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Judgment: approved by the Court for handing down | *Delivered:* **22/2/2008**
*(subject to editorial corrections)**

IN THE CROWN COURT IN NORTHERN IRELAND

NEWRY CROWN COURT (SITTING AT BELFAST)

THE QUEEN

v

AIDEN FRANCIS GREW,
THOMAS NOEL ABERNETHY,
JOHN GERARD ROBINSON,
PATRICK BRIAN SEAMUS DYNES,
AIDEN PATRICK MAGEE,
HENRY PATRICK McLAUGHLIN
and NUALA PAULINE GREW

Defendants

HART J

[1] The defendants are charged with offences under the Customs and Excise Management Act 1979 (CEMA 1979), under the Proceeds of Crime Act 2002, and at common law relating to the seizure of 15,434,540 cigarettes on 16 November 2005 in the Division of Armagh and South Down.

[2] As the offences were allegedly committed within the area of the Division of Armagh and South Down the accused have been returned to Newry Crown Court. However, the prosecution have made a number of applications that:

(a) under common law that witnesses 0363, 0286 and soldiers A-H be permitted to give their evidence anonymously and screened from the accused, jury, public gallery and press; and

(b) in the alternative that special measures directions be granted under the Criminal Evidence (Northern Ireland) Order 1999 (the 1999 Order) that these witnesses be screened from the accused and that their evidence be heard in private; and

(c) that the place of trial be varied.

[3] I am grateful to counsel for their comprehensive written and oral submissions, both on behalf of the prosecution and on behalf of a number of the defendants. I do not propose to refer to all of these submissions individually, I have considered them and taken them into account.

Delay

[4] The application for special measures directions under the 1999 Order was not lodged until 13 September 2007, and therefore was made long outside the 28 day period from the date of committal prescribed by the Crown Court Rules 1979. It is therefore necessary to determine whether an extension of time to bring this application should be granted before proceeding to consider the substantive applications.

[5] Rule 44B(3)(a) of the Crown Court Rules requires a special measures application to be made within 28 days of the committal of the defendant. As these defendants were returned for trial on 17 April 2007 almost 4 months elapsed after the expiry of the 28 day period within which the application should have been made. The explanation advanced for this is that it was necessary for the prosecution to "carefully consider the basis upon which any application for special measures is made", and that the submissions were sought from the police and the army to enable the prosecution to decide whether to bring such applications. It is stated that submissions from the police were not received until 28 August 2007, and not until 13 September 2007 from the army, and the application was served on 13 September.

[6] The prosecution submit that the rules are directory in effect, rather than mandatory, and submit that the late application presents no significant handicap to the defence. The defence counter this by pointing to the clear provision of the rules requiring an application to be made within 28 days from committal. The various submissions on this point on behalf of the defendants can be encapsulated in paragraph 47 of the written submissions on behalf of Aiden Magee in which it is submitted that the application to extend time should be rejected for the following reasons.

> "(i) The length of the delay is inordinate and inexcusable.
>
> (ii) There has been no, or no adequate, explanation in respect of this delay to date.
>
> (iii) The Explanatory Statement is wholly inadequate in this regard.

(iv) The delay constitutes a further example of a culture of non-compliance that has developed within the Public Prosecution Service in respect of Rules of Court; see King, Black and Fulton 05/59433 (unreported).

(v) Such a culture should not be appeased by the courts by granting such out of time applications save in exceptional circumstances and where there are compelling reasons to do so.

(vi) No such exceptional circumstances or compelling reasons exist in the context of these applications."

[7] The provisions regarding extensions of time have been considered in this jurisdiction on a number of occasions. In R v Cooper [2004] NICC 2 I considered the relevant provisions of Articles 7(1)(b) and 8(1)(b) of the 1999 Order. Rule 44CA(1)(b) states that:

> "The Court may of its own motion raise the issue of whether a special measures direction should be given".

At [15] of my judgment in Cooper I continued:

> "It is noteworthy that not only may the court raise the issue of its own motion, but Rule 2(b) does not apply in such circumstances. The court's ability to intervene in this way is therefore completely unfettered. The ability of the court to take the initiative if it considers that this is required mirrors the similar provision in Article 7(1)(b) of the 1999 Order, and also Article 8(1)(b) where a special measures direction may be discharged or varied `… if it appears in the interests of justice to do so.' These powers appear to confer a residual but unfettered discretion on the court to initiate, vary or discharge a special measures direction if the interests of justice require it, even though no application has been made by any party".

[8] In R v Black, Hill and Smith [2007] NICC 4 at [14](2) Gillen J stated:

> "Whilst I recognise that the terms of that discretion are couched in the Rules in unfettered terms, nonetheless I do not believe that the courts should exercise that discretion in a manner that ignores the clear intent of Parliament that applicants for special measures should comply with time limits. Parliament cannot have intended that the failure of such an applicant to comply with those limits can be easily overridden by that same applicant merely inviting the court to act of its own motion. Accordingly I consider that the exercise of that discretion must be tempered by due recognition of the failure of the applicant to comply with the Rules. Whilst the court must act in the interests of justice bearing in mind the mischief that the statute is intended to address nonetheless the court should not be easily persuaded to intervene of its own motion."

[9] In R v King [2007] NICC 17 Gillen J considered the exercise of the court's discretion to extend the time within which applications for bad character evidence must be made, applications which are governed by Rule 44 N (10) and 44O (8) of the Crown Court Rules, each of which provides:

> " The court may, if it considers that it is in the interests of justice to do so – abridge or extend the time for service of a notice or application required under this rule, either before or after that period expires."

[10] Gillen J observed at [21] in King that:

> "A culture of non-compliance of the Rules of the Court must not be tolerated by the courts. … Time limits require to be observed. The objective of the Rules is to ensure that cases are dealt with efficiently, fairly and expeditiously and this depends upon adherence to the timetables set out. Parliament has clearly intended that the courts should have a discretionary power to shorten a time limit or extend it after it has expired. In the exercise of that discretion the court will take account of all the relevant considerations including the furtherance of the overriding objective of the legislation".

[11] Gillen J went on to consider R(Robinson) v Sutton Coalfield Magistrates Court [2006] Cr. App. R. 13, R v M [2006] EWCA Crim 1509 and R v Bovell & Dowds [2005] EWCA Crim 1091 and stated that he considered that the following factors, whilst not exhaustive are relevant to late applications

> "(a) Close scrutiny of the reasons for late application should be given by the courts in each case.
>
> (b) Has the accused had an opportunity to make any investigations into the matters which are the subject of the late application?
>
> (c) Is the application so late as to put undue pressure on both the defendant and the judge?
>
> (d) Has the lateness of the application compelled the defendant to apply to adjourn in order to conduct further investigations particularly in circumstances where the complainant and other witnesses may already have given evidence?
>
> (e) Has the application been made in such time as to afford the defendant the necessary information in relation to such matters as convictions and other evidence of bad character?"

[12] I respectfully agree with Gillen J that a culture of non compliance with rules of court must not be tolerated by the courts, and that time limits require to be observed, because, as he observed, "the objective of the rules is to ensure that cases are dealt with efficiently, fairly and expeditiously and this depends upon adherence to the timetable set out." Nevertheless, one has to bear in mind that in the case of special measures directions applications under the 1999 Order, unlike the situation where the application is for a straightforward extension of time in bad character applications for example, such as King (an application which was granted), the provisions of the 1999 Order and the Crown Court Rules are somewhat different in that Rule 44CA does not contain a provision in the same terms as Rules 44N (10) and 44O (8), but states that

> (1) Notwithstanding the requirements of Rule 44B-
>
> (a) an application may be made for a special measures direction orally at the trial; or
> (b) the Court may of its own motion raise the issue whether a special measures direction should be given.

This unusual provision implements the power expressly conferred by Article 7(1)(b) of the 1999 Order. That being the case, the exercise of the court's discretion in the circumstances of each case requires the court to give appropriate weight to the power which is conferred upon it to exercise the power of its own motion to grant a special measures direction. Therefore, whilst the court clearly must take into account all of the relevant considerations, including the furtherance of the overriding objective of the legislation in the exercise of its discretion as Gillen J pointed out in King, the Order and the Rules place upon the court the duty to exercise its discretion in a way that will further the objective of the legislation. As I observed in Cooper:

> "Whilst the court should not likely intervene to relieve a party of the consequences of its failure to follow proper procedures, it has to be remembered that the clear legislative purpose behind the 1999 Order is to make it less stressful for various categories of witnesses for whom experience has shown that giving evidence may be particularly stressful to successfully give evidence. Parliament has, I believe, recognised that the stress of giving evidence in open Court for such witnesses is greater than for others and may result in a diminution in the quality of their evidence as a result. This is not in the interests of justice."

[13] The prosecution drew my attention to the decision of the Court of Appeal in England in R v Christian Thomas Brown and Jason Grant [2004] EWCA Crim 1620 where there was a late application that prosecution witnesses should give their evidence from behind screens under the equivalent provisions of the Youth and Criminal Evidence Act 1999. These applications were not made within 28 days of committal as is required by Rule 2(4) of the Crown Court (Special Measures Directions and Directions Prohibiting Cross-Examination) Rules 2002 [not 28 days before trial as Buxton LJ erroneously stated at (15)]. Those provisions are identical to the equivalent Northern Ireland provisions. In that case the Court of Appeal said:

> "…we do not accept that the provisions of Rule 4(2)(b) are mandatory, in the sense that if they are not complied with it is not possible for the judge to give the relevant directions. In our judgment they are directory, and the principal reason why they are there is that Special Measures Directions Rules apply to all special measures, including, in particular, the giving of evidence by video

> recording. There are obvious reasons why it is desirable that the latter applications should be made well in advance in those cases. It is much less obvious why it should be necessary for there to be a 28 day lead-in, if we may use that expression, when screens are going to be used."

[14] I do not find the decision in Brown particularly helpful because the attention of the court does not appear to have been drawn to the equivalent provision to our Article 7(1)(b).

[15] From Cooper, King and Black the following principles can be distilled.

(1) Time limits require to be observed because the objective of the rules is to ensure that cases are dealt with efficiently, fairly and expeditiously and this depends upon the adherence to the timetables prescribed by the Crown Court Rules.

(2) The court will not lightly intervene to relieve a party of the consequences of its failure to follow proper procedures.

(3) Whilst the court has a power to extend the time limit within which a special measures direction may be applied for, the exercise of that discretion must have regard to the interests of justice, and the court itself has a residual but unfettered discretion to initiate, vary or discharge a special measures direction if the interests of justice require it, even though no application has been made by any party.

(4) Amongst the factors which may be relevant to late applications are.

(a) The reasons for the late application.

(b) Whether the accused has had the opportunity to make any investigation into the matters which are the subject of the late application.

(c) Whether the late application requires the defendant to seek an adjournment in order to conduct further investigations.

(d) Whether the lateness of the application puts undue pressure on the court or the defendant to deal with the application at short notice in order to avoid disruption to the trial timetable, and possibly interfere with other court business, if the application is brought shortly before trial.

(5) Whilst the court must be alert to ensure that the timetable prescribed by the rules of court is observed, nevertheless in the exercise of its discretion the court must pay proper regard to the overriding objective of the legislation,

which was that Parliament intended to make it less stressful for various categories of witnesses to give evidence for whom experience has shown that giving evidence may be particularly stressful.

[16] In the present case whilst these applications were brought late, nevertheless they were originally listed for hearing some months before the trial date, and although pressure on court time meant that there was a delay in hearing the applications, nevertheless the defendants had ample time to prepare and marshal their arguments and it is not suggested that they have suffered any prejudice by delay. If it is necessary to make an order under the provisions of the 1999 Order I am satisfied that it is proper to exercise my discretion to permit the applications to be made out of time and I do so.

Anonymity

[17] The applications for anonymity are made at common law and the provisions of the 1999 Order and the Crown Court Rules do not therefore apply. However, as I pointed out in R v Marshal & Ors [2005] NICC 29, any such application should be made at the same time as any application for special measures directions under the 1999 Order because they are analogous to such orders, and the considerations which govern the making of screening and anonymity orders are similar. It is therefore not merely convenient, but desirable that both be dealt with at the same time.

[18] The prosecution have applied for orders that a number of police and military witnesses should be permitted to give evidence anonymously, and that they should be screened whilst giving their evidence. I shall consider the anonymity and screening applications separately, but before doing so it is appropriate to give a brief summary of the nature of the evidence which is proposed to be given by the witnesses concerned. Witnesses 0363 and 0786 are PSNI officers who describe how they were following or observing a white van registration number VJI 2353 for a short period when the van was seen to turn onto the Battleford Road, County Armagh at about 1.30pm on 15 November 2005, and later to enter the laneway leading to 194 Battleford Road at about 6.15pm on that day. On 16 November 2005 Soldiers A-H were involved in surveillance of this vehicle, and an articulated trailer and cab registration no CJZ 6505, and the tractor unit on its own, at various times and locations at Washing Bay, Coalisland; Derryvaren Road, Coalisland (Robinson resides at 47 Derryvaren Road), and 194 Battleford Road. Shortly after 5.00pm on 16 November 2005 uniformed police went to 194 Battleford Road where they found Aiden Grew, Noel Abernethy and Gerard Robinson. Grew was driving a white transit van registration no NG52 VXR away from the premises. Robinson was driving the lorry CJZ 6505, whilst Abernethy appeared to be directing it. A search of the lorry and a shed on the premises subsequently revealed 4,999,920 smuggled cigarettes stacked on pallets in the

lorry, and 10,434,620 smuggled cigarettes were recovered from one of the sheds.

[19] The application by the prosecution for anonymity on behalf of the PSNI and military witnesses may be said to be based on two distinct but overlapping grounds.

(1) That the safety of the witnesses and their families will be endangered if their identities become known (the personal safety issue).

(2) That their operational effectiveness will be impaired in the future if their identities become known (the effectiveness issue).

These overlap to some degree because it is part of the prosecution case that the witnesses' operational effectiveness would be impaired, and their safety put at risk, in future if they were performing a surveillance role in circumstances where they might be isolated and in danger if they were identified as such. These fears are also relied on in support of the screening applications. In support of the applications I heard evidence from Detective Inspector Monteith of the PSNI and Mr Keay of the Ministry of Defence. They set out in considerable detail in the written statements which they adopted as part of their evidence the financial and operational considerations upon which they rely in support of the contention that the safety of the witnesses, and of their families, would be endangered. They also described the considerable financial implications of training other personnel to replace the witnesses concerned were their identity to become known. For the police it is estimated that it would cost approximately £70,000 and take some 12-18 months to train each replacement. Mr Keay said on behalf of the Ministry of Defence that it would cost hundreds of thousands of pounds and take years rather than months to train replacements for these soldiers should their identities become known. I assume that his figures are for the total cost and time to train the same number of soldiers that are involved here, rather than the cost for an individual soldier's retraining. It is unsatisfactory that such general figures are given without elaboration when the PSNI can identify with some precision the cost of training replacement surveillance officers.

[20] In R v Marshall & Ors [2005] NIJB 135 at [13] I concluded that "the power to permit a witness to withhold his identity is well established and beyond question". In R v Davis [2006] 4 All ER 648 at [27] Sir Igor Judge P stated that "there is clear jurisdiction at common law to admit incriminating evidence given against the defendant by anonymous witnesses". He then engaged in a magisterial survey both of the common law decisions and the jurisdiction under the European Convention before concluding at [59].

> "In our judgment the discretion to permit evidence to be given by witnesses whose identity may not

> be known to the defendant is now beyond question. The potential disadvantages to the defendant require the court to examine the application for witness anonymity with scrupulous care to ensure that it is necessary and that the witness is indeed in genuine and justified fear of serious consequences if his true identity became known to the defendant or the defendant's associates. It is in any event elementary that the court should be alert to potential or actual disadvantages faced by the defendant in consequence of any anonymity ruling, and ensure that necessary and appropriate precautions are taken to ensure that the trial itself will be fair. Provided that appropriate safeguards are applied, and the judge is satisfied that a fair trial can take place, it may proceed. If not, he should not permit anonymity. If he does so, and there is a conviction, it is not to be regarded as unsafe simply because the evidence of anonymous witnesses may have been decisive."

[21] In Marshall & Ors I identified a number of principles to be taken into account when anonymity applications are being considered which give substance to the general observations of Sir Igor Judge in the passage just quoted, and which remain relevant.

> "[20] From the foregoing the following principles can be distilled.
>
> (1) The judge has the duty to see that justice is done and that the system operates fairly, not only to the defendants but to the prosecution and to the witnesses.
>
> (2) Whether to admit the evidence of an anonymous witness is a matter for the discretion of the judge.
>
> (3) The judge has to decide where the balance of fairness lies between the prosecution and the accused.
>
> (4) In striking that balance the importance of the accused knowing the identity of his accuser is a factor of great weight, but in some cases the

balance of fairness may come down in favour of the prosecution notwithstanding that the circumstances could not be described as rare and exceptional.

(5) The following factors are relevant to the exercise of that discretion.

(a) There must be real grounds for the fear of the consequences if the identity of the witness were revealed. It might not be necessary to the witness himself to be fearful, or be fearful for himself alone.

(b) The evidence must be sufficiently important to make it unfair to make the Crown proceed without it. A distinction can be drawn between cases where the creditworthiness of the witness was in question, rather than his accuracy.

(c) The Crown must satisfy the court that the creditworthiness of the witness had been fully investigated and disclosed.

(d) The court must be satisfied that there would be no undue prejudice to the accused, although some prejudice was inevitable, even if it was only the qualification placed on the right of an accuser to confront a witness.

(e) The court could balance the need for protection of the witness, including the extent of that protection, against unfairness or the appearance of unfairness.

(6) The trial judge must be made aware of the identity of the witness.

(7) The court should consider whether there are alternative methods of protecting the witness in each case, and should adopt the least intrusive method available."

[22] It is in the context of these principles that I turn to consider the application for anonymity. In the circumstances of this case I do not consider it necessary to consider the personal safety aspect of the applications, except

in relation to those soldiers who are no longer serving in this unit, because the courts have accepted on a number of occasions that anonymity may be granted to preserve the effectiveness in the future of an undercover agent. See Van Mechelen v The Netherlands, Ludi v Switzerland, R v Braniff [2005] NICC 26, R v Fulton [2005] NIJB 192 and R v Mackle & Ors [2006] NICC 8.

[23] Mr McDowell on behalf of the prosecution stated that soldier H was no longer in the armed forces, but is a reservist and therefore liable to be called up. Soldier F is no longer serving in the unit in question but could be recalled to it. A reference has been made to a further witness, soldier I, who it is said is in the same position as soldier F, but as no witness statement has yet been served in relation to soldier I and I have no knowledge of what his evidence is I leave him out of account in this judgment.

[24] Although these applications for anonymity are opposed by a number of the defendants, the main thrust of their objection is to the proposed screening of the witnesses. As will be apparent from the account of the evidence to be given by these witnesses none of the accused appear to have had the opportunity to see, or at least identify, any of the witnesses, and therefore I do not consider that they will suffer any prejudice in that respect from not being able to know who the witnesses are. Mr McDowell undertook that any material relative to the creditworthiness of the anonymous witnesses would be disclosed. I am satisfied that the future effectiveness of undercover personnel such as the police and military surveillance witnesses in this case would be very significantly impaired were they to be identified by name. I consider that balancing exercise I am required to perform in the light of the principles I have set out comes down firmly in favour of permitting the police and the other witnesses, save for soldier F and soldier H to whom I shall refer separately, to give evidence anonymously. I do not consider that any prejudice to the defence created by the witnesses being granted anonymity is significant because the trial judge can give an appropriate direction to the jury not to draw any inference adverse to the accused from the fact that the witnesses are anonymous. Their identities must be disclosed to the trial judge.

[25] Soldier H has now retired from the army and therefore the risk of impairment of his operational effectiveness is considerably lessened, although the prospect of his being recalled may mean that this cannot be entirely excluded. Nevertheless, I am satisfied that there could be a sufficient element of continuing risk to the personal safety of soldier H were he to be identified by name as having been an undercover or surveillance soldier. This risk may be regarded as comparatively slight but I do not consider that in the present day of the internet that the risk of an attack on such a person, or his family, can be regarded as fanciful. So far as soldier F is concerned, his position is somewhat different both from soldier H and the other soldiers because he is still serving in the army, but not in this unit although he is liable to be recalled

to it. I have no information as to how likely it is that he could be recalled. On balance, I am satisfied that the risk to him in the future were he identified as having taken part in this type of operation is such that he should be granted anonymity.

[26] I therefore order that witnesses 0363 and 0786, together with soldiers A-H, are to be referred to anonymously. Whether this is to be done by way of number, letter, or pseudonym is a matter that can be considered by the trial judge if necessary. However, in the absence of any agreement between the parties or other ruling by the trial judge the witnesses will be referred to by their present appellations.

Screening

[27] I now turn to consider the issue whether, and if so to what extent, these witnesses should be screened from the jury, the defendants, the press and the public. This gives rise to two distinct questions.

(1) Should these witnesses be screened; and

(2) If so from whom, and how, are they to be screened?

[28] The prosecution application that the witnesses be screened is based on the personal safety and effectiveness grounds that have already been considered in the context of the applications for anonymity, and the arguments in favour of this need not be repeated. However, I must refer to some additional points.

(a) The submissions that the personal safety of the witnesses and their families require them to be screened has been made with particular emphasis in this context, as the prosecution are concerned that if anyone, including the jury, have the opportunity to observe the features of the witnesses then their personal safety, and their future effectiveness, will be placed at risk.

(b) The prosecution indicated that they may have to consider whether these witnesses could be called if they were not to be screened.

[29] The prosecution rely both on the provisions of Article 11 of the 1999 Order and on a common law power to screen the witnesses in support of these applications. These applications are opposed with particular vigour by the defendants. The various arguments advanced in the written and oral submissions on behalf of the defendants can be broadly summarised as follows.

(1) For witnesses to be screened, no matter from whom they are screened, represents an exceptional departure from the normal manner in which justice

is administered in public and where the jury, the defence lawyers, the defendants themselves, the press and the public have the opportunity to observe the witnesses for themselves.

(2) Such a departure should only be permitted where the prosecution show that it is necessary, and it is submitted that the prosecution have failed to show that it is necessary in the present case.

(3) Were the witnesses to be screened, and were they permitted to give their evidence in private; the defence would be prejudiced because the jury might adversely speculate that the defendants were responsible for this state of affairs and hold it against the defendants. The defence argued that such prejudice could not be prevented or minimised by any direction given by the trial judge to the jury.

(4) It is also argued that the defendant may be prejudiced by a screened witness believing that he or she is thereby "imbued with an increased sense of impregnability" as it was put in the written submissions on behalf of Robinson.

(5) That there is no, or in the alternative, insufficient, evidence to show that (a) the quality, coherence or completeness of the evidence of the witnesses would be impaired or diminished by reason of fear or distress, or (b) that their evidence would be maximised by the witnesses being screened, or (c) that they are at risk of being intimidated by or on behalf of the defendants.

(6) There is no precedent for witnesses being screened from the jury.

[30] Whilst the screening of witnesses is a departure from the principle of open justice, screening can be permitted under the 1999 Order and, where that Order does not extend to the particular circumstances relied upon in support of the application, at common law. As I observed in R v Fulton [2005] NIJB 192 at [12] and [13], it is at least undesirable to resort to a common law power where there exists a statutory procedure which exactly covers the circumstances in respect of which the application is brought. Where the statutory procedure does not extend to the particular circumstances of an application, it is open to the courts to develop the common law by adapting existing principles, provided that this does not infringe a defendant's common law or Convention rights. In the present case the prosecution must rely on such a power in so far as the application for screening cannot be brought within the "personal safety" heading.

[31] Both Detective Inspector Monteith and Mr Keay referred to the rights of the witnesses under Article 2 of the ECHR, which provides that "everyone's right to life shall be protected by law". In R v Davis Sir Igor

Judge at [30] observed that Article 2 was engaged where "a witness had fear for his own life, or for the safety of a member of his family". Mr John McCrudden QC, who appeared on behalf of Abernethy, helpfully drew to my attention the judgment of Lord Carswell in In Re Officer L [2007] UKHL 36, where the question of anonymity was considered in relation to police officers who are required to give evidence to the Robert Hamill Inquiry. As that case concerned the witnesses giving evidence before an inquiry, and not before a court in a criminal trial where the defendant's Article 6 rights are relevant, the authorities considered in R v Davis were not referred to. Mr McCrudden (with whom counsel for the other defendants opposing these applications agreed), accepted that the Article 2 rights of a witness would trump the defendant's Article 6 rights, provided that those Article 2 rights had been established to the requisite standard. Mr McDowell on behalf of the prosecution accepted that Article 2 could come into play, although he argued that the risk to life does not need to be high and is a matter of fact and degree.

[32] Although Officer L relates solely to the question of anonymity, anonymity and screening are so closely entwined in practice that it is helpful to consider the principles enunciated in that case by Lord Carswell in respect of the screening applications. The opening paragraphs of Lord Carswell's opinion in the Officer L contain a valuable and salutary reminder of the perils faced by police officers in Northern Ireland over many years which it is unnecessary to repeat. From Officer L the following principles can be deduced.

(1) The State has a positive obligation to take preventative operational measures to protect an individual whose life is at risk from the criminal acts of another individual.

(2) That positive obligation only arises where there is a risk that is objectively verified, and which is present and continuing.

(3) The threshold is high and not easily reached.

(4) A fair balance has to be struck between the general rights of the community and the personal rights of the individual.

(5) The obligation of the State is to do all that could reasonably be expected of it to avoid a real and immediate risk to life of which the State has, or ought to have, knowledge.

(6) What could reasonably be expected of the State brings into consideration the circumstances of the case, the ease or difficulty of taking precautions, and the resources available.

[33] I would add to these a further principle, namely:

(7) It is implicit in the decision that the court is (as is a tribunal) under an obligation to take such steps by its decisions as are necessary to protect the Article 2 right to life of a witness because the court is itself under an obligation not to act in a way which is incompatible with a Convention right, see Section 6(1) and (3)(a) of the Human Rights Act, 1998.

[34] In Van Mechelen v The Netherlands [1998] 25 EHRR 647 at [57] the European Court of Human Rights expressly referred to the granting of anonymity to a police officer who has been engaged in undercover activities.

> "On the other hand, the Court has recognised in principle that, provided that the rights of the defence are respected, it may be legitimate for the police authorities to wish to preserve the anonymity of an agent deployed in undercover activities, for his own or his family's protection and so as not to impair his usefulness for future operations".

[35] Although that statement was made in the context of an application for anonymity, I can see no proper distinction in principle where the application is for the witness to be screened in order to preserve his usefulness for further operations. If the appearance of the witness becomes known there is plainly a risk to the life of a police officer or soldier conducting surveillance operations if they are recognised as such in certain parts of Northern Ireland at the present time. Recent events where two police officers have been shot when going about their private business in different parts of the province graphically demonstrate the nature of the continuing risk to members of the security forces. I am quite satisfied that such a risk would extend to soldiers as well as police officers conducting surveillance operations.

[36] However, it is necessary to point out that as soldier H has retired from the army and soldier F is no longer serving with this unit, if the prosecution application is to succeed in their cases then it has to rely upon a common law power, and in such circumstances Article 2 of the Convention is relevant.

[37] I am satisfied that a witness who declines to give evidence because of fear for his future safety falls within the ambit of Article 5(1) of the 1999 Order because the evidence of the witness will thereby be diminished to the point of extinction. I accept that witnesses who are no longer engaged in surveillance activities may be at a lesser risk than those who are, but it is necessary to separately consider whether it is necessary for them to be screened when they had been granted anonymity, because it is not the case that a witness who has been permitted to give evidence anonymously automatically has to be screened.

[38] So far as soldier F is concerned, whilst I consider his case is somewhat near the line, as he is liable to be recalled to his unit and therefore may have to perform surveillance duties in future I am satisfied he should be regarded in the same category as the other military witnesses. I am not persuaded that in the circumstances of this case screening is necessary for soldier H. The need to preserve his operational effectiveness is remote, and I am not persuaded that any continuing risk to him or his family once he has retired surmounts the high threshold required by Officer L, and any risk can be adequately dealt with by his having being granted anonymity. I am satisfied that the future effectiveness of the other military witnesses and the two police witnesses would be impaired were they not screened. I consider that any question of prejudice to the defendants can be appropriately dealt with by a direction by the trial judge to the jury in suitable terms. I therefore grant the applications that witnesses 0363 and 0786 and soldiers A-G be screened, but refuse in relation to soldier H.

[39] The next question is from whom are the witnesses to be screened? The prosecution seek to have the witnesses screened from the jury, the justification advanced for this by Mr McDowell being that the recent changes in the jury laws preventing the disclosure of the names and addresses of jurors means the prosecution are unaware of the identity of jurors, and therefore could not be sure that a witness might not be recognised by a juror on a subsequent occasion when the witness is performing his functions in an operational capacity, and might reveal his identity. This application was strenuously opposed by each of the defendants.

[40] The jury is the tribunal of fact in this trial and to prevent the tribunal of fact from observing a witness would be something which would be without precedent in this jurisdiction so far as I am aware. It is salutary to bear in mind that so far as the 1999 Order is concerned, Article 11(2)(b) prohibits a witness from being screened from "the judge and the jury (if there is one)", an indication of how much importance the law places on the ability of the tribunal of fact to see as well as hear a witness giving evidence.

[41] Even if it were possible at common law to order that a witness be screened from the tribunal of fact, whether that is a judge or jury, and the absence of any precedent strongly suggests that there may not be such a power, I consider that such an order could only be made in the most exceptional circumstances. It is not easy to envisage any circumstances in which such order could be made, representing as it would a fundamental departure from the normal criminal process. I consider that in any event in the present case the prosecution have singularly failed to make out a case for such an extreme departure from normal practice and I refuse the application that the anonymous witnesses be screened from the jury.

[42] The prosecution also seek to have the anonymous witnesses screened from the defendants. This is a course of action which has been adopted on a number of occasions where the circumstances warrant it. See R v Murphy & Maguire [1990] 7NIJB 86 (the Two Corporals case), and in R v Davis it appears that in the conjoined appeal of Ellis the anonymous witnesses were screened from the defendants at the trial, see [135]. Article 11(1) of the 1999 Order expressly permits a witness to be screened from the defendants. Whilst it is a departure from normal practice to screen witnesses from the defendants, it is of particular relevance to the application in the present case that there is nothing to show that the defendants saw these witnesses, or that their defence would be hindered in any way by their not having the opportunity to see the witnesses, an opportunity which will of course be available to their counsel. The prosecution have expressly undertaken, as they are in any event obliged to do, to disclose any material reflecting upon the creditworthiness of the witnesses. The allegations against the defendants clearly imply that they were involved in a highly organised criminal enterprise involving a significant number of individuals and a huge quantity of smuggled cigarettes. I am satisfied that individuals involved in such activities, or their associates, may have every incentive to display ill-will towards witnesses who have given evidence against them, at the very least by revealing their identity if they saw the witnesses carrying out their surveillance duties in the future. I am satisfied that it is necessary to preserve the future effectiveness of the anonymous witnesses that they be screened from the defendants in the course of this trial. That inevitably means that they must also be screened from the public gallery and the press.

Venue

[43] There was some debate during the course of the present applications as to whether witnesses could be screened in either Newry or Armagh Courthouse. I have made inquiries and am satisfied that it is not practicable to have witnesses screened in Newry. Whilst witnesses can enter the building and the courtroom without going through the public area, witnesses then have to cross the body of the court to get to the witness box, at which point they would be exposed to public view and the view of the accused. To prevent screened witnesses being seen would therefore require the court to be cleared of the public and the defendants each time such a witness was called, and that would be very disruptive to the trial.

[44] Having inspected the courtroom and other facilities available at Armagh Courthouse I am satisfied that it is possible to screen the witness from the accused. This would involve some screening of the public areas outside the courtroom to enable witnesses to come to the door to the witness box without being seen. However, this can be easily achieved by the use of temporary screens to create a passage to the witness box door from a private waiting room. In addition, there are 7 defendants in the present case which

means that there are 8 sets of counsel, and whilst there are seats for 8 sets of counsel, for the witness to be effectively screened would require the accused to sit on the same side of the courtroom as the witness, but on the other side of the screen so that the defendants are still in view of the jury. This would inevitably reduce the amount of seating available for the public. Whilst this would not be ideal because of the comparatively restricted size of the courtroom, it is nevertheless feasible to have these witnesses screened from the accused, the public and the press, but not from the jury or defence counsel.

Change of venue

[45] This brings me to the final issue in the case, namely the application by the prosecution that the trial be moved from the Division of Armagh and South Down to another venue. Section 48(3) of the Judicature (Northern Ireland) Act 1978 permits either party to apply to the Crown Court for a direction or further direction varying the place of trial. It is established that when the Crown Court makes an order under Section 48(3) it may have regard to considerations other than those which are contained in Section 48(1), see R v Morgan & Morgan Fuels and Lubes Limited [1998] NIJB 52. Section 48(1) requires a Magistrates Court when committing a person for trial to have regard to (a) the convenience of the defence, the prosecution and the witnesses; (b) the expediting of the trial, and (c) any directions given by the Lord Chief Justice under Section 47(2) when selecting the place at which the defendant is to be tried.

[46] The application is opposed by the defendants and a great many authorities, some of considerable antiquity, were referred to in the written submissions. It is unnecessary to refer to these authorities because, subject to very strict limitations, criminal trials on indictment were always heard in the assize courts or quarter sessions for the county or other locality in which the crime was alleged to have been committed. This is still the position today in that jury trials take place in the Crown Court division in which the offence was committed. However, from time to time it is necessary to transfer trials to other venues and whilst this happens infrequently, it is far from uncommon. The reasons for transferring cases to other divisions are usually one or a combination of the following.

(1) The court is satisfied that either the prosecution or the defence will not receive a fair trial in the Crown Court division concerned.

(2) There is inadequate courtroom accommodation to try the case in the division concerned, whether because of constraints of size and space or the lack of specialist equipment required.

(3) It may be necessary on occasion to transfer a case to another division to avoid an unacceptable delay in dealing with the case because of pressure of business in the division concerned.

[47] Whilst this list is not exhaustive, nevertheless there is a strong presumption that a trial before a jury should be heard in the division in which the offence was committed, unless there is a statutory or other reason why this should not be the case.

[48] In the present case the prosecution application is based on a number of grounds.

(1) That there is an element of risk to the witnesses in giving evidence in Armagh.

(2) The impact on police resources in the area by virtue of whatever steps may be necessary to protect the witnesses when they travel to and from Armagh Courthouse to give evidence.

[49] I have carefully considered the evidence of Detective Inspector Monteith and Superintendent McCrum. Whilst there is inevitably an element of risk, and it may well be that the risk is somewhat higher in Armagh than it would be elsewhere, I do not consider that the increased risk is such as to justify transferring the trial away from this venue. The screened witnesses will probably only be required to attend the trial for a comparatively brief period of time. I am not satisfied that a case has been made out to transfer the case on either security or financial grounds.

[50] The prosecution do not suggest that a jury from this division will not approach the case impartially. The application is on the basis that the prosecution will not receive a fair trial because of the risk of intimidation of jurors. If this were considered to be a significant risk one would have expected the prosecution to utilise the power conferred on the customs by virtue of Section 148(1)(c) of CEMA 1979 to commence the proceedings anywhere in Northern Ireland since the proceedings in this case primarily relate to revenue offences. In any event, I am not persuaded that any risk of intimidation of jurors would be materially alleviated by transferring the case to Belfast or some other venue. As can be seen from R v Mackle & Ors [2007] NIQB 105, where a similar type of case was being heard by a Belfast jury although the cigarettes had been seized in the Coalisland area and some of the defendants came from Armagh, nevertheless there were determined attempts to tamper with the jury.

[51] The prosecution have not sought to rely in the present application on the provisions of Section 44(3) of the Criminal Justice Act 2003 (the 2003 Act), but on a more generalised concern that the jury may be tampered with. The

trial judge can give the jury a suitably worded warning that if they are approached by anyone about the trial that they should report the matter to the court, and in such circumstances the judge could, if the provisions of Section 46 of the 2003 Act are met, discharge the jury and direct that the trial be heard by a judge alone, or continue without a jury to hear the trial.

[52] In the absence of more specific evidence than that put forward by the police in the present case, and I have not overlooked what has been alleged about the background of some of the present accused, I am not satisfied that the prosecution have established that it would be appropriate to transfer this trial to another venue outside the division of Armagh and South Down and that application is refused. The trial will therefore continue to be listed for trial in the division of Armagh and South Down at Armagh Courthouse.