| Ref: | COG7719 |
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**Neutral Citation No. [2010] NIQB 27**

*Judgment: approved by the Court for handing down*
*(subject to editorial corrections)**

| Delivered: | 26/2/10 |
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**IN THE HIGH COURT OF JUSTICE IN NORTHERN IRELAND**

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**QUEEN'S BENCH DIVISION (JUDICIAL REVIEW)**

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**R A's Application [2010] NIQB 27**

**IN THE MATTER OF AN APPLICATION BY R A FOR JUDICIAL REVIEW**

**-and-**

**IN THE MATTER OF A DECISION OF THE DISTRICT JUDGE DELIVERED ON 8 MAY 2009**

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**Before: Morgan LCJ, Coghlin LJ and Weatherup J**

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**COGHLIN LJ**

[1] This is the judgment of the Court.

[2] The applicant in this case, RA, seeks an order of Certiorari to quash a decision by District Judge (Magistrates' Court) White refusing to extend a reporting restriction order under Section 4(2) of the Contempt of Court Act 1981 in relation to the publication of the applicant's name in connection with a charge of withholding information relating to the murder of Constable Stephen Carroll in Craigavon on 9 March 2009 contrary to Section 5(1) of the Criminal Law Act (Northern Ireland) 1967.

[3] For the purposes of this application the applicant was represented by Ms Karen Quinlivan while Mr Tony McGleenan appeared on behalf of the respondent and Mr John Larkin QC represented the British Broadcasting Corporation, the intervening party. We are grateful to all counsel involved for their well researched and carefully constructed written and oral submissions.

[4] At the commencement of the hearing Ms Quinlivan applied for leave to amend the relief sought in the Order 53 statement to include breaches of the applicant's rights in accordance with Articles 3, 6 and 8 of the European Convention on Human Rights ("the Convention"). The court refused leave upon the ground no such alleged breaches had been referred to or argued before the District Judge.

**Background facts**

[5] The applicant is a 22 year old male who was arrested on 15 March 2009 under the provisions of Section 41 of the Terrorism Act 2000 in relation to the murder of Constable Carroll. On 25 March 2009 he was charged with the offence of withholding information.

[6] On the morning of 26 March 2009 the Irish News newspaper published an article relating to the police inquiry into the murder of Constable Carroll in the course of which the applicant's full name was published. The applicant's first appearance before Lisburn Magistrates' Court took place on that morning. His name appeared on the court list and was referred to in open court. At that hearing the applicant's legal representative applied to the court for an order pursuant to Section 4(2) of the Contempt of Court Act 1981 ("the 1981 Act") postponing the publication of any facts which might lead to the identification of the applicant, the dates contained in the charge and the details of the application for postponement under Section 4(2) until the next remand hearing on 17 April 2009. The District Judge acceded to that application and the applicant was remanded in custody.

[7] It appears that on 31 March 2009 the applicant's legal advisers learned that the Irish News proposed to publish a further article about the applicant, inter alia, linking him to graffiti that had appeared in the Lurgan/Craigavon area. The applicant's legal advisers then applied to the Queen's Bench Division of the High Court of Justice in Northern Ireland for an injunction prohibiting such publication. On 31 March 2009 Stephens J granted an interim injunction, which was subsequently converted into a final order on 15 May 2009, prohibiting anyone from identifying the plaintiff as the person charged on 25 March 2009 with withholding information or linking him to the graffiti or in any way identifying him in connection with the criminal proceedings until seven days after the conclusion of those proceedings or further order in the meantime.

[8] On 2 April 2009 members of the PSNI attended the applicant at Her Majesty's Prison Maghaberry and issued him with a "PM1" notice advising him that he "might be the target of CIRA (Continuity Irish Republican Army) activity should he be released on bail".

[9] District Judge White listed the case on 16 April 2009 for argument as to whether the order under Section 4(2) of the 1981 Act postponing publication of the identity of the applicant and other matters should be extended beyond 17 April 2009. In doing so the District Judge exercised his discretion to invite representation from the media and the British Broadcasting Corporation ("BBC") was legally represented and opposed the application. The District Judge adjourned the hearing in order to permit skeleton arguments to be filed and he heard full argument on 24 April 2009. The District Judge reserved his decision until 8 May 2009 when he delivered a written judgment. After carefully considering the arguments put forward by the parties the District Judge refused the application for an order further postponing publication in accordance with Section 4(2) of the 1981 Act. It is that decision that the applicant now seeks to judicially review. At the time of delivering his decision Judge White specifically recorded that the High Court injunction remained in place and, unless and until that was lifted, no reporting of the case was permitted.

**The statutory framework**

[10] Section 4 of the 1981 Act provides as follows:

> "4(1) Subject to this section a person is not guilty of contempt of court under the strict liability rule in respect of a fair and accurate report of legal proceedings held in public, published contemporaneously and in good faith.
>
> (2) In any such proceedings the court may, where it appears to be necessary for avoiding a substantial risk of prejudice to the administration of justice in those proceedings, or in any other proceedings pending or imminent, order that the publication of any report of the proceedings, or any part of the proceedings, be postponed for such period as the court thinks necessary for that purpose. …
>
> (3) For the purposes of sub-section (1) of this section a report of proceedings shall be treated as published contemporaneously –
>
> > (*a*) In the case of a report of which publication is postponed pursuant to an order under sub-section (2) of this section, if published as soon as practicable after that order expires."

[11] Section 11 of the 1981 Act provides as follows:

> "11. In any case where a court, having power to do so, allows a name or other matter to be withheld from the public in proceedings before the court, the court may give such directions prohibiting the publication of that name or matter in connection with the proceedings as appear to the court to be necessary for the purpose for which it was so withheld."

It is apparent from the wording of section 11 that there must be an independently existing power available to the court before it can be brought into operation.

**The submissions of the parties**

[12] Before the District Judge the main legal issue between the parties appears to have been whether, when hearing an application for an order in accordance with Section 4(2), the court was entitled and/or obliged to take into account the existence of any real and immediate risk to the defendant's life in its consideration of the risk of prejudice to the administration of justice .The District Judge himself raised an additional issue, namely, whether Section 4(2) included a power to order only that the publication of any information about the applicant's identity should be postponed. Before this court the applicant sought to argue that the District Judge had erred in his approach in failing to take account of and give effect to the applicant's Article 2, Article 3, Article 6 and Article 8 Convention rights as he was required to do in compliance with Sections 3 and 6 of the Human Rights Act 1998 ("the 1998 Act"). The respondent accepted that the question of the applicant's right to life in accordance with Article 2 had been raised before the District Judge in connection with the submissions as to the correct approach to the interpretation of section 4(2) but maintained that no submissions had been made to that court in relation to Articles 3, 6 or 8. The respondent and the notice party emphasised to the court the importance of open and public justice as a fundamental principle in both domestic law and the jurisprudence of the Strasbourg court.

**The judgment of the District Judge**

[13] In the course of his clear and carefully reasoned ruling the District Judge referred to the relevant legislation and expressed the view that the decision in Re Belfast Telegraph Newspapers Limited Application [1997] NI 309 was directly in point if the court was restricted by section 4(2) to a consideration of whether the order was necessary to prevent a substantial risk to the administration of justice and any such consideration did not involve the assessment of any personal risk to the applicant. He referred to

the judgment of McCollum LJ in that case who reviewed the relevant authorities relating to a risk to the administration of justice and, having done so, said, at page 314:

> "Mr McCloskey argued that the administration of justice would be frustrated if the accused were to be subjected to an attack which rendered him incapable of undergoing his trial. However, an attack upon the accused by ill-intentioned persons cannot be regarded as a natural consequence of the publication of the proceedings of the court and the danger of its occurrence should not cause the court to depart from well-established principles."

The District Judge then proceeded to record the guidance for tribunals provided by McCollum LJ at page 315 of his judgment. The District Judge gave as his reasons for refusing to make an order in accordance with Section 4(2) the importance of the principle of open justice and the guidance given by the Belfast Telegraph case. In addition he expressed the view that, even if he was permitted to take account of the risk of harm to the applicant, he did not consider that making such an order was necessary to avoid a serious risk to the administration of justice because it would be ineffective to do so. The identity of the applicant was already known to those who might wish to harm him as a consequence of the article in the Irish News, the graffiti in Lurgan and his appearance in open court as a defendant. Judge White also noted that the PM1 form confirmed that the applicant's identity was already likely to be known to terrorists. That form had been served at a time when an order preventing publication of the applicant's identity was already in force. Before this court the applicant accepted that his co-defendants would know his identity which may also be known to other individuals arrested at about the same time in connection with the same matters. In such circumstances the District Judge did not consider that an order under Section 4(2) would have the effect of removing or reducing any threat that existed to the applicant's life nor would the publication of his identity materially increase any such threat. On the contrary, he felt that an order would damage the administration of justice by impacting adversely upon public confidence. The District Judge was inclined to the view that, if the court was obliged to take Article 2 into account in relation to an order in accordance with Section 4(2) of the 1981 Act, and assuming that the relevant threshold was met, it would have the power to make a limited order granting anonymity. However, once again, bearing in mind the extent to which the identity of the applicant had already been publicly disclosed, he did not consider that making such an order would serve to remove or reduce the threat that already existed to the applicant's life nor would publishing the details of his identity materially increase any such threat.

[14] The District Judge recognised that the decision in the Belfast Telegraph Newspapers case had been made before the passing of the Human Rights Act 1998 and, in such circumstances, he proceeded to set out his reasoning based upon the assumption that he was subject to an obligation under Article 2 of the Convention to take into account a potential threat to the applicant's life and/or personal safety. Having regard to the PM1 and the graffiti the District Judge concluded that there was a risk to the life of the applicant which was both real and immediate. However for the reasons that he had already stated, namely, the extent to which the applicant's identity was already known to those who might wish to harm him he did not consider that such an order would serve to protect the applicant.

**The fundamental principle**

[15] There are many well known authorities that confirm that open justice is one of the cornerstones of the common law system and it will suffice to provide just one or two quotations by way of example. In Scott v Scott (1913) AC 417 Lord Shaw observed at page 477:

> "It is needless to quote authorities on this topic from legal, philosophical or historical writers. It moves Bentham over and over again. 'In the darkness of secrecy, sinister interest and evil in every shape have full swing. Only in proportion as publicity has place can any of the checks applicable to judicial injustice operate. Where there is no publicity there is no justice.' 'Publicity is the very soul of justice. It is keenest spur to exertion and the surest of all guards against improbity. It keeps the judge himself while trying under trial.' 'The security of securities is publicity.' But amongst historians the grave and enlightened verdict of Hallam, in which he ranks the publicity of judicial proceedings even higher than the rights of Parliament as a guarantee of public security, is not likely to be forgotten: 'Civil liberty in this kingdom has two direct guarantees; the open administration of justice according to known laws truly interpreted, and fair construction of evidence; and the right of Parliament, without let or interruption, to enquire into, and obtain redress of, public grievances. Of these, the first is by far the most indispensable; nor can the subjects of any state be reckoned to enjoy a real freedom, where this condition is not found both in its judicial institutions and in their constant exercise."

In Denbeigh Justices, ex parte Williams [1974] QB 759 Lord Widgery CJ, giving the judgment of the Divisional Court, said, at page 765:

> "Today, as everybody knows, the great body of the British public get their news of how justice is administered through the press or other mass media, and the presence or absence of the press is a vital factor in deciding whether a particular hearing was or was not in open court. I find it difficult to imagine a case which can be said to be held publicly if the press have been actively excluded. "

Finally, in Re Trinity Mirror Plc [2008] EWCA Crim. 50 Igor Judge P stated at paragraph 32:

> "In our judgment it was impossible to over-emphasis the importance to be attached to the ability of the media to report criminal trials. In simple terms this represents the embodiment of the principle of open justice in a free country. An important aspect of the public interest in the administration of criminal justice is that the identity of those convicted and sentenced for criminal offences should not be concealed. Uncomfortable though it may frequently be for the defendant that is a normal consequence of his crime. Moreover, the principle protects his interest too, by helping to secure the fair trial which, in Lord Bingham of Cornhill's memorable epithet, is the defendant's 'birthright'. From time to time occasions will arise where restrictions on this principle are considered appropriate but they will depend on express legislation and, where the court is vested with a discretion to exercise such powers, on the absolute necessity for doing so in the individual case."

[16] The primacy of the principle is also reflected in European jurisprudence and Article 6 of the Convention specifically provides that everyone is entitled to a fair and public hearing with judgment to be pronounced publicly although "… the press and public may be excluded from all or part of the trial in the interests of morals, public order or national security in a democratic society, where the interests of juveniles or the protection of the private life of the parties so require, or to the extent strictly necessary in the opinion of the court in special circumstances where publicity would prejudice the interests of justice." In Diennet v France (1995) 21 EHRR 554 the Strasbourg Court said at paragraph 33:

> "The court reiterates that the holding of court hearings in public constitutes a fundamental principle enshrined in Article 6. This public character protects litigants against the administration of justice in secret with no public scrutiny; it is also one of the means whereby confidence in the courts can be maintained by rendering the administration of justice transparent, publicity contributes to the achievement of the aim of Article 6(1), namely a fair trial, a guarantee of which is one of the fundamental principles of any democratic society."

**Section 4(2) of the 1981 Act**

[17] The District Judge observed in the course of his ruling that the Divisional Court in the Belfast Telegraph case had concluded that the risk of an attack upon the accused by ill-intentioned persons could not be regarded as a natural consequence of the publication of the proceedings and was not a factor that "touched upon or endangered" the due administration of justice as required by Section 4(2). As noted earlier, the Belfast Telegraph case was decided before the coming into operation of the Human Rights Act 1998 in October 2000. Subsequent to the passage of that legislation, it is interesting to note the manner in which Eady J dealt with arguments based upon Article 3 in a somewhat similar case. In W B (An individual) v H Bauer Publishing Limited [2001] WL 606353 he said at paragraphs 35 and 36 of his judgment:

> "35. Mr Christie emphasised that the prohibition on torture, and other forms of inhuman and degrading treatment, is absolute; it is not limited by any exceptions – regardless of any reprehensible conduct on the part of the victim or the aims of the relevant state. He argues that the claimant is a 'vulnerable' person, by virtue of having been acquitted of serious criminal charges in respect of which there was 'compelling evidence' of his guilt (according to the Court of Appeal). It is said that in light of this consideration some readers may be liable to take the law into their own hands by exacting a punishment which the criminal justice system had 'failed to deliver'. The claimant having, in the light of this, a reasonable apprehension of violence he has suffered distress and anxiety.
>
> 36. The difficulty about this argument seems to me that it would apply, if taken to its logical

> conclusion to anyone charged with a serious criminal offence. It would effectively militate against open justice and require anonymity throughout the trial. Indeed, in cases where there is a conviction of the relevant offence, the person concerned might arguably be under greater threat than those acquitted or awaiting trial. Nothing in Mr Christie's argument persuaded me that the law in this jurisdiction requires to be changed so as to impose such fundamental restrictions on the open justice principle itself or on the right of the media to report what goes on in the criminal courts. Both of those considerations reflect values fundamental to the European Convention and, in particular, to Articles 6 and 10."

[18] In Times Newspapers Limited & Anor v Soldier B [2008] EWCA Crim 2559 the Court of Appeal reviewed a decision by the Judge Advocate General sitting in court martial to grant anonymity to six soldiers charged with conspiracy to defraud. In essence, the judge had ordered that the proceedings, in their entirety, should be held in camera and that no reports of the proceedings should be published save for the fact that the six soldiers were so charged. In giving the judgment of the Court of Appeal Latham LJ pointed out that there was no authority at common law for the proposition that anonymity could be ordered for any purpose that was not connected to or did not have an effect upon the administration of justice or was not provided for in any statutory exception. He emphasised that section 11 of the 1981 Act presupposed the existence of some other independent power. In the absence of a relevant statutory power, Latham LJ considered that, in order to make an order for anonymity in relation to a defendant, the court would have to be satisfied either that the administration of justice would be seriously affected if anonymity was not granted *or* (our emphasis) that there was a "real and immediate risk" to the life of a defendant if such a precaution was not to be taken.

[19] In Re Officer L [2007] 1 WLR 2135 Lord Carswell, who delivered the unanimous judgment of the court, considered applications for anonymity by police witnesses in the context of the tribunal's obligations under Article 2 and its common law duty of fairness towards the persons that it proposed to call to give evidence. Lord Carswell proposed that the appropriate exercise to be carried out by the tribunal would be the application of the common law test with an excursion, if the facts required it, into the territory of Article 2. Such an excursion would only be necessary if the tribunal found that, viewed objectively, a risk to the witness's life would be created or materially increased if they gave evidence without anonymity. The threshold was said to be high and not readily satisfied. In the context of any potential

application under Section 11 of the 1981 Act it is perhaps worthwhile noting that in Officer L's case Section 19(4) of the Inquiries Act 2005 provided the Chairman of the Tribunal of Inquiry with the power to impose restrictions on publication of any evidence or documents having regard to a number of matters including, in particular, any risk of "harm or damage" defined as including death or injury. It was not in dispute in that case that the restrictions consisting of anonymity sought by the police officers were among those which the Chairman was empowered to order.

**Inherent powers/obligations**

[20] As an alternative to Section 4(2) of the 1981 Act the applicant relied upon the inherent duty of any court to act fairly submitting that the applicant's Article 2 rights could be "hitched on" to such a duty. While conceding that the decision pre-dated the coming into force of the Human Rights Act 2008, Ms Quinlivan relied upon the judgment of Carswell LJ in Re Jordan's Application (1995) NI 308 in which the learned Lord Justice was concerned with an application for judicial review of the power of a coroner to permit a witness to be only referred to by an alphabetical letter as part of the inherent power of a court to control its own proceedings. Ms Quinliven also relied upon that judgment in support of her submission that a risk to the physical safety of a witness or defendant could have an adverse impact upon the administration of justice. At page 318 the learned Lord Justice said:

> "When one comes to weigh the relevant factors in the balance, it may readily be seen that there are cogent factors in favour of permitting the officers' names to be withheld. The risks to serving officers and their families of having their names disclosed are obvious. It would in my view be extremely detrimental to the administration of justice if its processes could be used by terrorists to obtain information which would assist them to attack members of the security forces or their families. Moreover, there is potential detriment if witnesses of any class are concerned for their safety and their willingness to give evidence is decreased."

Carswell LJ's decision was upheld by the Court of Appeal in which MacDermott LJ, giving the judgment of the court, agreed that a court has an inherent power to control the conduct of its proceedings, including, in exceptional cases, the power to exclude the public, and went on to say:

> "For our part we are equally satisfied that in the exercise of in its inherent powers a court may take less draconian measures and may grant anonymity to a witness or screen the witness in whatever manner is

> appropriate if it is necessary in the interests of justice to take such a course. Thus the range of options open to a court, which includes a Coroner's Court, lies across the spectrum running from the granting of anonymity to sitting in camera if it necessary so to do."

[21] A somewhat more restrictive view of the "inherent powers" of statutory courts and tribunals was taken by Hickinbottom J in R v Asylum and Immigration Tribunal and Anor ex parte V [2009] EWHC 1902 (Admin) in which he noted that the AIT was purely a creature of statute and, as such, it was not equipped with the sort of inherent powers exercisable by the High Court. However, he expressed the view that such tribunals were entitled to exercise implied powers and referred to the well-settled law that it is justifiable to imply words into legislative provisions where there was an ambiguity or an omission and the implied words were necessary to remedy such defect. He qualified this observation by emphasising that what was "necessary" by way of implication would depend upon the nature of the Tribunal and its work together with the express powers given to it by the legislative scheme. In respect of any tribunal with a judicial function he considered that it must be assumed (at least in the absence of the clearest wording) that Parliament intended the Tribunal to deal with cases fairly and justly.

[22] It seems to us that the applicant faces a number of problems in advancing this submission based upon "inherent powers". In the Belfast Telegraph case the Divisional Court specifically held that:

> "In our judgment the power of the court to prohibit publication or postpone it contained in the 1981 Act fully encompasses the previous common law rights and there is therefore no power inherent in the court outside the confines of the 1981 Act."

[23] In a case that was concerned with an attempt to prevent publication of the surname of an adult charged with murder in order to protect the Article 8 rights of her child the House of Lords in In Re S [2005] 1 AC 593 gave specific consideration to the inherent jurisdiction of the Family Division of the High Court to restrain publicity and, having done so, Lord Steyn confirmed the unanimous view of the House that since the coming into force of the Human Rights Act the earlier case law did not need to be considered, stating at paragraph [23]:

> "The House unanimously takes the view that since the 1998 Act came into force in October 2000, the earlier case law about the existence and scope of inherent jurisdiction need not be considered in this case or in similar cases. The foundation of the jurisdiction to restrain publicity in a case such as the present is now derived from Convention rights under the ECHR. This is the simple and direct way to approach such cases."

[24] In Attorney General's Reference No. 3/1999 [2009] UKHL 34 the House again emphasised that it was no longer necessary to resolve doubts about the *vires* or scope of legislation, including Section 11 of the 1981 Act, because the House was bound to act compatibly with any relevant Convention rights.

**Discussion**

[25] In our view the District Judge was correct in his approach to the application under Section 4(2) of the 1981 Act insofar as he excluded the danger of an attack upon the applicant from his consideration. While the decision upon which he placed primary reliance, namely, the Belfast Telegraph Newspaper's case, pre-dated the coming into force of the Human Rights Act 1998, such an approach appears to be consistent with those authorities that post-date that event. For example in the Soldier B case the court of appeal appears to have viewed the affect upon the administration of justice and the risk to the lives of the soldiers as disjunctive reasons for he making of anonymity orders.

[26] The District Judge appears to have considered that the decision in the Trinity Mirror case supported the proposition that the relevant powers of his court were restricted to section 4(2) of the 1981 Act and that "Convention considerations are a matter for the High Court." We do not accept such a proposition which would, in practice, as he correctly foresaw, "cause real difficulties" for defendants." In our view it is important to bear in mind the nature of the application in the Trinity Mirror case, namely, an application to prevent publication of the identity of a defendant convicted of possessing indecent images of children in the interest of protecting his own children, who were not involved in any way in the proceedings, from the risk of emotional and traumatic stress and bullying. As Lord Steyn pointed out at paragraph 26 of the judgment of the House in Re S (FC), a similar case, such an application was for an injunction beyond the scope of the statutory remedy provided by Parliament to protect juveniles directly affected by criminal proceedings and no such injunction has been granted in the past under the inherent jurisdiction or the provisions of the ECHR to non-parties, juvenile or adult, in respect of the publication of criminal proceedings.

[27] However, we are satisfied that, post October 2000, the District Judge, as a public authority within the meaning of section 6 of the Human Rights Act 1998, was under an obligation to consider and, if appropriate, take steps to protect the applicant's human rights. In that context the applicant's Article 2 rights were freestanding and did not require to be grafted on to any other statutory or common law provision.

[28] In Guardian News and media Ltd [2010] UKSC 1 the Supreme Court recently gave guidance in relation to the use of anonymity orders. In dealing with cases said to involve a risk to personal safety Lord Rodger, delivering the unanimous judgment of the Court, said at paragraph 26:

> "26 In an extreme case, identification of a participant in legal proceedings, whether as a party or (more likely) as a witness, might put that person or his family in peril of their lives or safety because of what he had said about, say, some powerful criminal organisation. In that situation, he would doubtless ask for an anonymity order to help secure his rights under Articles 2 and 3 of the European Convention. Those Convention rights are not in play in these appeals, however, since counsel accepted that the appellants could not show that publication of their names would put any of them or their families at risk of physical violence.
>
> 27 States are, of course, obliged by Articles 2 and 3 to have a structure of laws in place which will help to protect people from attacks on their lives or from assaults, not only by officers of the state but by other individuals. Therefore the power of the court to make an anonymity order to protect a witness or party from a threat of violence arising out of its proceedings can be seen as part of that structure. And in an appropriate case, where threats to life or safety are involved, the right of the press to freedom of expression obviously has to yield: a newspaper does not have the right to publish information at the known potential cost of an individual being killed or maimed. In such a situation the court may make an anonymity order to protect the individual."

At paragraph 30 Lord Rodger confirmed that the Human Rights Act had removed any doubts that might otherwise have existed about the availability of a remedy in English law.

[29] However, as noted earlier, in the event that he did have power, the District Judge expressly went on to consider the applicant's Article 2 rights, in accordance with the decision of the House of Lords in Re Officer L. In so doing he asked himself whether the applicant's life was subject to a "real and immediate" risk defined in accordance with the approved test set out by Weatherup J in Re W's Application [2004] NIQB 67 as:

> "… A real risk is one that is objectively verified and an immediate risk is one that is present and continuing."

The District Judge gave careful consideration to the guidance given by Lord Carswell in Re Officer L and, after taking into account the factual evidence, concluded that there was a threat to the life of the applicant that was both real and immediate. He reminded himself that it might be necessary in some future case to consider what steps, if any, the court should reasonably be expected to take in striking a fair balance between the general rights of the community and the personal rights of the individual in accordance with the decision in Osman v United Kingdom (2000) 29 EHRR 245 at paragraphs 115-116. However, unlike the situation in the Soldier B case, he considered that this application faced a more fundamental problem in that the identity of the applicant was already known to those who might wish to harm him as a result of the article in the Irish News and confirmed by the graffiti in Lurgan and the PM1 form delivered by the police. He also recorded that the applicant, together with his co-defendants, had appeared in open court. In the circumstances he concluded that there was no basis for believing the order sought would serve to protect the applicant. The decision reached by the District Judge was based upon the factual evidence and detailed submissions that were put before him and that, in our view, was a conclusion that he was entitled to reach. It was certainly not a conclusion that could be impugned as irrational.

[30] Before this court Mr McGleenan accepted that the applicant's advisors could have asked District Judge for the applicant to be referred to by an alphabetical letter or number but noted that no such application had been made upon his behalf. By way of reply Ms Quinlivan maintained that the applicant had sought anonymisation together with a reporting restriction during the course of his appearance at Lisburn Magistrates' Court on 26 March 2009 and that such orders were made by the District Judge hearing the application upon that occasion. In fact, the order made by the District Judge on 26 March 2009 was an order in accordance with Section 4(2) of the 1981 Act postponing publication of any facts which might lead to the identification of the accused, the dates contained in the charge and the dates of the application for postponement until the next remand on 17 April 2009. The District Judge was inclined to the view that he did have power to make a

restricted order granting anonymity to the applicant but not extending to any other details of the case but did not consider that any such order would provide protection for the same reasons.

[31] In Guardian News and Media Lord Rodger when referring to Article 8 said at paragraph 28:

> "28 Under the Human Rights Act 1998 article 8(1) requires public authorities, such as the court, to respect private and family life. But M does not need to ask for the anonymity order to prevent the court itself from infringing his article 8 Convention rights. Suppose the court considers, whether in the light of submissions or not , that, by publishing its judgment in the usual form, it will itself act unlawfully under section 6 of the Human Rights Act because it will infringe a party's article 8 Convention rights. In that eventuality the court does not deal with the matter by issuing anonymity orders to other people; rather it ensures that it acts lawfully by taking appropriate steps of its own. That presumably explains why, for instance, the letter M, instead of the appellant's name, is used in the judgments below. In this way the courts avoid what they perceive to be the problem that they would act unlawfully if they named M in their judgments and so infringed his article 8 rights."

[32] In the course of his submissions on behalf of the B.B.C. Mr Larkin suggested that the court ought to have accepted that it had power, and a duty under section 6 of the 1998 Act, to protect the appellant's Article 2 rights and then proceeded to use that power as a foundation upon which to issue an anonymity order in accordance with section 11 of the 1981 Act. In support of this submission Mr Larkin drew the attention of the court to the reference to section 11 in the Soldier B case. After pointing out that section 11 did not itself confer any power to grant anonymity, Latham LJ, at paragraph 16 of his judgment, emphasised the distinction between the common law power to be exercised in connection with the administration of justice, specific statutory exceptions and Article 2 of the Convention. He was satisfied that the relevant statutory power, section 94(2) of the Army Act, was not relevant and held that in order to make any order for anonymity the court would have to be satisfied that either the administration of justice would be seriously affected or there was a "real and immediate" risk to the lives of the soldiers if anonymity was not granted. Having considered the evidence he said at paragraph 18:

> "In the present case the claim to anonymity rests fairly and squarely on the risk to the lives of two of the soldiers, and the service history makes it clear that they would be at a real and immediate risk if they were identified."

After accepting that three other soldiers were also at risk by association the court proceeded to direct that their names should be withheld and that appropriate orders should be made under section 11.

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[33] However section 11 was also the subject of comment in the Guardian News and Media case when Lord Rodger said at paragraph 31:

> "31. Incidentally, Collins J appears to have thought that section 11 of the Contempt of Court Act 1981 was the source of the power to make anonymity orders that is in play in these cases. That view was mistaken. Section 11 is dealing with the particular situation where a court, having power to do so, allows a name or other matter to be withheld from the public in proceedings before the court. An obvious example is a court allowing the victim to withhold his name when giving evidence for the Crown in a prosecution for blackmail. Section 11 then gives the court the ancillary power to give directions prohibiting a newspaper which actually knows the name of the individual from publishing it. The section resolves any doubt about the power of the court in these circumstances to prevent persons other than the parties from naming the individual or mentioning the matter outside court. Cf Ex p P, The Times 31 March 1998, per Sir Christopher Staughton."

As indicated above the applicant's advisors did not seek to persuade the original District Judge to withhold the applicant's identity when the case was first listed and in the circumstances it is difficult to see the basis for applying for an order under section 11 at this stage – see R v Arundel Justices ex parte Westminster Press [1985] 1 WLR 708.

[34] We consider that the District Judge was correct in his interpretation and application of section 4(2) of the 1981 Act. In our view he did have power to make an anonymity order in order to protect the safety of the applicant by virtue of Article 2 of the Convention and section 6 of the Human Rights Act 1998. However, in view of his factual findings there is nothing to be gained by remitting the case to his jurisdiction. Accordingly the application will be refused. The applicant is of course free to renew his application to the

Magistrates' Court should he believe such a course of action to be warranted by fresh evidence and/or alternative legal argument. In the meantime the High Court injunction remains in force.