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IN THE CORONER'S COURT IN NORTHERN IRELAND

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

OPEN RULING ON APPLICATIONS FOR LIVE LINK, ANONYMITY AND SCREENING OF MILITARY WITNESSES

HUMPHREYS J

Introduction

[1] In a previous ruling, I upheld the claim for Public Interest Immunity ('PII') with the exception of the material relating to the location of Soldier H. I found that disclosure of the names of military witnesses would give rise to a real risk of serious harm to the public interest and, having carried out the balancing exercise, this risk outweighed any harm caused to the administration of justice.

[2] It therefore follows that the military witnesses are entitled to anonymity in the course of the inquest proceedings. I invited further submissions on other special measures which were necessary or proportionate in order to protect their identities.

[3] Two of the military witnesses, Soldier M and Solider N, intend to attend the inquest in person to give evidence. The following military witnesses, namely Soldiers A, B, D, E, G, H, J, K, L, O, P, Q, S, V, W, X, Y, Z, AA, AB, AD, and P1, have made applications for their evidence to be taken via a live link. It is noted that there remains an outstanding excusal application in respect of Solider F. These applications are advanced pursuant to the provisions of the Coronavirus Act 2020 and/or the court's general case management powers.

The Statutory Provisions

[4] Section 57 of the Coronavirus Act 2020 ('the 2020 Act') provides that Schedule 27 governs the use of live links in courts in Northern Ireland, including inquest

hearings. By a statutory rule made on 23 September 2022, these provisions were extended to 24 March 2023. Paragraph 2 of the Schedule states:

> "(1) A person may, if a court or statutory tribunal so directs, participate in any proceedings in the court or tribunal through a live link.
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> (2) A direction may not be given under this paragraph as respects a person's participation in proceedings as a member of a jury.
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> (3) A direction may be given under this paragraph in respect of a person—
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> (a) of the court or tribunal's own motion,
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> (b) on application by the person, or
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> (c) on application by a party to the proceedings.
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> (4) A court or tribunal may not give a direction under this paragraph unless the court or tribunal is satisfied that it is in the interests of justice to do so.
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> (5) In deciding whether to give a direction under this paragraph, the court or tribunal must consider all the circumstances of the case.
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> (6) Those circumstances include (in particular)—
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> (a) the views of the person;
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> (b) the views of the parties to the proceedings;
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> (c) public health interests.
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> (7) Where a court or tribunal refuses an application for a direction under this paragraph, it must—
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> (a) state openly its reasons for doing so, and
>
> (b) if it is a magistrates' court, cause the reasons to be entered in the Order Book.

> (8) Power of a court or tribunal to give a direction under this paragraph is additional to, and does not limit, any other power of the court or tribunal."

[5] The test is therefore one of the interests of justice to be considered in light of all the circumstances of the case. In this inquest, each of the applicants has expressed a strong preference for the use of live link to give their evidence whilst this course of action is objected to by the next of kin ('NOK').

[6] Counsel for the military witnesses asserts that the use of live link does not constitute an interference with the principle of open justice and will actually facilitate the efficient use of court time and obviate the need for travel arrangements from outside the jurisdiction into Northern Ireland. The security measures required for travel, transport and accommodation all amount, it is said, to an unnecessary use of resources. Furthermore, many of the military witnesses are of relatively advanced years and whilst the impact of the pandemic has reduced substantially, it remains inadvisable to engage in unnecessary travel.

[7] By contrast, the NOK contend that the use of live link does constitute an infringement with the principle of open justice. It is asserted that these military witnesses are the most controversial the inquest will have to deal with and it is simply not the same to have a witness challenged as to the veracity of his evidence over a live link rather than in person. Further, it is contended that the applications lack a sufficient evidence base, and they should be refused.

Use of Live Link in Inquests

[8] In the Ballymurphy Inquest [2021] NICoroner 6, Keegan J addressed the use of live link in a pre-2020 Act situation:

> "In addition, the issue of live link evidence arose and this was something that I granted in many of the applications as witnesses were outside the jurisdiction, fearful of coming to the jurisdiction and in some cases exhibited medical issues which would necessitate a provision of special measures. Of course, this inquest occurred pre the Coronavirus Act 2020 which allows for live link but I applied my common law discretionary powers in the inquest to allow for live link… I have no doubt that this method is a valuable tool in dealing with legacy inquests which will pertain after the Coronavirus Act 2020. There is a statutory regime regarding criminal trials in which live link is used, the test for special measures being whether or not this would be 'likely to improve the quality of the evidence given by the witness.' This medium is frequently used in other jurisdictions

> including the civil and family jurisdictions with the main focus being to improve the quality of evidence. In all of these applications I allowed the views of the next of kin to be taken and then I considered each case on its own merits." [paras 26 and 27]

[9] In the Inquest into the death of Patrick McElhone [2021] NICoroner 1, Keegan J commented:

> "Whilst live link was clearly a pragmatic solution during the pandemic, I have also utilised this medium in other inquests pre-pandemic under common law case management powers. In my view such methods are useful in legacy cases where witnesses, civilian and military, are often elderly and outside the jurisdiction. The focus in this type of exercise is to ensure that the evidence is obtained and transmitted in the most effective way." [para 9]

[10] Evidence of military witnesses was also given remotely in the Stephen Geddis inquest and also that into the death of Kathleen Thompson.

Consideration

[11] It is important to recall that, fundamentally, a coroner's inquest remains an inquisitorial process, even in the context of controversial legacy killings. No jury has been convened and I am the decision maker in respect of disputed facts. In order to make the decision-making process as effective as possible, the inquest will always seek the best evidence. If a witness gives evidence remotely, he or she will still be seen and heard by me. Insofar as it is suggested that the use of live link constitutes an interference with open justice, I reject that. The focus must be on whether the use of remote technology assists the inquest process in receiving evidence and using time and resources in an efficient and effective way.

[12] It is sometimes said that the use of remote technology is unsuitable in relation to witnesses whose credibility is under challenge. This does not, however, reflect judicial experience. In *Re One Blackfriars Limited* [2021] EWHC 684 (Ch), John Kimbell QC articulated his experience of holding a contentious trial using remote technology:

> "I did not feel in any way disadvantaged in my ability to assess the reliability or credibility of the oral witness evidence. If anything, the opposite was the case. The engineer host provided by Sparq not only ensured that the internet connection was sufficiently good and stable to enable remote cross-examination (well before the witness

> appeared) but also helped to ensure that the witness was generally positioned at a reasonable distance from the camera and in optimal light conditions. The result was in most cases as if I were sitting about 1.5 metres directly opposite both the witness and the cross-examining advocate with the trial bundle open in front of me. This permitted me to follow the ebb and flow of a cross-examination very well. If anything, I was in a better position to observe the witness's reaction to the questions and documents being put to them than if the trial had taken place in a traditional court room. In a typical Rolls Building court room, I would have been positioned behind a bench looking for the most part at the side of the witness's head from a distance of three or four metres while her or she either looked down into a paper trial bundle or at cross-examining counsel…My overall impression with all the witnesses, but in particular with the expert witnesses, was that giving evidence from their own offices or homes put them at their ease and assisted in getting the best evidence from them." [paras 20, 21]

[13] The learned judge also drew on the well-known comments of Leggatt LJ in *R (on the application of SS) v Secretary of State for the Home Department* [2018] EWCA Civ 1391 at paras [36] et seq in relation to the demeanour of witnesses, and the ability of judges to discern whether a witness is telling the truth from their body language and behaviour. Far more important is the ability of the cross-examiner to draw out inconsistencies in evidence, particularly in relation to known or probable facts or by reference to previous statements of the same witness.

[14] In *A Local Authority v Mother* [2020] EWHC 1086 (Fam), Lieven J commented:

> "[27] Having considered the matter closely, my own view is that it is not possible to say as a generality whether it is easier to tell whether a witness is telling the truth in court rather than remotely. It is clear from Re A that the Court of Appeal is not saying that all fact finding cases should be adjourned because fact finding is an exercise which it is not appropriate to undertake remotely. I agree with Leggatt LJ that demeanour will often not be a good guide to truthfulness. Some people are much better at lying than others and that will be no different whether they do so remotely or in court. Certainly, in court the demeanour of a witness, or anyone else in court, will often be more obvious to the judge, but that does not mean it will be more illuminating.

> [28] I was concerned that a witness might be more likely to tell the truth if they are in the witness box and feel the pressure of the courtroom, but having heard Mr Goodwin and Mr Verdan I do now accept that this could work the other way round. Some witnesses may feel less defensive and be more inclined to tell the truth in a remote hearing than when feeling somewhat intimidated in the court room setting. In the absence of empirical evidence, which would in any event be very difficult to verify, I can reach no conclusion on what forum is most likely to elicit the most truthful and/or revealing evidence."

[15] I have considered these examples and drawn on my own experience of the use of remote technology in arriving at my conclusion. I concur with the remarks of the Lady Chief Justice when she describes the use of live link as a valuable tool in the conduct of legacy inquests. I have determined that these military witnesses ought to be permitted to give their evidence by live link for the following reasons:

(i) I am quite satisfied that there will be no reduction in the quality of the evidence given to the inquest;

(ii) I will have every opportunity to assess the credibility of each of the witnesses;

(iii) The principle of open justice will not be interfered with;

(iv) The experience of recent inquests is that there has been no downside to the use of remote technology for the giving of oral evidence;

(v) There will be significant practical benefits to the inquest in terms of efficiency, flexibility and the saving of time and valuable resources.

Consequential Directions

[16] I am conscious that there is a need to make further directions in order to ensure the integrity of the inquest process and ensure that public access to the hearing is maintained.

[17] I therefore direct as follows:

(i) There must be a solicitor present in person with the military witness at all times during the giving of evidence;

(ii) The witness shall give evidence at a location to be notified to me and which I regard as suitable for the purpose;

(iii) Where practicable, there should also be present a member of the Legacy Inquest Unit during the giving of the evidence;

(iv) The public and media shall continue to have access to the inquest hearing via the medium of Sightlink.

[18] I will hear counsel as to any further directions.

Screening

[19] The PII certificate signed by the Secretary of State on 10 June 2022 states that appropriate measures will be sought to preserve the anonymity of the military witnesses, including screening even if their evidence is to be given by video link.

[20] This application does not therefore engage the familiar principles of *Officer L* [2007] UKHL 36 and *Re C's Application* [2012] NICA 47, rather the special measures are sought via the vehicle of the PII certificate.

The Legal Principles

[21] In *Re Ministry of Defence's Application* [1994] NI 279, the Court of Appeal considered a Coroner's ruling that three military witnesses should give evidence without screens. The inquest arose out of the shooting of three civilians by soldiers A and B. At that time 'shooters' could not be compelled to give evidence in inquest proceedings but three other solider witnesses were directed to attend by the Coroner. The Secretary of State signed a PII certificate to the effect that these soldiers (members of a specialist military unit) could only attend to give evidence screened from all except the coroner, the jury and the legal representatives of the Properly Interested Persons ('PIPs').

[22] The court held that it was appropriate for a Minister to advance a PII claim in respect of oral evidence, including the use of screens. The balancing exercise for the coroner was to measure the harm to national security against the infringement of the principle of open justice. Hutton LCJ stated:

> "The screening sought by the Secretary of State would be of a limited nature. The soldiers would still be seen and heard giving evidence by the coroner, the jury, and the legal representatives of the parties. They would also be heard giving evidence by the members of the public and by the press and media. The interference with a public hearing would be that the members of the public and of the press and media would not see the faces of the soldiers as they heard them give evidence…This is undoubtedly a restriction on the public nature of the hearing, but it is a limited restriction and the coroner will

> have to balance that limited restriction against the considerations of national security set out in the certificate of the Secretary of State, to which certificate he must give due weight."

[23] In the Ballymurphy Inquest, and that into the death of Daniel Carson when screening was permitted, this did not extend to relatives of the NOK. They were permitted to see the witness whilst he gave evidence. Similarly in the Jordan inquest, Horner J ruled that the police witnesses were not screened from the parents of the deceased whilst giving evidence. None of these cases involved the use of a PII Certificate – all were instances of the conventional application of anonymity and screening measures pursuant to common law and Article 2 of the European Convention on Human Rights ('ECHR').

[24] By contrast, in the McCaughey and Grew inquest, the Special Military Unit ('SMU') witnesses were screened from everyone except the coroner, the jury and the legal representatives.

[25] It is trite to say that every case is fact and evidence specific and must be determined in light of established legal principle. I do not need to record here what I said in my previous open ruling about the correct approach to PII in terms of the balancing exercise to be carried out and the weight to be attached to a PII certificate signed by a minister.

Consideration

[26] There are four possible outcomes to the screening application:

(i) The witnesses given their evidence without screens, in full view of the public;

(ii) The witnesses are screened from the public but seen by the coroner, legal representatives and the representatives of the NOK;

(iii) The witnesses are screened from all except the coroner and legal representatives; and

(iv) The witnesses are screened from all except the coroner.

[27] Outcome (iv) was that sought by the Ministry of Defence ('MOD') in its written submission. However, during the course of submissions it became clear that outcome (iii) was acceptable to it, but it maintained the position that the military witnesses should be screened from the NOK. To adopt outcome (i) would effectively nullify my determination that anonymity was required in the interests of national security since the witnesses would be seen by the public at large.

[28] Counsel for the MOD referred to some of the redacted intelligence material which has been disclosed in the course of the inquest which refers to an investigation being conducted by the Provisional Irish Republican Army ('PIRA') in East Tyrone into the circumstances surrounding the deaths at Coagh. The context of this inquest is said to be quite different from either Ballymurphy, Jordan or Thompson which involved the shooting of unarmed individuals.

[29] Counsel for the NOK stressed the core role played by the military witnesses in the deaths of the three deceased and emphasised that the NOK should be included in the process leading to the answers to the questions posed at the inquest.

[30] For reasons which can only be disclosed in a CLOSED ruling, I am satisfied on the basis of the evidence that if military witnesses are not screened from everyone save for the coroner and the legal representatives, this gives rise to a real risk of serious harm to national security.

[31] I am also satisfied that the use of screens does give rise to a departure from the principle of open justice and therefore a balancing act must be carried out between these different aspects of the public interest.

[32] I have no doubt that hostile actors would wish to know the identity of those individuals who fired shots at Coagh. There is a risk that anyone seeing one of these witnesses could identify him by some means, even inadvertently, or even recognise him. As against the risk to the individual and to national security more generally, I must balance the impact of screening on open justice and on the ability of the NOK to participate in the inquest process.

[33] I would echo the comments of Hutton LCJ in relation to the extent of the restriction imposed by the screening of the witnesses under outcome (iii) and also repeat my comments above relating to the nature of the coronial process and the importance of demeanour in the assessment of credibility. On my analysis, the screening of the military witnesses from all except the legal representatives does not prevent the inquest from carrying out its duty to rigorously examine the circumstances surrounding these deaths, including the key question as to whether lethal force was justified.

[34] I have concluded that screening from legal representatives would potentially hinder or prevent the inquest from properly exploring the evidence of these core witnesses. Indeed, it is hard to conceive of any circumstances in which a witness should be screened from the view of those lawyers asking questions of him.

[35] However, in the balancing act which I am required to carry out, I have determined that the real risk of harm to national security outweighs the infringement with the principle of open justice and that these witnesses should be screened from public view, including the NOK.

Conclusion

[36] The military witnesses concerned in this application will be entitled to be screened whilst giving their evidence from all save for the coroner and the legal representatives of the NOK.

[37] I will hear counsel as to any consequential directions.