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IN THE CORONER'S COURT IN NORTHERN IRELAND

BEFORE THE CORONER
MR JUSTICE HUDDLESTON

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

APPLICATION TO ADDUCE SIMILAR FACT EVIDENCE

Background

[1] This application is set in the context of a cross-referencing schedule that has been prepared by the Ministry of Defence (MOD) and circulated to the potentially interested persons (PIPs) identifying by reference to a cypher, the involvement of those who will give evidence in this inquest in other similar incidents. A slightly amended copy of the Schedule is attached because it explains the exact cross over of those witnesses. All of those referred to were members of the Special Military Unit (SMU) that was deployed in Northern Ireland during the Troubles. On the back of the production of that schedule in its final form (in July 2023) the next of kin (NOK) have sought to adduce into evidence in this inquest details of those other incidents on the basis that "[it] may provide evidence which is of actual relevance to the issues that this inquest will … consider **in the context of the scope of this particular inquest**." [Emphasis added]

[2] The scope to which reference is made is that which has been identified in the provisional scope document that was circulated and commented on by the parties in/around April 2023 (The Scope Document) before the commencement of the inquest and in which the provisional scope of this inquest was set out (the Scope). Whilst the scope of this inquest is necessarily kept under review nonetheless the statutory questions with which this inquest is primarily concerned are specific to the deaths of Mr Daniel Doherty and Mr William Fleming on 6 December 1984.

[3] The cross referencing schedule, as I have said, identifies a number of incidents in which the SMU were involved. From that document it is clear that Former Soldiers A, B & C were the ones who discharged their weapons in the incident under investigation. Former Soldiers C, D, E, I & T were involved in the Hogan & Martin incident (also in 1984) but did not fire their weapons. Soldier I had a command position in that

incident. Former Soldiers F, P R & T were involved in the Devine, Devine & Breslin incident (in February 1985) but did not fire. Former Soldiers B and G were also involved in that incident and did fire their weapons. Former Soldier H is the only one who had involvement in all eight of the incidents and then in various command capacities. It cannot be said that there is any pattern – other than the fact that those that I mention were attached to the SMU. It is clear from information provided to me and to the PIPs that they did not all serve at the same time and as will be apparent from the Schedule they were not all involved in the same incidents. The cross over is that detailed in the Schedule.

[4] Based on the detail of the schedule (and more specifically the material that has been disclosed about the incidents detailed therein) the NOK advance the argument that the similar fact evidence which they now wish to deploy meets the threshold for relevance. They highlight eight indices which they have extracted from a review of the incidents and upon which they base that contention:

(i) They say that the incidents were close temporally;

(ii) They say that the incidents appear to have involved the same SMU;

(iii) It is their contention that it is a feature of each that force was deployed instantly and lethally – but in a controlled and deliberate fashion without prior warning or challenge;

(iv) They say that there is evidence to suggest that men were shot whilst lying on the ground and vulnerable;

(v) They say that the soldiers involved seek to justify their shooting of men who did not fire back by claiming to be under threat/in immediate danger;

(vi) They say there was what might be said to be a pattern of precision shots;

(vii) They allege that in each incident steps were taken by the SMU - to include interference with the "crime scene" - which impacted adversely upon any subsequent investigation; and

(viii) They say that, as in this case, the SMU appears to have been in charge of the Divisional Mobile Support Unit (DMSU) and in another instance the DMSU appears to have been kept in comparative ignorance as to what was going on as regards military operations.

[5] In their wider submissions the NOK look at each of the incidents in turn and comment in detail upon those alleged similarities. I do not rehearse that review here. From that review, however, those that act for the NOK arrive at what they call certain "thematic issues" which they say emerge:

(a) They say there are multiple instances of members of the SMU purporting to

feel themselves under "threat" so as to justify firing which allows for the inference either that these soldiers are 'supernaturally predisposed to feel such threats, or claim such threats after the event to cover up the true facts of the incidents';

(b) Such inference is supported, they say, by the evidence that, in point of fact, no actual shot ever appears to have been fired at SMU members during any of these incidents;

(c) They suggest that there are multiple incidents evidenced where shooting is described (as is the case in the incident under investigation) in terms of there being shots fired, then a pause, then further shots – indicating controlled and deliberate shooting and a targeting of the various deceased;

(d) They say there are multiple instances of evidence indicating that various deceased were shot whilst prone or in vulnerable positions suggestive of a 'coup de grâce or a "finishing off" a job once started' (to adopt their wording);

(e) Allied with this they say there are a disturbing number of the incidents involving what might be called "head shots" which may have been delivered 'as a coup de grâce, or if not, indicate precision shooting designed to kill';

(f) They suggest that several of the incidents involved the deceased engaging in what could be considered 'superhuman feats of endurance which then justify them being fired upon again in the nature of a finishing-off';

(g) They suggest that there appears to be a complete absence of any challenge being raised or shouted or warnings issued before firing across all of these fatal incidents;

(h) They say there are repeated instances of soldiers interfering with the scene and focus, in particular, at the removal of weapons from the scene – 'which allows/may allow for a subsequent ability to control a narrative without proper forensic analysis of an undisturbed scene';

(i) The other thematic matters of note they say are that these incidents all involve the same SMU, "and it is believed the same sub-unit Commander H; who … in conjunction with his Team Leaders would be responsible for the detailed tactical planning of an operation."

(j) they submit a general proposition that evidence of this nature is "relevant" in the context of this inquest to illustrate the general track record of this SMU when engaged in 'contacts' resulting in fatal killings "as it is or may be generally indicative of their work mindset, objectives, modus operandi and methods of justification in general."

[6] The issue of relevance leads to the NOK's consideration of *O'Brien v Chief Constable of South Wales* [2005] UKHL 26 where the House of Lords considered the admissibility of similar fact evidence. The NOK, based on their conclusions, say

that:

(i) When one takes the incidents referred to in the cross-referencing schedule, they are all relevant and that the totality of the information in relation to them should be admitted because they are potentially probative in relation to the matters which this inquest must address;

(ii) That it is in the interests of justice that the evidence be admitted as a question of fairness to all of the parties and to avoid prejudice – although the NOK acknowledge that in what is commonly called the second limb of *O'Brien* the judge in his or her considerations must also take into account questions of proportionality in terms of the admission of the evidence when balanced against the likely increase of time and cost of proceedings.

[7] In relation to that final point the NOK accept that "in the final analysis … the court [takes its decision] after making careful assessment based upon its knowledge of the case at hand and the material that it is sought to deploy" before they further expand on the eight features identified above from the incidents referred to in the schedule. Based on that review of each of those incidents they advance the case that they should be permitted "to reference all of the other incidents involving the SMU which bear similar hallmarks with a view to establishing whether or not these represented the outworking of a particular type of planning and control, of their training and experience and/or the guidance and standards at the time. In particular, '[it is suggested] that the court should probe with the military witnesses the type of firearms training received by the soldiers from the Special Military Unit and whether they were trained to shoot to kill (and without warning) rather than to wound/disable."

[8] At para [131] of their submissions they summarise their position thus "across these incidents, it is respectfully submitted that this inquest should explore the full extent to which the investigative process was being thwarted by the military with a view to obscuring (i) the application of legal force being deliberately sanctioned or the risk of same not being minimised; (ii) that this was how the soldiers were, in fact, trained and (iii) that this was reflective of guidance received in advance."

[9] In the submissions made on behalf of the MOD, there is no particular dispute on the test, which is to be applied per *O'Brien*, but some gloss is added with reference to this inquest and the consideration in hand.

[10] It is pointed out that Lord Bingham in *O'Brien* referred positively to the observation in *DPP v Kilbourne* [1973] AC 729 that "evidence is relevant if it is logically probative or disprobative of some matter which requires proof" but that equally a judge may decline to admit evidence (per Lord Phillips):

> "[Having regard] to the need for proportionality and expedition [and/or] whether its admission is likely to create side issues which will unbalance the trial and make it harder to see the wood from the trees."

[11] The MOD also refer to the *Coagh* Similar Fact Ruling of Humphreys J who, in turn, referred to the comments of Horner J in the *Jordan Inquest* [2016] NICoroner 1, who having admitted the similar fact evidence in that case declined "to make … findings of fact in support of allegations of the utmost gravity having been presented with only fragments of the evidential material.' The MOD suggest the same here.

[12] The MOD also cite the relevance in this context of *Re Gribben* [2017] NICA 16 in which the Court of Appeal upheld a coronial decision not to deploy material on the basis that the material was not relevant to the scope of the inquest and that there had been no request to expand the scope to make it a 'forum for a public inquiry into the activities of a military unit from 1980-1992.' In that context they also highlight that in *McCaughey and Grew* the ECtHR concluded at para [136] of App No.28864/18:

> "The court is similarly not persuaded that the decision to prevent the next of kin from questioning the soldiers and other witnesses about these lethal force incidents and to remove references to such incidents in the statements put before the jury prevented examination of those aspects of the planning and conduct of the operation which fell within the scope of the inquest into the killing of Mr McCaughey."

[13] Subject to that background (in terms of authority) the thrust of the MOD's rebuttal is that the "submission of NOK does not appear to invite the court to make specific admissions of material in respect of identified soldiers but appears to suggest that all of the material shall be admitted against all of the witnesses to the inquest."

[14] In addition they then proceed to challenge the suggested similarities which are relied upon by the NOK. Again, I do not rehearse the detail of that comparative analysis in this ruling.

[15] Counsel for the former military witnesses (FMWs) argues that what he categorises as extraneous evidence of the incidents identified in the schedule is not admissible because (a) it is not relevant to the issues in this particular inquest; and (b) even if it is relevant that I should not admit it, applying both *O'Brien* and *Re Gribben* (supra).

Ruling

[16] This case and the issues I must determine clearly fall within the *O'Brien* considerations. Adopting the comments of Lord Carswell in *O'Brien* I accept that there is no requirement for there to be proven or established facts to assess the question of relevance. I also agree, as the NOK have pointed out, that the threshold as to the question of relevance is quite low - it need only be something that is potentially probative of an issue in this inquest. I accept that that is the case here and so I find that the first limb of the *O'Brien* test is met in relation to the similar fact evidence disclosed in the Schedule (and the material sitting behind it that has been disclosed) and upon which the parties have based their submissions.

[17] Considerations around the second limb of *O'Brien* are, obviously, more nuanced. In considering that I must address my mind to the question of what is in the interests of justice and question if that calls for the similar fact evidence to be admitted. That involves considering the question of what is fair to all of the parties (including PIPs and those who are witnesses in this inquest (which in turn involves a consideration of their Article 8 rights where applicable)), the avoidance of prejudice and the consideration of questions of proportionality in terms of the likely increase in time, cost and delay if the similar fact evidence is to be permitted when weighed against its probative value.

[18] In that second stage consideration, it is appropriate that I also take into account that the allegations which are made by the NOK are, at this stage, just that. They are not proven facts and nor have they been the subject of judicial or other findings. Again, referring to Lord Carswell in *O'Brien* that **is** something which is relevant to my consideration. I am also very mindful that on foot of the application made the NOK are not seeking to adduce the evidence of a specific witness nor, indeed, are they asking for me to admit (a) specific document (s). Their application is much more general than that. They wish to adduce what they refer to as certain 'thematic issues' (as they refer to them (see above)).

[19] That being the case, the admission of such evidence is likely to lead to a proliferation of requests for the adduction of expert evidence, reports, documents and, indeed, witness statements in relation to each of those distinct inquests not least on the basis that there are no (or very limited) established facts or findings upon which I can actually draw. That would inevitably lead to a wide variety of applications and cross-applications in relation to that information which will lead to an increase in costs, exacerbate delay and in my view could only be justified if there is sufficient probative potential.

[20] When I consider those issues against the provisional Scope Document which long since has set out the scope for this inquest that inevitably gives me concern. That provisional Scope Document was circulated to the parties quite some considerable time ago. All the parties had an opportunity to consider and comment upon it. In reality the substance of the NOK's submissions is that they now seek to suggest that (as per para [131] of their written submissions) "across these incidents, it is respectfully submitted that this inquest should explore the full extent to which the investigative process was being thwarted by the military with a view to obscuring (i) the application of lethal force being deliberately sanctioned or the risk of same not being minimised; (ii) that this was how soldiers were, in fact, trained; and (iii) that this was reflective of guidance received in advance." That, I fear, takes us into the sort of more general inquiry that was considered (and rejected) in *re Gribben*.

[21] With respect, the assertions made by the NOK would inevitably go far beyond the scope of this inquest and would, I fear, be of little actual assistance in carrying out the task which this inquest must perform its statutory remit with regard to the deaths of Mr Fleming & Mr Doherty.

[22] The submissions made by the NOK are not, in essence, specific requests to admit material in respect of identified soldiers, nor do they identify particular material.

It can only be interpreted as a generic application to admit evidence based on suggested similarities. In my view that is going too far and (to adopt the words of Lord Phillips in *O'Brien*) is more likely to "create side issues which will unbalance the trial [or in this case the inquest] and make it harder to see the wood from the trees."

[23] The preliminary Scope Document, in my view, already covers the issues upon which the NOK seek to enquire viz Item 3(viii):

> "Whether, in the planning and control of the operation or in the conduct of the operation, those involved sanctioned or engaged in the deliberate use of lethal force that was unjustified and whether in any event, state authorities (including the military and the RUC) tolerated the deployment of unnecessary or unreasonable force by the soldiers."

[24] It does so in a way that is specific to the facts that are in issue in this inquest. In my view, that is more than sufficient and, even if I were to admit the similar fact evidence, I am not convinced that it would be particularly probative in respect of those considerations. In coming to that view I am very mindful of the comments of Horner J in *Jordan*, as commented on by Humphreys J in his ruling on Similar Fact Evidence in *Coagh*. In that ruling he (at para [43]) said that:

> "Delay and further costs are properly thought to be inimical to the interests of justice. These harmful impacts must be measured against the modest probative value which any of the evidence could realistically contribute."

He continued at para [44] (specifically commenting on the experiences of Horner J in *Jordan*) that it was:

> "Quite apparent that this proved to be of little assistance to [the coroner] in carrying out the task of answering the statutory and article 2 inquest questions. The same problem of arriving at conclusions of the utmost gravity on the basis of fragments of evidential material would arise in the instance case."

[25] That is the territory which I think applies here. In the context of a situation where the FMW's article 8 rights are engaged I cannot fault that rationale and wholeheartedly concur with it and find that those concerns apply with equal force in this inquest – particularly in light of the very general application which has been made.

[26] I am satisfied that given the depth of information about the incident at Gransha and the witnesses who will appear at this inquest that there will be sufficient scope to answer the statutory questions concerning how Mr Fleming and Mr Doherty came by their deaths. The NOK will have their opportunity to question on the planning and control that was directly relevant to the operation by which the deceased met their

deaths. I do not think the overriding objective is served by the adduction of 'fragments of evidence' as Horner J called them from other lethal force incidents and I am, indeed, of the view that quite the contrary would result with the risk of considerable prejudice arising to individuals with considerable further delay and expense arising.

Conclusion

[27] For those reasons, therefore, whilst I consider that the information disclosed in the schedule and the additional material is relevant in the exercise of my discretion, I refuse the application for its deployment as "similar fact evidence" at the hearing in this inquest.

[28] By necessity this is a provisional ruling, and I will revisit it, if necessary, considering evidence which is adduced at the hearing itself and any applications that may arise therefrom.

APPENDIX

DOHERTY AND FLEMING SOLDIER CROSS-REFERENCING TABLE (based on table provided by CSO on 20 July 2023)

Soldier D&F Cipher	Other incidents in NI involving use of lethal force	Did Witness Discharge weapon in other incident/s?	Location of evidence about other incident/s in papers
A	Nil	N/A	Folder 2 pdf pages 20 - 22
B	Devine, Devine and Breslin (Strabane)	Yes	Folders 12b and 12c
C	Hogan and Martin (Dunloy)	No	Folder 12 Pgs 150 - 223
D	Hogan and Martin (Dunloy)	No Role unknown	Folder 12 Pgs 150 - 223
E	Hogan and Martin (Dunloy)	No Role unknown	Folder 12 Pgs 150 - 223
F	Devine, Devine and Breslin (Strabane)	No	Page 25 Folder 12b **and** Pg 127 Folder 12c

Soldier D&F Cipher	Other incidents in NI involving use of lethal force	Did Witness Discharge weapon in other incident/s?	Location of evidence in papers
G	Devine, Devine and Breslin (Dunloy)	Yes	Pg 307 - 310 File 12c
H	Involved in all other incidents* see below index	No in various command positions	Box File 12 PDF Pages 299 – 304
I	Hogan and Martin (Dunloy)	No In command position	Box File 12 PDF Pages 216 – 217 Deposition 19 May 1986
J	Nil		
K (RMP)	Not SMU soldier	NA	
L(RMP)	Not SMU Soldier	NA	

Soldier D&F Cipher	Other incidents in NI involving use of lethal force	Did Witness Discharge weapon in other incident/s?	Location of evidence in papers
M(RMP)	Not SMU Soldier	NA	
N OC (RMP)	Not SMU Soldier	NA	
O (ALS)	Not SMU Soldier	NA	
P	Devine, Devine and Breslin (Strabane)	No	Folders 12b and 12c
Q	Nil	No	
R	Devine, Devine and Breslin (Strabane)	No	Folders 12b and 12c
S	Nil	No	
T	Hogan and Martin (Dunloy) Devine, Devine and Breslin (Strabane)	No	Folder 12 pages Folders 12b and 12c

OTHER INCIDENTS OF LETHAL FORCE INVOLVING MILITARY WITNESSES FOR DOHERTY AND FLEMING INQUEST

Henry Hogan, Declan Martin – 21 February 1984 - Dunloy, Co. Antrim

Charles Breslin, Michael Devine, David Devine – 23 February 1985 - Strabane, Co. Tyrone

Brian Robinson – 02 September 1989 – North Belfast

Peter Thompson, Edward Hale, John McNeill – 13 January 1990- Whiterock Road/Falls Road Belfast

Martin Corrigan – 18 April 1990 – Kinnego, Co. Armagh

McCaughey & Grew - 09 October 1990 – Loughgall, Co. Armagh

Alex Paterson – 12 November 1990 – Victoria Bridge, Co. Tyrone

Lawrence McNally, Peter Ryan, Tony Doris – 03 June 1991 – Coagh, Co. Tyrone