequent on their giving evidence may rise to *substantial* (an attack was a strong possibility) that was sufficient to meet the threshold of "real and immediate risk" as defined in the test adumbrated by Lord Carswell in Re Officer L. He upheld the decision of the coroner to grant anonymity on the basis of article 2 to some of the officers and the decision to grant anonymity at common law to those officers and Officer Q. The decision to grant screening to each of the relevant officers was upheld subject to the remittal of the case of Officer E. In the case of E the judge concluded that he had given evidence in numerous criminal prosecutions. Having found that E was entitled to avail of article 2 it seemed to the judge that if the witness had a distinctive physical appearance, as he claimed, that would tilt the balance in favour of anonymity (sic) (presumably the judge here meant screening). He remitted the matter to the coroner to review his own decision in favour of screening in the light of the judgment and in the light of a confidential meeting with Officer E to form his own judgment about the matter. The judge considered that the coroner was in error to refuse anonymity and screening to the officers who failed to persuade the coroner that article 2 and the common law required anonymity and screening. He concluded that the court should quash his refusal to do so and make anonymity and screening orders.

Discussion

The proper test for judicial review

[15] The next-of- kin of the deceased have an entitlement to participate in an inquest and where the inquest is one which must satisfy the procedural requirements of article 2 they have a legitimate interest in seeking to ensure that the inquest is article 2 compliant. Before the court can intervene at the suit of next-of-kin to quash a coroner's procedural ruling the court must conclude that the ruling will result in the inquest being one which will not be article 2 compliant. The applicant must establish that the conduct of the inquest following the procedural ruling will deprive him of an opportunity to properly participate in the inquest and that, unless restrained, the coroner will be proceeding to carry out an inquest that is in breach of article 2. In considering the question the court must take into account the following matters:

(a) the next-of-kin is entitled to be involved in the inquest proceedings to the extent necessary to safeguard his legitimate interest;
(b) in an inquisitorial inquest no party has a right to demand that evidence be presented in a particular way. It is for the coroner to ensure that the inquest as a whole ensures a proper inquisition into the issues arising and that the evidence is presented in such a way as to enable the coroner and the jury after a searching inquiry to reach fair and balanced conclusions to which the verdict gives effect;
(c) the coroner's rulings on anonymity and screening are subject to review and alteration in the course of the inquest and must be kept under review;
(d) the adequacy of the inquest process and its overall compliance with the requirements of article 2 can only fairly be assessed at the conclusion of the inquest. It is not possible to make an assessment of any real or apparent prejudice suffered by the next- of- kin until the inquest is underway and it can be seen what the real issues are, how they are developing and the way in which the next-of-kin are affected or prejudiced in their ability to deal with the evidence and the witnesses.

[16] Applying this test, which is the proper test which should be applied in any application by the next-of-kin in judicial review challenges to procedural rulings (other than ones directly affecting them as witnesses themselves), the appellant has failed to demonstrate a proper basis for his legal challenge to the coroner's rulings in relation to the granting of anonymity and screening. He has not demonstrated that the inquest will inevitably be conducted in breach of article 2 unless the rulings are set aside. Nor has he established that he would be without a remedy if the rulings did ultimately result in an inquest falling foul of the requirements of article 2. The proper time to raise such a challenge would be at the conclusion of the inquest.

[17] In view of the conclusion which we have reached on this aspect of the case it is strictly unnecessary to come to a conclusion on the legal issues raised by Ms Quinlivan QC. In view of the arguments raised and the implications of the points raised for this and other inquests and out of deference to the judge who gave a lengthy judgment on the issues it may be helpful to express my conclusions on the procedural points raised.

The alleged illegality of the decisions on procedural grounds

[18] As the judgments at all levels in Al Rawi make abundantly clear that case dealt with an issue relating to the fair conduct of civil litigation between parties entitled to a fair trial in relation to their dispute. The case turned on the question whether the procedures relating to discovery of documentation could be adopted at common law outwith the normal PII procedure so as to permit the adoption of a closed material procedure under which the court could itself view documents and decide not to disclose them to the other party if the disclosure were considered to be contrary to the public interest. The conclusion reached was that the principles of

common law fairness applying to a common law trial precluded such a procedure. As Lord Neuberger MR in the Court of Appeal and Lord Dyson in the Supreme Court noted different considerations apply where proceedings do not only concern the interests of the parties to litigation but also have significant effect on vulnerable third parties or where a wider public interest is engaged (see in particular paragraph [33] of Lord Neuberger's judgment). Thus in cases involving children it may be justifiable for the court to see a document which is not seen by the parties in the proceedings. In Re K (Infants) [1965] AC 201 at 240 to 241 Lord Devlin stated that:

> "Where the judge is not sitting purely, or even primarily, as an arbiter, but is charged with the paramount duty of protecting the interests of one outside the conflict, a rule that is designed for just arbitrament cannot in all circumstances prevail."

(See also Baroness Hale in Home Secretary v MB [2008] AC 440 at [58]). In Roberts [2005] 2 AC 738 Lord Woolf CJ referred to the Parole Board having a triangulation of interests, the Board's obligations to the prisoner, its obligations to protect society and as part of the latter obligation its obligation to protect third parties so far as is practical. He concluded that the Board should be able to see documents not seen by the relevant prisoner to enable the Board to perform its statutory duty to protect the public provided a fair procedure was followed.

[19] In Al Rawi Lord Dyson noted:

> "It is surely not in doubt that a court cannot conduct a trial inquisitorially rather than by means of an adversarial process (at any rate, not without the consent of the parties) or hold a hearing from which one of the parties is excluded."

Per contra an inquest is indeed an inquisitorial process; not an adversarial process. As such the coroner's inquisitorial and investigatory functions differ from those of a judge trying a common law case.

[20] In relation to determining the question whether anonymity and/or screening should be offered to a witness to be called to give evidence in an inquest it must be remembered that the coroner is not sitting as an arbiter nor is he resolving a conflict. Where issues as to the safety and well-being of witnesses arise the coroner has an obligation to act fairly to the witnesses and must protect their article 2 rights if they are in issue. As Lord Devlin pointed out in K rules designed for just arbitrament do not in such circumstances prevail. What the coroner must do is to follow a fair procedure in the circumstances taking into account any representations made by other interested parties. The obtaining of information and advice from the Security Services and personal representations from the proposed witnesses is entirely

legitimate. It is clearly proper that such information is used in such a way that it protects the interests of the relevant witness who may be vulnerable because of the security concerns. This necessarily means that in many cases the information cannot be freely and openly disseminated to other parties. Divulging that information may enhance the risk to the individual concerned and frustrate the very object which the exercise of considering the information is designed to achieve.

[21] Deeny J was accordingly correct to reject the next-of-kin's argument that the principles in Al Rawi undermined the coroner's Protocol which itself represents a fair and balanced procedure aimed at protecting the interests of all parties. He was right to conclude that the procedure followed was not fundamentally unfair. As between the interests of witnesses whose article 2 rights and rights to common law fairness are potentially in play and the interests of the next-of-kin whose legitimate interest is that the inquest will be carried out in as full, fair and open a way as circumstances permit, a balance must be struck which does not jeopardise the safety and well-being of witnesses. The Protocol seeks to achieve this balance and does so fairly.

[22] The judge also rightly rejected the proposition that the coroner should have subjected the Security Service risk assessments to an examination including an examination of the independence of the Security Services. He correctly considered the next- of-kin's argument on this issue to be unrealsitic. The approach advocated by the next-of-kin would effectively require the coroner to pursue satellite investigations in relation to the independence of persons charged by the state with the protection of the public from terrorism. The judge correctly identified the problems such a course of action would raise (for example, further delay and further disputes about what should or should not be disclosed as a result of such investigations, about whether the inquiry was properly conducted and about the role to which the next-of-kin would be entitled in connection with such an investigation). Obviously there must be a degree of finality in relation to peripheral procedural issues of this kind if the inquest is ever going to reach the point of ultimate resolution.

[23] On the issue of the over-redaction of material relating to Officer E which the coroner released to the next-of-kin purportedly under the protocol, the judge concluded that the coroner had delegated redaction to the officer's solicitor and the judge found that he did not operate the procedure correctly. The non-disclosure of the fact that the officer was a serving rather than a retired officer was a disclosable matter that had been redacted out of the document furnished to the next-of-kin. A second point of potential substance was that he, and perhaps other officers applying for anonymity and screening, had previously given evidence in terrorist trials. The third matter related to the disclosure of the witness's role in the incident. The judge concluded that in fact the next-of-kin suffered no prejudice because (a) the next-of-kin were already aware that some officers were serving and some had retired and the point was there to be made; (b) the coroner in his provisional decision had noted

that some witnesses had given evidence in other matters without anonymity and the next-of-kin already had the point; and (c) the witness's role in the incident was already known. The coroner in a letter of 18 July 2012 considered that any residual concerns regarding the redacted material ought to be fully met by revealing a generic list of issues raised in personal statements. The judge concluded that the course taken by the coroner was in the circumstances a reasonable one. He rejected this basis of challenge to the fairness of the procedure adopted.

[24] Mr Scoffield correctly argued that a breach of the terms of the protocol did not of itself mean that overall the coroner breached the requirements of a fair process. If a decision is to be qualified as having been made in such an unfair way that it rendered the resultant decision unlawful it is necessary to consider the procedures actually followed to see if a case of such unfairness has been made out. It must be concluded that in fact in the case of the officer in which over-redaction had occurred no such unfairness has been demonstrated. The fact that a review was undertaken by the coroner in relation to redactions and his decision not to make any amendment showed that the coroner did carefully consider the matter. There is no evidential basis for the argument that there was such unfairness in the coroner's procedure as to render his decision unlawful on that account. We conclude that the judge was correct to dismiss the next-of-kin's argument on this issue.

[25] Deeny J was also correct to reject the next-of-kin's argument that giving effect to the article 10 rights of the next-of-kin should have led the coroner to refuse anonymity and screening to the officers concerned. The next- of- kin were not victims suffering any infringement of their article 10 rights. Those rights in any event are qualified and call for a balancing of other parties' rights including their article 2 rights.

The case in relation to the officers refused anonymity in screening

[26] At the heart of the argument that the coroner erred in his approach to the cases in which he refused anonymity and screening is the proposition that he applied the wrong test in deciding whether article 2 required action to be taken to provide a measure of protection to the officers giving evidence in the light of the risks to life which they faced if they had to give evidence unscreened and revealing their identity.

[27] In addition to article 2 imposing a negative duty to refrain from taking life and a positive duty to conduct a proper and open investigation into deaths for which the state may be responsible article 2 imposes a positive duty to protect life in certain circumstances. In addition to the positive duty to put in place the legislative and administrative framework designed to provide effective deterrence against threats to the right to life there is what is now termed an operational duty which requires, in certain circumstances, that appropriate steps be taken to safeguard the lives of those within the State's jurisdiction and imposes an obligation to take

preventative operational measures to protect an individual against risks or criminal acts from others. (See per Lord Dyson JSC in Rabone v Pennine Care NHS Trust [2012] AC 72.)

[28] A leading, though not the only, Strasbourg authority on the question of when the obligation to take preventative operational measures arises is Osman v United Kingdom [1998] EHRR 245. In a case such as Osman there will be a breach of the positive obligation where:

> "The authorities knew or ought to have known at the time of the existence of a real and immediate risk to the life an identified individual or individuals from the criminal acts of the third party and that they failed to take measures within the scope of their powers which, judged reasonably, might have been expected to avoid that risk."

[29] Before the Commission in Osman the Commission by majority concluded that where there was a real and imminent risk to the life of an identified person or group a failure by the state to take action may disclose a violation of article 2 but there must be an element of gross dereliction or wilful disregard of the duties imposed by law. A dissenting minority proposed a different test namely the test of increased risk. If the action called for would have considerably diminished the risk (that is to say if the omission considerably increased the risk) the state should take action. One dissentient espoused a duty to avert real danger to life in all cases where concrete evidence signalled such a danger.

[30] The court itself, however, did not adopt the formulations of the various kinds propounded at Commission level. It did reject the UK Government's argument and the Commission's conclusion that there had to be an element of dereliction or wilful disregard to the duties arising.

[31] Osman was a case in which, with the *retrospective* benefit of evidence as to what had actually happened in the case of a fatal attack, the court was considering the question whether the obligations under article 2 had in fact been breached. On the facts of that case the court concluded that there was never any suggestion that the deceased was at risk sexually or physically from the teacher who carried out the murderous attack and who, suffering from mental health problems, had formed a disturbing attachment to the deceased. The court concluded after an analysis of all the evidence that the applicants had failed to point to any decisive stage in the sequence of events leading up to the tragic shooting when it could be said that the police knew or ought to have known that the lives of the Osman family were at real or immediate risk. The finding of fact by the court having regard to the evidence adduced made the outcome unsurprising.

[32] The present case is not one involving a retrospective analysis of evidence but is one in which the coroner and now the court is called on to make a *prospective* analysis of the situation to see whether the circumstances call for operational preventive measures. The question is not, as it was in Osman, one of determining whether the state had violated its positive obligations to protect the right to life of one who has died but whether in the tragic event of one or more of the witnesses concerned being killed the state would be shown to have violated its obligation in failing to put in place measures to reduce the risk of a fatal attack on the relevant witness.

[33] In Soering v UK 11 EHRR 439 the European Court of Human Rights had to consider a case in which it was alleged that state actions were going to lead to an infringement of Article 3 in respect of the applicant in futuro. In that case the court had to consider an application by a West German national alleging that the Home Secretary's decision to extradite him to the United States to stand trial on a charge of capital murder in Virginia gave rise to a breach of article 3. If sentenced to death he would, he claimed, be exposed to the death row phenomenon which would violate article 3. The UK Government did not accept that the risk of a death sentence (which would have led to the death row phenomenon) attained a sufficient level of likelihood to bring article 3 into play. It so argued because the applicant was contesting the charge; he had a possible insanity defence; it could not be assumed the jury would recommend execution or that the judge would confirm it or that the Supreme Court of Virginia would uphold it; there were arguable mitigating circumstances which could lead the court not to impose the death sentence; and there was an assurance given to the UK Government that representations would be made to the court indicating the United Kingdom's opposition to the imposition of the death sentence. The UK Attorney General made clear that the Government understood that there was "some risk" which was "more than merely negligible" that the death penalty would be imposed. The court accepted that the UK was justified in its assertion that no assumption could be made that Mr Soering would certainly or even probably be convicted of capital murder. Nevertheless, the Attorney General conceded that there was a "significant risk" that he would be convicted. The assurance that the United Kingdom Government opposition to the death penalty would be made clear to the court, in light of the US prosecutor's attitude, did not eliminate the risk of the imposition of a death penalty. The court concluded:

> "It is hardly open to the court to hold that there are no substantial grounds for believing that the applicant faces a real risk of being sentenced to death and hence experiencing the death row phenomenon."

It concluded that the likelihood of the feared exposure of the applicant to the death row phenomenon had been shown to such an extent as to bring article 3 into play. It was clear that it was satisfied that the risk of this happening was neither certain nor

probable but neither certainty nor probability represented the appropriate threshold. The threshold test which the court applied in that case was whether there were substantial grounds for believing that the applicant faced a real risk.

[34] In Re Officer L in the course of a public inquiry into the death of Robert Hamill an application for anonymity was made on behalf of serving and former police officers whom the inquiry proposed to call as witnesses on the ground that they would be in fear for their lives due to exposure to terrorist attack if they were publicly identified. It was contended that to compel them to give evidence without anonymity would infringe article 2. In that case the inquiry had considered the question whether the pre-existing risk of death would be materially increased if they were required to give evidence without anonymity and it concluded that it would not. It concluded that the witnesses were not entitled to anonymity on the ground of a breach of article 2. Thus in that case there was no evidential basis for the conclusion that giving evidence would increase the risk to life. The evidential background in Re Officer L is thus different from the present case in a significant respect.

[35] Lord Carswell in Re Officer L said at paragraph [20]:

> "Two matters have become clear in the subsequent development of the case law. First, this positive obligation arises only when the risk is 'real and immediate'. The wording of this test has been the subject of some critical discussion but its meaning has been aptly summarised in Northern Ireland by Weatherup J in Re W's Application [2004] NIQB 67 at [17] where he said that:
>
> > 'A real risk is one that is objectively verified and an immediate risk is one that is present and continuing.'
>
> It is in my opinion clear that the criterion is and should be one that is not readily satisfied: in other words the threshold is high. There was a suggestion in paragraph 28 of the judgment in R (A) v Lord Saville of Newdigate [2002] 1 WLR 1249, 1261 that a lower degree would engage Article 2 when the risk is attendant upon some action that an authority is contemplating putting into effect itself. I shall return to this case later but I do not think that this suggestion is well founded. In my opinion the standard is constant and not variable with the type of act and contemplation and is not easily reached. Moreover,

the requirement that the fear has to be real means that it must be objectively well-founded. …."

[36] Lord Carswell's reference to the threshold being high and that the criterion was not easily reached formed the bedrock of Ms Quinlivan's argument that the risk to the life of a witness seeking anonymity in such a case must be of a high order well beyond the moderate or even substantial risk in the Security Service's categorisation of risk. She also called in aid what was said in Van Colle v The Chief Constable of Hertfordshire Police [2009] 1 AC 225.

[37] Lord Hope in Van Colle in referring to Lord Carswell's words pointed out that they were no more than a comment on the nature of the test propounded by Strasbourg. They should not be read as a qualification or a gloss on it. Lord Hope went on to say that we are fortunate that the Strasburg Court has expressed itself in such clear terms and provided a clear objective test. Experience has shown and the argument in this present appeal has demonstrated that the test propounded by Strasbourg in Osman is not as straightforward as it might appear at first sight. Judicial pronouncements purporting to set a general principle as opposed to establishing a particular outcome in a particular case not infrequently turn out to need more refinement and a closer analysis when a concrete case arises. As has often been said, judicial dicta do not fall to be construed in the same way as a statute. In Rabone Lord Dyson points out paragraph 37 that the test is a high one or more stringent than the test for negligence but that that does not shed light on the meaning of "real and immediate" or on the question whether there is "a real and immediate risk" on the facts of any particular case.

[38] Concentrating, as we must in line with what Lord Hope says in Van Colle, on the Strasbourg concept of what constitutes a real and immediate risk calling for action under article 2 rather than any domestic law gloss on it one must bear in mind that Osman is part of wider jurisprudence which helps to understand what the court was referring to in Osman. Both in the context of Article 2 and Article 3 Strasbourg uses varying terminology. Expressions such as *substantial grounds for believing, real risk, substantial risk, serious reason for believing* are used interchangeably. Nearly all the cases deal with a retrospective analysis of a situation where a person has died or suffered ill-treatment and where the question is whether the State should be held liable for breach of its Convention obligations with the benefit of hindsight.

[39] In the Equality Human Rights Commission v Prime Minister and Others [2011] EWHC 2401 a judicial review challenge was brought in respect of governmental guidance to intelligence officers on the detention of detainees overseas and on the passing and receipt of intelligence relating to detainees. The guidance provided, inter alia, directions in relation to the mitigation of the risks of torture and cruel, inhuman and degrading treatment (CIDT) of detainees. The guidance pointed out that the UK took great care to assess whether there was a risk that a detainee would be subject to mistreatment and consideration of the question

whether it was possible to mitigate any such risks. In circumstances where, despite efforts to mitigate risk, "a serious risk" of torture at the hands of third parties remained the presumption would be that the UK agents would not proceed. A section of the guidance dealt with situations where (a) officers knew or believed torture would take place, and (b) officers judged that there was a lower than serious risk of CIDT. The crux of the Commission's case was that the expression "serious risk" misstated the legal position. It argued that the threshold test should be "real risk" not "serious risk" and that there was a difference. It argued that a real risk is one that exists and is identifiable in contrast to a risk that is fanciful and so improbable as not to be a risk at all. It argued that a "serious risk" refers to undefined level of probability. The Government contended that there was no material difference between a real risk and a serious risk. Neither was especially low or high. In that case the court concluded that there was no material difference between a real risk and a serious risk. It pointed out that furthermore in the context of torture and cruel, inhuman and degrading treatment a real risk must be a serious risk because torture and CIDT are universally regarded seriously. The court concluded that there was nothing in the guidance which resulted in giving intelligence officers the green light to carry out actions which were incompatible with the UK's obligation under the Convention. The decision is not authority for the proposition that "a real risk" means "a serious risk" set at a particularly high level.

[40] In Rabone the expert evidence was that the risk of suicide of the deceased was 5% on the day of her release from hospital increasing to 20% on the second day thereafter. The lower court concluded that the risk was real but the trial judge did not consider that the risk was immediate. The Supreme Court concluded that the risk was both real and immediate. Lord Dyson giving the main judgment rejected the defence argument that there had to be "a likelihood or fairly high degree of risk". He said no support for that test was to be found in the jurisprudence in Strasbourg. He also concluded that the risk was a continuing one. Lord Dyson stated:

> "On the expert evidence it was a substantial or significant risk and not a remote or fanciful one."

[41] A fanciful or remote risk could thus not constitute a real risk or threat to the life of an individual and certainly not one triggering an obligation by the state to take action. The question is whether a risk which is not fanciful or remote falls to be categorised as a real risk thus triggering article 2 obligations if it is present and continuing or whether a risk can only be considered real if the chances of the feared event are demonstrated to be of a high though indefinable order.

[42] There is clear support in other fields of law to support the view that a risk that is neither fanciful nor trivial constitutes a real risk. Thus in R v Benjafield [2003] 1 AC 1099 the Court of Appeal had to consider the meaning of the expression "a serious risk of injustice" in the context of the Criminal Justice Act 1988 and the

Drugs Trafficking Act 1994. The Court of Appeal said of the weight to be given to the word "serious" that "any real as opposed to fanciful risk of injustice can be appropriately described as "serious". Here a serious risk was a real risk which was the opposite of a merely fanciful risk. In the somewhat different context of employer's liability and health and safety law, in dealing with the question whether an employer had failed to conduct his undertaking in such a way as to ensure so far as reasonably practicable that persons were not exposed to risks to their health and safety, the Court of Appeal in R v Porter [2008] ICR 1259 stated that what is important is that the risk which the prosecution must prove should be real as opposed to fanciful or hypothetical. There was no obligation to elevate risks which were merely fanciful. A line had to be drawn between risks which were real and those which were hypothetical. While a jury had to draw the line there were no objective standards or tests applicable to every case by which the line might be drawn but in most if not every case there would be indicia or factors which the jury must take into account in determining whether the risk was real or fanciful. In R v Chargot (Trading as Contract Services)[2008] UKHL the House of Lords approved that approach, pointing out that "the law does not aim to create an environment as entirely risk free. It concerns itself with the risks which are material".

[43] Those authorities, albeit in a different context, together with Lord Dyson's contrast between a fanciful risk and a significant risk lend support to the view that a real and immediate risk points to a risk which is neither fanciful nor trivial and which is present (or in a case such as the present will be present if a particular course of action is or is not taken). In a stable and law abiding society the risk of homicidal attacks on individuals is fortunately rare and statistically will be a very uncommon occurrence. Before the state can be fairly criticised for failing to prevent a homicidal attack it is right that the circumstances must bring home to the state authorities that a person is under a threat of substance. In the French text of the judgment in Osman the term for a real risk is *menace d'une manière reélle.* 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, though 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 it 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.

[44] In individual cases the fact that article 2 is engaged does not mean that action or any particular action needs to be taken. As Baroness Hale states in Rabone at 104:

> "Whether the state is in breach of Article 2 obligations will depend on the nature and degree of the risk and what, in the light of the many relevant considerations, the authorities might reasonably have been expected to do to prevent it. This is not only a question of not expecting too much of hard pressed authorities with many other demands upon their resources. It is also a question of proportionality and respecting the rights of others who require to be protected."

Thus to conclude that a real risk is one which is not fanciful or trivial does not impose on the state an excessive burden bearing in mind the requirement for a balanced and graduated response to deal with situations of risk impacting on the lives of citizens.

[45] If Re Officer L were to be construed as authority for the proposition that the threshold for the engagement of the article 2 operative duty is "high" or "not easily reached" such a test of itself would not provide particularly clear guidance and would open the door to the kind of arguments which have been presented in this case. But as Lord Hope points out in Van Colle and as Lord Dyson confirms in Rabone Lord Carswell's remarks in L cannot be treated as a gloss on what Strasbourg actually meant by the phrase. They cannot be construed as stating the definitive test of what constitutes a real and immediate risk. The graduated response to risk of which Lady Hale speaks takes account of the nature and degree of the risk. A very high risk (for example where a person has received a clear and definite death threat) will call for a heightened and different response from the state authorities compared to a more generalised threat (for example where the individual is only one of a large group of people who might be affected by terrorist actions). The one situation will call for a quite different response from the other. In the latter situation it may be that no particular response is called for other than the ordinary enforcement of the criminal law and ordinary policing. The context of the risk will be of central importance. What article 2 in its operative duty context requires is for the relevant authority to think through the implications of the risk which is ex hypothesi neither fanciful nor trivial so as to decide what if anything, should be done in the light of that risk.

[46] In the context of the officer's refused anonymity in screening the coroner proceeded on the basis that the risk was not at a sufficient level to engage the need for positive action under article 2. However, in each case it was recognised that there was a real possibility of the officer's personal security being undermined. This would depend on the nature of the evidence, how this would be examined in the course of the inquest and whether or not it was considered controversial. Those are all matters which would emerge over a period of time. The officers were already within the level of moderate threat. If they gave evidence without the benefit of anonymity / screening there was a possibility of a rise within the moderate band or

beyond. Against that fluid and unpredictable background and in the context of an on-going terrorist campaign in which police officers very much remain as higher risk targets compared to the general population, the evidence points, in the words of Soering, to substantial grounds for believing that they faced real risks of a murderous attack. The risk could not be dismissed as fanciful, trivial or the product of a fevered imagination. What the evidence before the coroner showed is that the relevant officers were at real risk of terrorist attack. The state authorities know that the evidence, if given openly, could expose the witnesses to an increased risk, that that increase in risk could be significant and that the incalculable extent of that increase depended on what the witness might say in the course of the evidence, how controversial his evidence might be perceived to be and how he might be questioned in the course of the investigation. Arrangements for anonymity and screening will reduce and may well remove the risk of the increased chances of a terrorist attack. These factors point to the conclusion that the coroner was in error in concluding that the need for action under article 2 did not arise. Since the need for operational action under article 2 was in play the coroner in acting as a public authority is required to address the issue of what proportionate response is required in the circumstances.

Disposal of the appeal

[47] Accordingly the decisions to refuse anonymity and screening must be quashed and the matter remitted to the coroner for reconsideration. While is seems likely that the coroner, following through the logic of his decisions in respect of those officers who were granted anonymity and screening, will accord the witnesses the same arrangements it is a matter for the coroner to determine in the light of the ruling of this court. In the meantime the anonymity of the witnesses should be preserved.

Higgins LJ

I agree