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*Judgment: approved by the Court for handing down (subject to editorial corrections)**	*Delivered:*	**19/04/2021**

IN THE CROWN COURT FOR NORTHERN IRELAND
SITTING AT BELFAST

R

v

SOLDIER A and SOLDIER C

RULING ON APPLICATION FOR ANONYMITY

Mr L McCollum QC with Mr I Turkington (instructed by McCartan Turkington Breen Solicitors) for the Defendants
Mr L Mably QC with Mr S Magee QC (instructed by The Public Prosecution Service) for the Prosecution

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O'HARA J

Introduction

[1] The defendants are former members of the Parachute Regiment. They are jointly charged with the murder of Joe McCann who was shot dead by soldiers on 15 April 1972 in the Markets area of Belfast. The issue at this point is whether they should be named or whether they should be anonymised. This leads into an issue about the various forms which anonymization can take.

Background

[2] The decision to prosecute the defendants was taken by the Public Prosecution Service and issued in December 2016. The anonymity issue has been "live" since then but without any ruling having been made, either in the Magistrates' Court or the Crown Court. Colton J expressed dissatisfaction with this as a result of which updated submissions were presented in 2020. It was however agreed that the court needed to have an up to date threat and risk assessment before it could rule on anonymity. A threat assessment analyses the level of intent to harm the defendants

whereas a risk assessment analyses their level of vulnerability to that threat. There may therefore be cases where the threat level is high but the risk level is low.

[3] It might be said that all defendants in criminal trials face some risk if they are identified. Despite the presumption of innocence there are cases in which there may be a risk of some form of attack e.g. a so-called revenge attack. Even if a person is acquitted s/he might still face the risk of attack. Notwithstanding this the position in the overwhelming majority of cases is that defendants are named and appear in court where they can be seen by all. That happens because of the importance which is attached to the principle of open justice. Applying that principle, the public is entitled to know who is before the courts and what they look like.

[4] Even in Northern Ireland, with our dark history, most people who have been prosecuted over the last 40-50 years have been identified. This includes those policemen and soldiers who have faced charges up to and including murder. The same principle of openness applies to the vast majority of witnesses who have given evidence in these cases. During the worst days of our troubles, police officers who were under direct personal threat from paramilitary organisations gave evidence in open court, named and visible. In a number of cases which are pending before the Crown Court, relating to shootings from many years ago, the soldiers who have been charged have been named.

[5] What then is said to be different about this case? In the submissions of Mr McCollum QC, who for the purposes of this application represents both defendants, there are two distinguishing features. The first is that the defendants served in the Parachute Regiment which, in the eyes of some people, has a notorious reputation, not least because of what was done by its members in Derry on Bloody Sunday. The second is that the victim of the shooting in this case, Joe McCann, was no ordinary civilian. He was instead a well-known member of the Official IRA who had come to prominence because of his involvement or alleged involvement in various confrontations with the security forces and loyalists.

[6] The defendants called two witnesses on the issue of threat and risk. The first was Mr Alan McQuillan, a retired Assistant Chief Constable in the police in Northern Ireland with significant experience in dealing with and investigating terrorism and organised crime. The second was Mr Mark Veljovic. He too is a former senior police officer, in the Metropolitan Police. He has extensive experience in counter-terrorism, both as a police officer and in the Home Office and has advised the inquiry into undercover policing in Britain on levels of risk to former undercover officers.

[7] I accept the qualifications of each expert to advise the court on what the threat and risk levels are to soldiers A and C if they do not retain their anonymity.

[8] In the present case the defendants are not at any meaningful risk before trial so long as they remain anonymous. For the duration of the trial I am satisfied that

they will not be at risk because they will have protection from the Ministry of Defence in conjunction with the PSNI. If they are convicted and are therefore sent to prison any risk to them will become the responsibility of the governor in whichever prison they are jailed. In these circumstances, given the fact that anonymity lost cannot later be restored, the real issue is what risk they would be exposed to if they were acquitted and returned home. Their homes are not in Northern Ireland but are in Great Britain. Other than that I do not know and do not need to know where those homes are.

[9] An up to date risk analysis was provided to the court by Detective Inspector Pete Billingsley of the PSNI Legacy Investigation Branch. It was his intelligence analysis which satisfied me that there will be no risk of any significance during the trial. His further analysis then makes the following points:

(i) Any risk assessment can only address threats which are currently known. What might happen in the future is unpredictable e.g. the capabilities of terrorists (in this case dissident republicans) might increase or decrease or there might be a ceasefire.

(ii) The current threat level within Northern Ireland for the defendants is low but might rise above low if anonymity is removed.

(iii) The current threat level within Northern Ireland in relation to domestic related terrorism is severe i.e. an attack is highly likely.

It was not part of the Detective Inspector's remit to assess risk levels outside Northern Ireland.

[10] In addition to this assessment I have an assessment dated September 2020 from MI5 which makes the following points:

(i) The threat level to the defendants in both Northern Ireland and Great Britain is low so long as they remain anonymous.

(ii) The overall threat level in Northern Ireland is severe.

(iii) If anonymity is removed the threat level to them in Northern Ireland has the potential to rise above low.

(iv) If anonymity is removed the threat level to them in Great Britain has the potential to increase but it is likely to remain within the same low band.

(v) The extent of any increase in the level of threat will depend on whether any subsequent intelligence is received and the nature of that intelligence but that can only be assessed at the time.

[11] The main arguments advanced by Mr McQuillan and Mr Veljovic were:

(i) This is the only legacy trial in which soldiers are accused of murdering an active IRA leader.

(ii) Mr McCann retains iconic status among republicans, even half a century after his death.

(iii) It is the ambition of dissident republicans to emulate the Provisional IRA and launch attacks on targets in Great Britain.

(iv) To date the security forces have managed to contain dissident republicans with some success but attempts to send parcel bombs to Great Britain were made in 2014 and more recently in 2019.

(v) It simply is not known whether the current level of containment will continue or whether the capabilities of dissident republicans will increase.

(vi) A former paratrooper charged with the murder of Mr McCann would be a prize target for dissident republicans even if he had been acquitted.

(vii) If the names of the defendants are revealed it will not be that difficult to find them, especially since their approximate ages are known.

(viii) The lives of family members would be put at risk if anonymity was removed.

[12] Mr Veljovic disagreed with the September 2020 MI5 assessment on the single issue of whether the threat to the defendants in Great Britain would rise above low if anonymity was removed. He contended that MI5 are wrong to suggest that it would not; he said "that could not possibly be asserted because it would depend so much on circumstances and capabilities in the future." And he added that this did not just mean over 3 or 6 months in the future but over a much longer period.

The Law

[13] The prosecution and defence agreed on the well-established principles which apply to applications such as this for anonymity. They are derived from a series of cases including *Re L* [2007] 1 WLR 213 (a case about whether police witnesses at a public inquiry in Northern Ireland should be given anonymity) and *R v Marine A* [2014] 1 WLR 3326 (a case about soldiers having anonymity removed at the end of a court martial at which they faced charges of murder).

[14] The principles which are found in these authorities can be summarised as follows:

(a) The starting point for the court is that it has a duty to follow to the maximum degree possible the principle of open justice.

(b) The threshold for departing from that principle is high.

(c) The court, as a public authority within the meaning of section 6 of the Human Rights Act 1998, has an absolute duty under Article 2 of the European Convention on Human Rights to protect life and under Article 3 to prevent anyone being subjected to inhuman or degrading treatment.

(d) These obligations have both negative and positive aspects so that in the case of Article 2 the negative obligation is not to take life whereas the positive obligation is to take steps to prevent the loss of life.

(e) The court also has a duty under Article 8 to respect private and family life which is not absolute but which is qualified so that protection is given subject to proportionate and necessary interference.

(f) The court has a duty under Article 10 to respect freedom of expression. This includes the right of the media to report court proceedings and impart information. The right is qualified, not absolute, and is to be protected subject only to proportionate and necessary interference.

(g) Section 12 of the Human Rights Act 1998 requires courts generally to recognise the importance of journalism and the public interest in reporting.

(h) The absolute Article 2 positive obligation to protect life arises only when it is shown that the risk to life is "real and immediate" – Lord Carswell in *Re Officer L* at paragraph 20.

(i) In this context a real risk is one that is objectively verified while an immediate risk is one that is present and continuing – Lord Carswell at paragraph 20 approving Weatherup J in *Re W's Application* [2004] NIJB 67 at paragraph 17.

(j) If there is a risk which is neither fanciful nor trivial it constitutes a real risk – Girvan LJ in *Re Officers C and others* [2012] NICA 47 at paragraphs 41-42.

(k) The fact that an individual feels himself to be at risk does not mean or approve that he is but if the fear is genuine it is relevant when considering if the risk is real.

(l) Apart from the court's obligation under the Human Rights Act 1998 it also has to consider the common law duty of fairness. The principles which apply to the duty of fairness are "distinct and in some respects different from those which govern a decision made in respect of an Article 2 risk. They entail the consideration of concerns other than the risk to life, although … an allegation

of unfairness which involved a risk to the lives of witnesses is pre-eminently one that the court must consider with anxious scrutiny." – see Lord Carswell at paragraph 22.

(m) Subjective fears, even if they are not well-founded, can be taken into account. It is unfair and wrong that witnesses should be avoidably subjected to fears arising from giving evidence, the more so if that has an adverse impact on their health. It is possible to envisage a range of other matters which could make for unfairness in relation to witnesses. Whether it is necessary to require witnesses to give evidence without anonymity is to be determined by balancing a number of factors which need to be weighed in order to reach a determination – see Lord Carswell at paragraph 22.

Discussion

[15] I have considered all of the evidence, oral and documentary, and the oral and written legal submissions provided for which I am grateful. The prosecution through Mr Mably QC maintained a neutral stance on the anonymity application. It was correct to do so. During his questioning of the two experts however Mr Mably probed whether the defendants actually face a risk which is real and immediate or whether it is just speculative to suggest they do. I agree that that is the issue upon which I must focus.

[16] There is much evidence that dissident republicans want to emulate the Provisional IRA but have, so far, been contained with some (but not total) success by the security forces. As Mr Mably put it, the difficulty lies in assessing future risks. I have to decide this on the basis of what is known or can reasonably be anticipated but even that involves some guesswork since nobody pretends to know precisely what threat dissident republicans might present in the future. What is clear however is that despite the significant efforts of the security forces the risk level in Northern Ireland remains severe so that an attack is highly likely.

[17] The fact that the defendants live in Great Britain and would return there if they were found not guilty means the risk to them is less than if they lived in Northern Ireland. The MI5 assessment is that if they lost anonymity and returned to Great Britain the risk to them would remain low. I agree that might be the case but I cannot dismiss the proposition that it might not be, for the combination of the two reasons advanced by Mr McCollum QC. Despite my instinctive resistance to anonymity and, more importantly, my duty to ensure the most open and public hearing possible I cannot dismiss the risk to the defendants in this case as being fanciful or trivial. I accept the case advanced on their behalf that if their anonymity was removed in full they would face real and imminent risk to their lives and physical safety within the meaning of Articles 2 and 3 in the event that they were found not guilty and returned to Great Britain.

[18] It is obviously impossible to say today what the verdict in this trial will be – the trial hasn't even started. However, if anonymity is removed now and the defendants are ultimately acquitted it would be impossible to restore anonymity.

[19] In these circumstances I am driven to conclude that the defendants must retain some level of anonymity. During the course of the submissions last week I discussed with counsel what that level might be. I suggested that if their names were withheld and they continued to be known as 'A' and 'C' there was no reason why they should be screened behind a curtain. That possibility was not resisted by counsel subject to appropriate precautions being put in place.

[20] Since that hearing I have considered in more detail what the various options are. I now confirm that while the defendants' names must be withheld in order to protect them from the risk of being tracked down and attacked, it is not necessary to screen them from the view of those present in the courtroom.

[21] If they sat in the dock during the trial they would have their back to the public gallery and could only be seen, and even then only from the side, as they entered and left the courtroom. In this non-jury trial they will sit instead in the jury box from where they will be side-on to the public gallery and therefore visible within the courtroom but not on Sightlink. If they give evidence at any point in the trial they will do so in open court but they will not be visible on Sightlink to avoid the risk of screen grabs.

[22] In my judgment requiring them to be visible within the courtroom is the most that I can order so as to protect their Convention rights while also delivering the most open trial possible.

[23] It is a criminal offence to take photographs in court – section 29 Criminal Justice (NI) Act 1945. Notices will be placed outside and inside the court to advise everyone in court of that fact. And the order in relation to anonymity will extend to drawings or impressions which might be made in court.

[24] I will hear counsel on any other steps which require to be taken.