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IN THE CORONER'S COURT IN NORTHERN IRELAND

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IN THE MATTER OF AN INQUEST TOUCHING UPON THE DEATHS OF DANIEL DOHERTY AND WILLIAM FLEMING

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RULING ON ENGAGEMENT WITH THE CORONER'S INVESTIGATOR AND THE PROVISION OF WITNESS EVIDENCE

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HUDDLESTON J

Background

[1] The issues dealt with in this ruling arise out of case management leading towards an inquest to be held into the deaths of Daniel Doherty and William Fleming.

[2] Whilst considerable preliminary work and investigation has been carried out in preparation for that inquest those who represent the military witnesses (witnesses F, G, H, I, J, P, Q and R) ("the Military Witnesses") have requested, through written submission, that those witnesses be allowed to provide their witness statements through their own solicitors (in this case Devonshires) rather than through the offices of the investigator appointed for that purpose by the Coroner's Service of Northern Ireland (CSNI). The Ministry of Defence (MOD) have filed written submissions which are supportive of that approach. Junior Counsel to the Inquiry, Steven McQuitty, circulated his note of advices to me, to all parties in advance of the hearing that was convened on 2 December 2022 to allow all parties to make oral submissions in support of their written submissions.

[3] Broadly speaking, there is acceptance across those submissions that a coroner may, by issue of a notice, require a person to attend an inquest to give evidence (section 17A(1)(a)(b) of the Coroners Act (NI) 1959 (the Act)) and may (again, by notice) require a person to provide evidence to the coroner about a matter specified in such a notice in the form of a written statement (section 17A(2)(a) of the Act). Those statutory provisions (and others that are relevant) have been replicated in the appendix to this judgment for ease of reference. In short, whilst those who represent the Military Witnesses accept that there is power to require a statement, they do not

accept that a Coroner has power to prescribe the method by which that statement might be given – other than to acknowledge that it must be in writing and that it be provided within a reasonable time. By reference to section 17B(2)(a) of the Act and the decision of the Court of Appeal in Northern Ireland in the case of *M4 v Coroner's Service for Northern Ireland* [2022] NICA 6 (M4) (which recognised that a witness has a right to protect themselves from self-incrimination) they argue that there is no rule – statutory or otherwise - that requires the provision of a witness statement only through the offices of an investigator appointed for that purpose by the Coroner's Service.

[4] Unsurprisingly, I was also referred to the Presiding Coroner's ruling on a similar (indeed, if not identical) issue which arose in the inquest into the deaths of *Messrs McNally, Doris and Ryan* (at [2022] NICoroner 6) (referred to in this ruling as "Coagh") where the Presiding Coroner (at paras [18]-[20]) accepted that there is "no statutory power to require a witness to attend before an LIU investigative interview nor to provide a witness statement through a particular process."

[5] To demonstrate the flexibility which has been adopted in other inquests I was also referred to the approach adopted by Keegan J (as she then was) in the *McElhone* inquest proceedings ([2021] NICoroner 1) where, absent recent or updated witness statements of any type, the judge permitted transcripts of oral evidence to be provided to the parties of the witnesses' examination in chief and then allowed an adjournment of the hearing to facilitate later cross-examination of those witnesses on the evidence given. This has been described as "the *McElhone* approach" – a shorthand term I adopt in this ruling.

[6] The submissions made by Ms Quinlivan KC for the next of kin (NOK) describe the proposal now made by those who represent the Military Witnesses as being a "significant departure" from the approach which is outlined and, indeed, advocated for in the Witness Protocol for Legacy Inquests (the Protocol) which was issued on 6 October 2020. The Protocol was promulgated as a way of providing expedient case management directions within (inter alia) the very area that is under contention. Before it was promulgated the Protocol was widely consulted upon. It recognises, at its core, that engagement with witnesses is primarily a matter for the coroner. It also provides procedural guidance as to how the coronial discretion may be exercised to ensure that legacy inquests are conducted in a way that is transparent, fair and proportionate.

[7] Fundamentally, the Protocol makes it clear that it is a matter for the coroner to determine, when a statement has been provided, whether or not it is potentially relevant to the inquest, in which case it will be disclosed to potentially interested parties (PIPs) (subject to issues of public interest immunity, anonymity and other necessary redactions).

[8] The NOK submit that either the Protocol should be followed in this case or the *McElhone* approach be adopted in preference to what is now advanced on behalf of the Military Witnesses.

[9] In support, it is argued that section 17A(2) envisages a "level of control over the statement taking process" something which, on the case made by the NOK, involves something more than the passive receipt of prepared statements through their instructed legal representatives. They expand upon this to argue that common law fairness and the provisions of Article 2 ECHR require an investigation by/on behalf of the coroner that is independent and impartial in both law **and practice** (their emphasis).

[10] In short, what is argued on behalf of the NOK is that whilst they accept that section 17A(2) may not give the coroner **power** to require witnesses to produce his or her statement through a CSNI investigator they suggest that the scheme that exists under the Act (when taken as a whole) should be interpreted in such a way that the public interest and the spirit of the legislation requires the coroner to undertake the relevant investigations. I was referred to a ruling provided by Tom Kark KC (Chair) of the Muckamore Abbey Hospital Inquiry in which he resisted an application by solicitors on behalf of a certain group of witnesses who expressed a wish to be represented by those whom they had instructed (in that case Phoenix Law) and had refused to give statements to CFR (the solicitors appointed by the Inquiry to perform that role) which raises similar points. I have considered the comments to which I was taken but feel that, not least because it is an inquiry, those comments can be distinguished from the issues under consideration in this Inquest.

Consideration

[11] I was the Presiding Coroner at the time when the Protocol was promulgated and I remain of the view that parties should be encouraged to adhere to the Protocol. The principles which lie behind it and, indeed, which motivated it were largely to provide for transparency and avoid delay in the provision of evidence to inquests such as the present one.

[12] I vehemently resist any suggestion that the Protocol is unfair – it was negotiated over a prolonged period and all stakeholders (including some of those who appear in this inquest) had the opportunity to provide input at that time and prior to its promulgation.

[13] Having said that, I fully accept (as did Humphreys J in Coagh) that the Protocol itself does not impose any legally enforceable obligations. The legal requirements themselves are to be found in the Act and the 1963 Rules – a point which all parties either through their written or oral submissions appear to accept. Those legislative provisions do not contain the gloss that Ms Quinlivan urges on me on behalf of the NOK. It seems quite clear to me that on any reading of section 17A it does not encompass an express power to either require someone to attend before

an LIU investigator for the purposes of interview nor, indeed, to require provision of a witness statement through any particular process.

[14] As to the overall question of fairness and Article 2 compliance that Ms Quinlivan also raises, I am more than satisfied at this stage that this can be met through the provision of statements by the Military Witnesses through their legal representatives. I am content to allow that approach to be adopted as a way of advancing the evidence to this Inquest. As Humphreys J has emphasised in Coagh, and I myself accept, whilst those representatives have a duty to their respective clients, they also have duties as officers of the court.

[15] Further, in the final instance, if what is produced is unclear or obfuscates on the issues that are relevant to this Inquest, then further options can then be considered. Beyond that, however, in the present case the real protection is that the Military Witnesses have already agreed to attend the inquest and provide evidence upon which they can then be questioned by each of the other parties. That approach itself is the cornerstone of the system of justice which we operate in this jurisdiction and, indeed, is itself a hallmark of fairness and compliance with the requirements of the Convention itself. That same voluntary submission to the Inquest Hearing has not necessarily been the case in other Inquests and accordingly has raised different considerations.

[16] Counsel for the NOK have, as a fallback argument, argued that if the Protocol is not to be followed then the inquest should adopt the *McElhone* approach. Frankly, I think it is too early to determine that question. Having determined that the Military Witnesses can provide witness statements through their legal advisers it follows that I must receive those and consider them under the usual parameters. It is only after that, when those that are relevant will be promulgated to the PIPS, that I could properly consider whether or not it would be appropriate in the circumstances to admit them and/or to adopt any alternative process – such as the *McElhone* approach. I do not accept any suggestion that it is an 'either/or' situation. The interests of fairness are something that must be considered on an ongoing basis as this inquest and the evidence before it, progresses. Permitting statements to be provided by the Military Witnesses through their lawyers is not something which I consider is automatically non-compliant with Article 2, nor does it automatically breach the requirement of common law fairness.

[17] To allow matters to be progressed, all relevant evidence must be analysed and subjected to scrutiny. Thereafter, it will be appropriate for me to consider the next stages and that may, or may not, involve service of additional notices under the provisions set out in section 17A and/or may or may not involve a consideration of whether the *McElhone* approach is something which should be adopted in all the circumstances.

[18] I consider that any other suggestion, at this stage of the proceedings, if not flawed, is certainly premature.

[19] In closing, I deal with one point that arose in submissions/cross submissions and, whilst premature, I set out my views now for the further guidance of the parties. Whilst I did not understand it to be their case, a point was made that those that represent the Military Witnesses might (on their case) be suggesting that s.17B(2) and M4 and issues around the privilege against self- incrimination would somehow operate to constitute a veto on the general power of the Coroner to compel attendance. Mr Mulholland KC clarified his clients' position both under the Act and section 67 of the Judicature Act (NI) 1978 (and the interplay between the two) and specifically on the issue of the privilege against self-incrimination in this context. That was helpful and clarifies that there was no actual dispute between the parties but, lest there be any doubt on the issue, I do not accept that either section 17B or the decision in M4 is justification of any such an interpretation. Whilst the issue is not actually before me in this ruling, I note the debate and include the clarification at this stage for the ease of all parties.

APPENDIX A

Legal Framework

1. Section 17A of the Coroners Act (Northern Ireland) 1959 ('the Act') provides:

> "**17A Power to require evidence to be given or produced**
>
> (1) A coroner who proceeds to hold an inquest may by notice require a person to attend at a time and place stated in the notice and—
>
> (a) to give evidence at the inquest,
>
> (b) to produce any documents in the custody or under the control of the person which relate to a matter that is relevant to the inquest, or
>
> (c) to produce for inspection, examination or testing any other thing in the custody or under the control of the person which relates to a matter that is relevant to the inquest.
>
> (2) A coroner who is making any investigation to determine whether or not an inquest is necessary, or who proceeds to hold an inquest, may by notice require a person, within such period as the coroner thinks reasonable—
>
> (a) to provide evidence to the coroner, about any matters specified in the notice, in the form of a written statement,
>
> (b) to produce any documents in the custody or under the control of the person which relate to a matter that is relevant to the investigation or inquest, or
>
> (c) to produce for inspection, examination or testing any other thing in the custody or under the control of the person which relates to a matter that is relevant to the investigation or inquest.
>
> (3) A notice under subsection (1) or (2) shall—

(a) explain the possible consequences, under subsection (6), of not complying with the notice;

(b) indicate what the recipient of the notice should do if he wishes to make a claim under subsection (4).

(4) A claim by a person that—

(a) he is unable to comply with a notice under this section, or

(b) it is not reasonable in all the circumstances to require him to comply with such a notice,

is to be determined by the coroner, who may revoke or vary the notice on that ground.

(5) In deciding whether to revoke or vary a notice on the ground mentioned in subsection (4)(b), the coroner shall consider the public interest in the information in question being obtained for the purposes of the inquest, having regard to the likely importance of the information.

(6) A coroner may impose a fine not exceeding £1000 on a person who fails without reasonable excuse to do anything required by a notice under subsection (1) or (2).

(7) For the purposes of this section a document or thing is under a person's control if it is in the person's possession or if he has a right to possession of it.

(8) Nothing in this section shall prevent a person who has not been given a notice under subsection (1) or (2) from giving or producing any evidence, document or other thing."

2. Section 17B provides:

"**17B Giving or producing evidence: further provision**

(1) The power of a coroner under section 17A(6) is additional to, and does not affect, any other power the coroner may have—

(a) to compel a person to appear before him;

(b) to compel a person to give evidence or produce any document or other thing;

(c) to punish a person for contempt of court for failure to appear or to give evidence or to produce any document or other thing.

But a person may not be fined under that section and also be punished under any such other power.

(2) A person may not be required to give or produce any evidence or document under section 17A if—

(a) he could not be required to do so in civil proceedings in a court in Northern Ireland, or

(b) the requirement would be incompatible with a [retained EU obligation].

(3) The rules of law under which evidence or documents are permitted or required to be withheld on grounds of public interest immunity apply in relation to an inquest as they apply in relation to civil proceedings in a court in Northern Ireland."

3. Section 17C provides:

"**17C Offences relating to evidence**

(1) It is an offence for a person to do anything that is intended to have the effect of —

(a) intentionally to suppress or conceal a document that is, and that the person knows or believes to be, a relevant document, or

(b) preventing any evidence, document, or other thing from being given or produced for the purposes of such an investigation or inquest, or to do anything that the person knows or believes is likely to have that effect.

(2) It is an offence for a person—

(a) intentionally to suppress or conceal a document that is, and that the person knows or believes to be, a relevant document, or

(b) intentionally to alter or destroy such a document.

(3) For the purposes of subsection (2) a document is a "relevant document" if it is likely that a coroner making any investigation or holding an inquest would (if aware of its existence) wish to be provided with it.

(4) A person does not commit an offence under subsection (1) or (2) by doing anything that is authorised or required—

(a) by a coroner, or

(b) by virtue of section 17B (2) or (3) or any privilege that applies.

(5) Proceedings for an offence under subsection (1) or (2) may be instituted only by or with the consent of the Director of Public Prosecutions for Northern Ireland.

(6) A person guilty of an offence under subsection (1) or (2) is liable on summary conviction to a fine not exceeding level 3 on the standard scale, or to imprisonment for a term not exceeding 6 months, or to both."

4. Rule 9(1) of the Coroners (Practice and Procedure) Rules (Northern Ireland) 1963 ('the Rules') provides that no witness shall be obliged to answer any question tending to incriminate himself or his spouse.

5. Rule 9(2) of the Rules provides that where it appears to the coroner that a witness has been asked such a question, the coroner shall inform the witness that he may refuse to answer.

The Protocol

6. In addition to the Act and the Rules a bespoke Witness Protocol in Legacy Inquests ('the Protocol') was issued, after consultation, by Mr Justice Huddleston (as then Presiding Coroner) on 6 October 2020. The Protocol provides, in summary:

(a) Witnesses and state bodies are expected to co-operate fully with the Coroner at all times in order to ensure that the Coroner's investigation is progressed in a timely and effective manner (para 2);

(b) The purpose of the Protocol is to provide a 'general guide' to the processes used in legacy inquests for, inter alia, taking statements from witnesses (para 3);

(c) The Protocol applies to all outstanding legacy inquests (para 4);

(d) Decisions on the application of the Protocol are to be made on a case by case basis (para 6);

(e) The overriding objectives of the Protocol are to ensure, inter alia, that each legacy inquest is fully and properly investigated in accordance with the relevant legal principles, that each legacy inquest is managed in a way that is transparent, fair and proportionate and that there is full and effective participation of all Properly Interested Persons ('PIPs') in each legacy inquest, particularly bearing in mind the needs of the next of kin (para 7);

(f) The role of the Legacy Inquest Unit ('LIU') is to support Coroners assigned to legacy inquests. Correspondence from the LIU is issued on behalf of the Coroner (paras 10-11);

(g) The purpose of an interview with a witness (which includes a potential witness) is to hear the witness's recollection of the relevant events and facilitate the witness in making a statement for the assistance of the Coroner (para 39);

(h) Unless a Coroner directs otherwise, such interviews will be conducted on behalf of the Coroner by an appropriately trained member of the LIU (para 40);

(i) A witness may be legally represented at the interview (para 42);

(j) During interview any previous account the witness gave will be available so that the witness may refresh their memory. The witness may be asked to comment on matters outlined in any previous account to confirm their accuracy. The witness may be shown other materials, such as maps and photographs, to assist their recollection (para 43);

(k) At the end of an interview the witness will be invited (and expected) to sign and date a witness statement setting out their account (para 44);

(l) It is the Coroner's aim that a witness should (in general) be interviewed only once in order to obtain a witness statement (para 46);

(m) Where the witness is a state body witness, the witness statement will be provided to an appropriate state body for a sensitivity review, the purpose of which is to facilitate the state body in identifying for the Coroner's consideration provisional redactions to the statement. In order to ensure that the inquest process is as transparent as possible, the Coroner expects any redactions which are proposed to be reasonable and proportionate and in accordance with any redaction strategy which the Coroner may see fit to apply (paras 57-58).

(n) All witnesses are encouraged to participate voluntarily in an inquest (para 70) but where a witness is unable to assist (or refuses to do so) for non-health reasons then the Coroner will take any steps they consider appropriate to obtain the assistance of the witness (para 72).