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

Delivered: 22/06/2023

IN THE CORONER'S COURT IN NORTHERN IRELAND

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

RULING ON MEDICAL EXCUSAL APPLICATION IN RESPECT OF SOLDIER F

HUMPHREYS J

Introduction

[1] On 5 September 2022 an application for medical excusal was made in respect of Soldier F. At this time, the court was asked to excuse the witness from giving a statement or otherwise participating in the inquest on the basis that he lacked capacity. This was supported by a report from a consultant psychiatrist, Professor Fox.

[2] Thereafter, this mutated into an application for special measures in light of a second report from Professor Fox. I ruled on this application on 12 January 2023 and this ruling should be read in conjunction with that decision.

[3] By this time, a witness statement dated 10 November 2022 had been prepared by Soldier F in consultation with his legal representatives which proved that he was, in fact, able to participate in these proceedings. The special measures sought were to excuse him from giving oral evidence and to proceed by way of written questions and answers.

[4] Soldier F has been diagnosed as suffering from post traumatic stress disorder and a moderately severe depressive illness, as well as physical conditions which restrict his mobility.

[5] For the reasons set out in my previous ruling, he is an important witness in the inquest who speaks to many of the issues which are in contention.

[6] In January 2023 the court had the benefit of the reports prepared by Professor Fox and also by Dr Armstrong, consultant psychiatrist retained on behalf of the NOK. These experts also produced a joint statement and gave oral evidence.

[7] In the special measures application on behalf of Soldier F dated 10 January 2023 his counsel stated:

“F is not seeking medical excusal. Medical excusal would be a much more significant limitation on the inquest process than F seeking special measures.”

[8] Having heard the evidence and applied the relevant legal test, I determined that Soldier F should give oral evidence to the inquest, and be cross-examined, but that he would be entitled to certain special measures, viz:

- (i) He will be entitled to anonymity and screening;
- (ii) He should give evidence by livelink from his own home if possible or from another location suitable for the provision of a secure link;
- (iii) He should be attended by his solicitor and also, if he desires and circumstances permit, by a medical professional;
- (iv) He should be provided, 72 hours in advance, with a list of topics to be addressed in questioning together with a schedule of any documents which counsel intend to rely upon;
- (v) Regular breaks should be afforded to the witness, as and when required;
- (vi) The court should be configured in such a way as to limit the number of persons visible to the witness to the coroner and the counsel asking questions.

[9] Soldier F is scheduled to give evidence on 29 June 2023. The court was informed, from the Bar, that during the course of consultations with his legal representatives Soldier F ‘broke down’ and the consultations could not continue. After I heard all the evidence in this matter, I received a letter from Soldier F’s solicitor which confirms what I was told from the Bar. No evidence was called in this regard.

[10] An application is now made on his behalf for the court to review its previous ruling on the basis of fresh medical evidence from a newly instructed expert, Professor Fazel, and to excuse Soldier F from giving evidence.

The Medical Evidence

[11] As outlined in my previous ruling, Prof Fox changed his position between his first report in July 2022 and his second in September 2022. His initial opinion was that Soldier F was not able to provide a statement of any kind or otherwise give evidence to the inquest. This was comprehensively disproved in due course when Soldier F produced his detailed written account of events in November 2022.

[12] In his second report, Prof Fox opined that the witness would be unable to cope with giving evidence either in person or by video link. I found the reasons proffered for this change of position unpersuasive and concluded that the conclusions of Prof Fox were not based on an evidential substratum of fact.

[13] Dr Armstrong, retained on behalf of the NOK, has not examined Soldier F but has considered the reports and medical evidence and concluded that he is able to give oral evidence.

[14] Prof Fazel had a video consultation with Soldier F on 31 March and produced a report dated 7 May 2023. In it, he notes the medical history in his notes and records of post traumatic stress disorder and depressive symptoms since around 2017.

[15] Prof Fazel agrees with the diagnosis of PTSD and moderately severe depressive illness. No issue of capacity or cognitive impairment arises.

[16] In relation to the effect of giving evidence at the inquest, Prof Fazel opines:

“It is my view that there are significant risks to his mental health. The first is the likelihood of a deterioration in his mental health, which is very likely in my view...Another risk is that this deterioration will be severe in my opinion.”

[17] Prof Fazel purports to identify ‘risks’ when, in fact, it is a single risk, that of a deterioration in his mental health which he regards as likely, and which may be severe.

[18] Prof Fazel proceeds to set out the special measures “which could be considered” in order to minimise risk of mental health deterioration. It is odd, to say the least, that he fails to recognise that the coroner had already directed that six specific measures be put in place. In relation to the measures he outlines:

“It is my view that these measures will not mitigate the aforementioned risk of a deterioration in mental health. The key factors for Soldier F’s deterioration risk are in relation to re-engaging with the inquest process and material. Anonymity or support during the inquest will not address these factors.”

[19] The report therefore postulates a definite and categorical position in relation to the efficacy of special measures. Under questioning from the court, Prof Fazel accepted that special measures can and do mitigate against the risks of harm to vulnerable witnesses and, in this case, the risk of harm to Soldier F would be considerably ameliorated by the suite of measures directed. As such, the conclusion expressed in his report was simply wrong.

[20] Completely absent from the report is any analysis of how and to what extent the special measures direction already made by the court would serve to assist the witness and provide an environment which may reduce the risks to his mental health. Such an analysis would have been of considerable assistance to the court.

[21] Prof Fazel also finds that the risk of suicide would be moderately increased in this case. This conclusion is arrived at on the basis of identified risk factors, but it is also noted that he has not previously attempted suicide nor has he expressed any suicidal ideation. It is recorded that F told the psychiatrist that he did not wish to wake up some mornings, but this is not regarded as suicidal ideation.

[22] The court heard further evidence from Dr Armstrong who had prepared a supplemental report in light of the opinion expressed by Prof Fazel, albeit one which was limited to a desktop review. Dr Armstrong agreed that Soldier F presents with a moderately increased risk of suicide but not as a result of these inquest proceedings but rather as a result of his mental health issues when compared with a notional individual who does not suffer in this fashion.

[23] Dr Armstrong disputed the assertion that preparing for and giving evidence would lead to worsening of Soldier F's mental health. The experts also disagreed on the predictability of suicide.

Consideration

[24] I have had the benefit of considering all the medical evidence presented in this case and have heard the relevant experts give oral evidence and be cross-examined.

[25] There are two glaring and inexplicable omissions from Prof Fazel's report. Firstly, he fails to address how Soldier F was able to prepare a detailed witness statement in conjunction with his legal representatives if "re-engaging with the inquest process and material" was very likely to cause a deterioration in the witness's mental health. He accepted that there was no evidence at all of any deterioration caused by the considerable time that would have been spent engaging with the issues and documents which led to the production of the statement. More remarkably, Prof Fazel stated that he did not even ask Soldier F about the statement taking process. The fact that no harm was caused during this process drives a coach and horses through the primary conclusion of Prof Fazel.

[26] Secondly, there is no reference whatsoever in Prof Fazel's report to the apparent 'breakdown' undergone by Soldier F during subsequent consultations with his legal representatives. This is specifically referenced in the instructions sent to him by Devonshires solicitors on 17 March 2023. If, as the court was led to believe, this was the trigger for the instruction of a new expert witness, it is quite extraordinary that these events were not the subject of any comment or analysis by the expert.

[27] It was also evident, under questioning, that Prof Fazel had failed to consider the impact of special measures on this witness either adequately or at all.

[28] Quite inappropriately, without the permission or at the request of the court, Prof Fazel prepared an addendum report dated 12 June 2023 after he had been cross-examined in an effort to undo some of the damage which had been done to his credibility. This ought not to have occurred, but I have nonetheless taken its contents into account. In it he accepts that special measures would mitigate the degree of deterioration but not the risk of deterioration 'per se.' This is little more than an admission of the inadequacies of his previously expressed opinion.

[29] Secondly, he avers that preparing for giving of evidence would present a 'different set of stressors' than providing what he describes as a 'short witness statement.' He does this without, it would seem, any proper investigation of what the preparation of the witness statement actually entailed. It represents a thinly veiled effort to address an obvious shortcoming in his expert report. He also does not seek to rebut the assertion that the exercise of preparation of the witness statement did not result in any recorded deterioration in Soldier F's mental health. He does refer to the witness commenting about not wishing to wake up in the mornings, a point not referenced by Prof Fox, but makes no causal link between this and these inquest proceedings.

[30] For these reasons, I have concluded that Prof Fazel has failed to comply with his fundamental duty which is to assist the court by clearly addressing all relevant material and drawing attention to any matters which may affect the validity of an opinion expressed. In his addendum report he has exacerbated the situation by attempting to cover over the evident shortcomings in his evidence which were exposed at hearing. The reality is that Prof Fazel's opinion is pure conjecture, unsupported by any concrete evidence.

[31] I find that the conclusions expressed by Prof Fazel, both in respect of the likelihood of harm and the impact of special measures, are fundamentally undermined by these failings.

Conclusion

[32] Soldier F has, in effect, pursued three separate applications:

- (i) Medical excusal based on a want of capacity;
- (ii) Special measures by way of written questions and answers;
- (iii) Medical excusal based on adverse impact on his mental health.

[33] The medical evidence furnished on his behalf has been, for the reasons outlined in both rulings, less than satisfactory.

[34] The court is required, in a case such as this, to balance the competing rights of PIPs. This is an article 2 inquest, and the evidence of Soldier F is of central importance to the contentious issues. He is a competent and compellable witness. I am conscious, however, of his mental health and vulnerability and the impact of these proceedings on him and his Convention rights.

[35] On the basis of the evidence, I am satisfied that the correct balance can be struck by his giving evidence with the benefit of the special measures previously outlined.

[36] The application for excusal is refused and Soldier F will give evidence in accordance with the ruling which I previously gave on 12 January 2023.