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IN THE CORONER'S COURT IN NORTHERN IRELAND

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BEFORE THE CORONER
MR JUSTICE HUDDLESTON

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

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RULING ON THE PROVISION OF WITNESS BUNDLES TO WITNESSES IN ADVANCE OF GIVING EVIDENCE

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Background

[1] The parties have raised issues regarding making available information to witnesses in advance of their appearance at the Inquest.

[2] At a hearing on 15 May 2023 I gave a preliminary indication of my view following the provision of both written and oral representations on these issues. Those representations were backed with reference to the appropriate authorities in point adduced both by those representing the Next of Kin (NOK) and those who represent the Former Military Witnesses (FMWs) (with whom the PSNI and MOD through their respective counsel largely concurred). In the following ruling I have varied in some limited respects from the oral ruling I gave on that occasion but have done so in order to reflect the representations received and, indeed, certain administrative practicalities.

The FMW's position

[3] The issue most raised on behalf of the FMWs is phrased in their written submissions at para 5 as follows:

> "[5] The NOKs position is clear. They seek to question FMWs "cold" absent the prior opportunity to see documentary material which they will be questioned from. Bearing in mind the purpose of any such questioning is to assist the Coroner such an approach runs contrary to the rationale underpinning an article 2 procedurally compliant inquest."

[4] The FMWs portray the NOK's approach as "cards down" - an approach which they say is the "antithesis of modern procedure in the Civil and Criminal Courts… where statutory provisions and the Rules of Court require discovery of relevant documents to be made to a party in advance of a civil trial and disclosure of relevant material to be made to an accused person in advance of his criminal trial."

[5] The FMWs say that given the potential of a referral of a party giving evidence to the DPP pursuant to the provisions of section 35 of the Justice (NI) Act 2002 (which I will call a 'DPP referral') that it is incumbent upon any Coroner "to ensure procedural fairness is scrupulously maintained for all witnesses." In furtherance of that view they suggest that witnesses should have access to all of the information upon which they are likely to be questioned by any party and the ability to take legal advice upon it. The FMWs' position is that the Next of Kin seek to justify their position in that:

(a) Witnesses who have not sought PIP status must not expect to be criticised and accordingly are not at the same risk of criticism;

(b) As former soldiers, witnesses will have a tendency to collude or tailor their evidence [so as not to give true or complete evidence].

The FMWs say that there is no evidential basis for the latter view and, accordingly, no justification for the NOK concerns as they have been expressed.

[6] At para 29 of their written submissions they distil what they say is at the core of this issue [namely] "the question of whether the Coroner is to permit the witnesses to be questioned blind, on material, much of which they have never seen and which speaks to events which occurred almost 40 years ago. Seen in this way the question is perhaps rhetorical. Such an arrangement is plainly unfair and without justification."

[7] In support of those views I was referred to the case of *Ketcher and Mitchell* at first instance ([2014] NIQB 4) where at para [63] McCloskey LJ indicated that:

> "[63]… The fundamental duty imposed on interested parties is one of co-operation with and assistance to the Coroner. This is an essential element in the performance by the Coroner of the overriding objective namely "**to deal with cases justly"** [emphasis added]. Furthermore, given that this principle was devised in the context of adversarial litigation, it must logically have greater purchase and force in the forum of a process which is predominantly inquisitorial."

[8] I was also referred to the case of *Re W* [2017] 1 WLR 2415 in support of the argument that the FMW witnesses face the risk of serious adverse findings being made against them – something which they suggest is analytically similar to the professional witnesses in *Re W*. It is argued therefore that all witnesses (not just PiPs) enjoy basic minimum procedural rights pursuant to article 8 ECHR that call to be protected. An analogy is drawn between the allegations (which in *Re W* were of professional

incompetence) against social workers and police. In the present context it is argued that the rights of witnesses who will appear to be questioned "can be no less important." The FMWs formulation of this (at para 38 of their written submissions) is as follows:

> "[38] It follows that the FMWs have an article 8 right to know the case against them, the disclosure of information relevant to the allegations made against them and sufficient opportunity to consider and take legal advice upon that information. In this context relevant information includes all material both inculpatory and exculpatory."

[9] Finally, I was referred to the comments of the Presiding Coroner in what is known as the Coagh inquest on a substantially similar point which culminated in a direction from him that core bundles were to be produced and provided in advance and that it was to include the documents which are "likely to be the subject of cross examination" on the basis that Humphreys J did not "want people to be ambushed with points because it is an effective way to cross examine." The FMWs argue that that precedent should be adopted in this inquest.

Next of Kin submissions

[10] The Next of Kin, through their legal team, principally deny the applicability of *Re W* based on the distinction that in that case the trial judge made specific adverse findings against the professionals involved (a social worker and police officer) without ever allowing them the opportunity of refuting or commenting upon those findings and that it was that issue that was seized upon by the Court of Appeal as unfair. The protections which they extract from *Re W* are those contained at para 95] of the judgment:

> "[95] Where, during the course of a hearing, it becomes clear to the parties and/or the judge that **adverse findings of significance** outside the known parameters of the case may be made against a party or a witness consideration should be given to the following:
>
> (a) Ensuring that the case in support of such adverse findings is adequately 'put' to the relevant witness(es), if necessary by recalling them to give further evidence;
>
> (b) Prior to the case being put in cross examination, providing disclosure of relevant court documents or other material to the witness and allowing sufficient time for the witness to reflect on the material;
>
> (c) Investigating the need for, and if there is a need the provision of, adequate legal advice, support in court and/or representation for the witness."

[11] The NOK point out that the PIPs already enjoy all of those protections. In respect of the witnesses (ie those without PIPs status) the NOKs say that when *Re W* is properly considered there is nothing to support a suggestion that the article 8 rights of a witness, who does not enjoy PIP status, are engaged through the inquisitorial process of an inquest such as typifies the present one.

[12] That, I accept, is a truncated version of the submissions of the respective parties but certainly, I feel, it captures the essence of their respective positions at the hearing.

Consideration

[13] As I have indicated I received written and then had oral representations made to me in respect of those differing positions. I thank counsel for each of the legal teams for their helpful and detailed submissions.

[14] I observe that much lip service is given by all of the parties to the principle of collaboration as between themselves to act in a concentrated way which helps me fulfil my statutory duty. In my experience such expressions of collaboration are in fact eclipsed by what respective colleagues have long since accepted is the ever increasing trend towards adversarial traits in inquests of the type which is under consideration here.

[15] It ought to be trite for me to say that the inquest process is fundamentally inquisitorial. Morgan LCJ, I think, put it very fairly in *Ketcher and Mitchell* (on appeal to the CANI) ([2020] NICA 31 at para 28)

> "[28] There are many aspects of the coronial process which are plainly inquisitorial. The coroner is the investigator and exercises a broad discretion in respect of the inquiry that is to be conducted. The coroner determines the scope of the investigation and the witnesses who are to be called. When called, those witnesses are examined by the coroner before being examined by the properly interested persons. The strict rules of evidence do not apply. There are no pleadings. There is no determination having direct legal effect on the rights or liabilities of any person although there may be indirect consequences. The object of the exercise is to determine who the deceased was and how, when and where he came to his death (section 31 of the 1959 Act)."

[16] Having stated that, I would say as an aspiration or goal, Morgan LCJ proceeds to acknowledge that that is not the "whole story." He cites from the report by Dame Elish Angiolini (Independent Review of Deaths and Serious Incidents in Police Custody in January 2017) where she concluded at para 16.57:

> "16.57 The reality is that inquests into death in police custody are almost always adversarial in nature. This has been the unanimous opinion of Coroners, lawyers and families who have given evidence to this review. There is nothing inherently wrong with an adversarial approach as it may be

> the best way to robustly test evidence in court. However, it needs to be recognised as such."

[17] This in turn led Morgan LCJ to the view that in its practical application in this jurisdiction it "demonstrates that although the coronial process is essentially inquisitorial, for the properly interested persons the experience is largely adversarial."

[18] At this stage, therefore, I fear we must accept that contrary to the aspirations of many coroners the reality is that the inquisitorial process is impacted upon by an increasingly adversarial approach which undoubtedly makes the job of the coroner no easier – as Girvan LJ in *Jordan* [2009] NICA 64 observed. The risk of satellite litigation and/or the mere threat of the involvement of a DPP referral inevitably complicates the position and generally impacts upon the duration and progress of an inquest such as this one. The most one can hope for is that the adversarial dynamic, ultimately, may result in an overall process by which a greater proportion of the truth is unveiled but if that be the positive it comes at additional expense and inevitable delay.

[19] Setting those considerations aside for the moment, the question before me is what fairness requires in relation to this particular issue. To answer that question, I have already orally ruled that within the conduct of an inquiry there should be no need for any form of "ambush questioning" as it has been categorised by the FMWs. In my view such an approach is neither conducive to any hope of collaboration but, more importantly, nor is it of material benefit to the fact-finding mission upon which I am embarked. In the interests of the overriding objective it is both proper and fair, in my view, that all parties who are to be questioned have prior sight of the relevant information upon which those questions may arise. I say this not least because it is transparently obvious to me in respect of the witnesses who have already given evidence to this inquest that their recall of events which occurred some 40 years ago now is understandably scant. There are also, in most instances, age considerations at play which compounds if not, indeed, confounds the quality of the evidence they can give without the assistance of aide memoirs. Accepting that as a fact, it is not helpful, from the perspective of achieving the best information available, that they then are questioned without the benefit of having had the ability to consider, in advance, an agreed bundle of documentation. Indeed, in most cases they have already had access to this as part of the statement taking process but, at this point in time, that process itself in most cases took place many months ago.

[20] It was for that specific reason that I orally directed, and now confirm in this written ruling, that **all** witnesses are to have as a minimum the documents which are described in Appendix 1 to this judgment and referred to in the earlier ruling as ("the Tab 1 Documents"). Given the nature of these documents, consisting as they do mainly of maps, contemporaneous photographs, etc. they generally act as an essential aide-memoire and are, in my view, vital in terms of achieving best evidence and allowing me to tackle some of the factual disputes which this case presents.

[21] In respect of those witnesses who have provided witness statements they, in the main, have also had access to certain additional documents (the Tab 2 Documents). By these I mean any documents which have been viewed by them for the purposes of making their witness statements and/or in which the witness is mentioned or which

he/she mentioned within his/her statement. The Tab 2 Documents will differ from witness to witness but again in the interests of fairness and justice it is important that they are made available to a witness in advance of his/her questioning. Not to do so, in my view, will prove ultimately to be a disservice to what we are seeking to achieve in the inquiry upon which we are embarked.

[22] Those documents when taken together (ie the Tab 1 and 2 documents) will form a Core Bundle. In addition to those specific items if any of the parties wish to examine any witness on any *additional* document then that must be highlighted to CSNI (and the other parties) by way of the provision of a list of documents which itemises those documents by reference to the composite index. This must be done and the Core Bundle and additional documents so highlighted **not less than ten days** in advance of the date upon which a witness is scheduled to give evidence (as per the updated running order issued from time to time) so that CSNI can make an appropriate logistical arrangements. A soft copy of the full bundle will be provided to all PiPs (and the relevant witness, if not a PiP) by CSNI five days prior to the date on which the witness gives evidence. The upshot is that the primary information upon which a witness is to be questioned will be known sufficiently far in advance of his/her appearance to allow due consideration of the documentation and any issues that may arise.

[23] That overall approach, is, I feel, both proportionate and fair in respect of all parties but also will aid the proper disposal of this inquest. It means that the witness and all parties will have visibility, in the period prior to a witness appearing, of the documents which have been made available to that witness. The necessary consequence of this is that all parties will need to have prepared their cases sufficiently far in advance to comply with the time schedule provided for in this ruling, but I see that rather as a positive overall that is to be welcomed and, indeed, encouraged. Where collaboration may fail us, advance preparedness will assist us all.

[24] Beyond those specific case management rulings, however, I do concur with the view of Humphreys J as expressed in *Coagh.* There is a further important caveat to the position which I have outlined. I fully anticipate that during the course of questioning a witness may also be questioned in relation to other documents which have not been presented to him/her in advance. I see nothing untoward in that and indeed take the view that it is entirely to be anticipated and is largely an inevitable consequence of the progress and advancement of an inquest such as this ranging over a 40-year period and encompassing a wide variety of documentation. It is, therefore, in my view a necessary consequence of getting to the truth. Having said that, I equally anticipate that if a document is not put to a witness in advance there is a considerable chance that he/she may simply not remember or be able to assist. That has been my practical experience to date. What I will not countenance, however, is that this caveat be considered by any of the parties as a back door route to cross examining "by ambush." That is not its purpose and so will not be allowed to be exploited.

[25] Overall, I take the view that the ultimate protection is that those who appear in this inquest, certainly those who assert any question of their article 8 rights being engaged are already represented by senior legal teams – in most cases consisting of senior counsel, junior counsel and respective instructing solicitors. Potential issues of conflict have already been highlighted and there has, as a result, been a proliferation in legal representation in order to fully protect those scheduled to give evidence. I anticipate, therefore, that issues of concern have already been identified and that the

legal representatives therefore are already familiar with the issues which are likely to arise and can prepare accordingly.

[26] Those representatives are, as is common in any other forum or tribunal, more than capable of protecting the rights of the clients for whom they represent. Through such representation - at not inconsiderable expense to the public purse (either directly or indirectly) - I feel that entirely the right balance has been struck and that, if adhered to, the process outlined in this ruling will ensure procedural fairness.

APPENDIX 1

"TAB 1" documents

Photographs and maps
RUC photographs (Album N1665-84 WS; Album N1664-84; 1675/84)
TBM photographs (Folder 17)

Gavin Dunn report photographs 1-37 (Folder 17)

TBM plans (Folder 17)

McCullough Map (Folder 4 last page)

MOD Document 106A – 2 maps (Folder 7 Former Tab 31)

Folder 16 page 9

Exhibit C2 – photograph marked by witness Mrs Peoples

Exhibit C4 – photographs of cars provided by NOK