

## THE AL-SWEADY PUBLIC INQUIRY

### **GENERIC LEGAL ARGUMENTS ON ANONYMITY ON BEHALF OF MOD WITNESSES REPRESENTED BY THE TREASURY SOLICITOR**

#### *Preliminaries*

1. By way of a letter dated 11 May 2010, the Solicitor to the Inquiry issued an invitation, on behalf of the Chairman, to the Treasury Solicitor to make written submissions as to the law he should apply when determining applications for anonymity, or other similar protective measures, made by witnesses in the course of the Inquiry.
2. The Solicitor to the Inquiry indicated that the Chairman would be assisted in particular by submissions, in the form of a skeleton argument, on 4 issues:
  - (i) What is the legal test to be applied, and what considerations are relevant, in relation to any application that relies on articles 2 or 3 of the ECHR?
  - (ii) What is the legal test to be applied, and what considerations are relevant, in relation to any application that asserts that there is a risk of death or injury, but where articles 2 or 3 of the ECHR are not relied on (the so-called “common law test”)?
  - (iii) What is the legal test to be applied, and what considerations are relevant, in relation to any application that relies on article 8 of the ECHR?
  - (iv) What is the legal test to be applied, and what considerations are relevant, in relation to so-called “public interest” applications for protective measures.
3. Each of these four issues is addressed in turn. The analysis set out below is subject to the following preliminary observations:
  - (i) The Chairman’s indication in his preliminary statement that this is to be a public inquiry and, having regard to s.18 of the Inquiries Act 2005 (the Act), its proceedings will be conducted in an open and transparent manner, is noted. No objection is taken to the Chairman’s intended approach and these submissions have been formulated with that indication firmly in mind.

- (ii) The submissions set out below are generic and have been formulated in the abstract. The precise formulation of the applicable tests, and the identification of the relevant considerations, will only be possible once the facts of each individual application are known.
  
- (iii) The Inquiry's indication that, save in an exceptional case, it will redact any personal information relating to a witness other than his name and designation (including addresses, telephone numbers, e-mail addresses) is noted. The Inquiry's proposed approach is plainly appropriate.
  
- (iv) As matters stand, no witnesses have been identified by the Inquiry and the Treasury Solicitor's Department has no clients from whom instructions may be taken. The submissions set out below are, therefore, subject to instructions, and may require amendment in due course in the light of such instructions.
  
- (v) There are a range of protective measures available to the Inquiry ranging from full anonymity to specific evidential and/or reporting restrictions. For the sake of simplicity, the term "anonymity" has been used in these submissions to refer compendiously to the full range of protective measures available to the Chairman.
  
- (vi) As requested, an index of the authorities referred to in these submissions is appended.

### **The Test**

4. Article 2 will be engaged in a case where the Inquiry finds that, if the witness gave evidence without the benefit of anonymity:
  - (i) a risk to the witness's life would be created or materially increased; and
  - (ii) that risk would amount to a real and immediate risk to life.
5. This test is derived from the judgment of the ECtHR in *Osman v United Kingdom* [1998] 29 EHRR 245 and was adopted by Lord Carswell in *re Officer L* [2007] 1 WLR 2135 (at para.29).
6. The question of whether a risk would be created, or materially increased, without anonymity is an objective one, to be determined on the evidence before the Inquiry. For the risk to be "immediate" it must be present and continuing: *In re W's application* [2004] NIQB 67.
7. The same test would apply in the context of article 3, which is also a fundamental and unqualified right. The "real and immediate risk" in such a case would relate to serious bodily injury, torture, or inhuman or degrading treatment.
8. The Inquiry is a public body and must not act in a way which is incompatible with a Convention right: s.6 HRA 1998. If it found that the test under articles 2 and/or 3 was met then it would be required to take such measures as would be reasonably necessary to avoid the risk it had identified.

### **Relevant Considerations**

9. There is no balancing act to be performed under articles 2 and/or 3. If, objectively viewed, a failure to grant anonymity would create, or materially increase, a real and immediate risk of violation of the witness's rights as protected by those articles then, it is submitted, anonymity must be ordered.
10. In addressing the objective question of whether a real and immediate risk would be created, or materially increased, by a refusal to grant anonymity the following questions are likely to be relevant:

- (i) Does the applicant himself have any objective basis for his fear?
  - (ii) What is the threat assessment?
  - (iii) Is the Inquiry aware of any additional material which indicates that anonymity is required to protect the witness's rights under article 2 and/or 3?
11. The applicable jurisprudence identifies neither a burden nor a standard of proof as far as the objective assessment of risk is concerned. The obligations imposed by article 2 and 3 are imposed on the Inquiry as the public body concerned. In discharging those obligations it is for the Inquiry to ensure that it does not act in a manner such as to violate the fundamental rights of witnesses who provide it with evidence.
12. In the immigration context, it is well-established that in determining whether an individual's return to his country of origin will give rise to a violation of his rights as protected by articles 2 and/or 3 a "rigorous" examination of "the existence of a real risk" must be undertaken: see, for example, *Chahal v UK* (1997) 23 EHRR 413 (paras. 95-96). No less is required in the case of a witness appearing before a public inquiry.
13. In *R(A) v Lord Saville* [2000] 1 WLR 1855 Lord Woolf, when considering the common-law approach to be applied in cases where the evidence fell short of establishing "real and immediate" risk, held that the common-law jurisdiction to order anonymity would be engaged in a case where the fears of the individual concerned were "based on reasonable grounds" (1877B-C). There would be no justification for setting a higher threshold in an Article 2/3 case than in a case falling short of real and immediate risk.
14. It follows that when determining each application for anonymity based on articles 2 and/or 3, the Inquiry must ask itself the following question: does a rigorous and objective assessment of the totality of the relevant information available to the Inquiry reveal reasonable grounds for fearing (or a real risk) that, if anonymity is not granted, the witness will face a real and immediate risk of death or bodily injury?

**The Test**

15. If the Inquiry were to find that the article 2/3 test of real and immediate risk was not met then the question of whether anonymity should be granted on common-law principles would arise.
16. That there are both article 2/3 and common law grounds for granting anonymity to a witness to a public inquiry was explained by Lord Carswell in *re Officer L*, at para 29:  
*“If there would not be a real and immediate threat to the witness’s life, then article 2 would drop out of consideration and the tribunal would continue to decide the matter as governed by the common law principles. In coming to that decision the existence of subjective fears may be taken into account on the basis which I earlier discussed (see para.22).”*
17. In identifying the test to be applied in cases where anonymity is being considered on common law principles it is necessary to draw a distinction between two different types of case:
  - (i) cases in which giving evidence without anonymity would give rise to an increased risk to the witness’s life, albeit of a degree insufficient to meet the Article 2/3 threshold; and
  - (ii) cases in which giving evidence without anonymity would not give rise to an increased risk to the witness’s life, but would give rise to a subjective fear on the part of the witness that his life would be in danger.
18. In the former type of case the test to be applied is as set out by Lord Woolf in *R(A) v Lord Saville* (cited above) at para. 68(5):  
*“...in our judgment the right approach here once it is accepted that the fears of the soldiers are based on reasonable grounds should be to ask: is there any compelling justification for naming the soldiers, the evidence being that this would increase the risk?”*

19. The essential feature of this type of case is that it requires a finding, on the evidence, that naming the individual “would increase the risk” to his life. In those circumstances it is not surprising that a compelling justification for naming the individual would be required.
20. Nothing said by the House of Lords in *re Soldier L* casts doubt on the applicability of the test articulated by Lord Woolf in *R(A) v Lord Saville* in a case where a refusal of anonymity would increase the risk to the life of the witness. Insofar as the Court of Appeal in Northern Ireland held otherwise in the case of *In the matter of an application by A and others (Nelson Witnesses) for Judicial Review* [2009] NICA 6, it was wrong to do so.
21. In *re Soldier L* the factual scenario under consideration was one in which the refusal to grant anonymity was found *not* to give rise to an increased risk to the life of the witnesses concerned (para.16). The test to be applied in this type of case, the latter of the two categories identified above, consists of a balancing exercise between the witness’s subjective fear on the one hand, and any countervailing interest in identifying the witness on the other. The ultimate question will be whether, in light of the material considerations, it would be unfair publicly to identify the witness.
22. The two types of case identified above have been considered separately for convenience of analysis. In practice, there may well be a case in which the Inquiry finds that there would be an increase both in the objectively assessed risk to the witness’s life and in the witness’s subjective fears for his own safety were he to be required to give evidence without anonymity. In such a case the “compelling justification” test would apply.

### **Relevant Considerations**

23. In relation to the first type of case identified above, factors relevant to the question of whether there is a compelling justification for not granting the protection sought may include (see *In re Officer L* at paras. 14 and 26):
  - (i) the likely effect on the inquiry’s ability to arrive at the truth if it refuses or grants the application in whole or in part;

- (ii) the effect on the public's perception of the impartiality and rigour of the inquiry, having regard to the factors which led to the decision to hold the inquiry and its terms of reference;
- (iii) The likely effect on the public's ability to follow the evidence.

24. In relation to the second type of case identified above, factors likely to be relevant to the assessment of the witness's subjective fear would include:

- (i) What is the nature of the witness's fear?
- (ii) How serious is it?
- (iii) How, and to what extent, would the subjective fear be reduced by granting the order sought?
- (iv) Is there medical evidence as to the impact on the witness's health as a result of being identified as a witness and/or the impact that there would be if the protection sought were not given?

25. The potential benefits of granting an application for anonymity are not restricted to the interests of the witness himself. In many cases, the primary task of the Inquiry, namely uncovering the truth as to what occurred, will be furthered by granting such an application. Whether the witness's fear is objectively justified or not, he is likely to be more candid if reassured that by giving evidence he will not place himself, his colleagues, or his family in danger.

26. Furthermore, a grant of anonymity is unlikely adversely to affect the public's perception of the rigour, openness and impartiality of the Inquiry. In particular:

- (i) As observed above, the granting of anonymity in an appropriate case is likely to increase the Inquiry's access to relevant evidence and enhance the thoroughness of the investigation.
- (ii) It is for the Inquiry to assess the evidence. Insofar as the identity of the witness is relevant to the assessment of his evidence that information will be known to the Inquiry.

- (iii) The evidence given by the witness will be public, even if his identity is withheld.
- (iv) It is likely that anonymity orders will be sought from a range of witnesses. In any event, it is clear from the Inquiry's draft protocol that each case will be carefully assessed individually and on its merits.

27. These considerations have been recognised in previous Inquiries where similar issues have arisen. For example, in addressing a number of applications for anonymity made by witnesses to the Bloody Sunday Inquiry, the tribunal observed:

*“Our task is to do justice by ascertaining, through an inquisitorial process, the truth about what happened on Bloody Sunday. The proper fulfilment of that task does not necessarily require that the identity of everyone who gives evidence to the inquiry should be disclosed in public. The tribunal will know the identity of all witnesses and unlike a court, will itself take responsibility for investigating their credibility if there is reason to think that such an investigation is necessary. Indeed we think that there are likely to be circumstances in which granting anonymity will positively help us in our search for the truth. Witnesses are unlikely to come forward and assist the tribunal if they believe that by doing so they will put at risk their own safety or that of their families.*

*Moreover it would be a mistake to suppose that the grant of anonymity would always operate to protect soldiers who are alleged to have been guilty of serious offences on Bloody Sunday. There may well be witnesses who wish to give evidence that is favourable to the interpretation of events for which the family and wounded contend, but who will not co-operate with the tribunal without assurances as to their anonymity.”*

Issue 3 - Article 8

### **The Test**

28. A person's professional life comes within the scope of his article 8 rights: *Niemietz v Germany* (1992) 16 EHRR 97 (para. 29). An act which significantly interferes with a

29. A person's reputation also comes within the scope of Article 8: *Pfeifer v Austria* (2007) 48 EHRR 175 (para.35), *HM Treasury v Mohammed Jabar Ahmed and Others* [2010] UKSC 1 (para.42). An act which causes significant damage to a person's reputation would amount to interference with his rights as protected by article 8(1).
30. In the course of this Inquiry, applications made in reliance on article 8 are likely to fall into two categories:
- (i) Evidential restrictions: restrictions on the Inquiry disclosing the name/image/address/current position of a witness.
  - (ii) Reporting restrictions: restrictions on the press/media reporting information provided to the Inquiry in public.
31. The test to be applied in each category of application will be different and so each is addressed in turn.

#### Evidential Restrictions

32. The Inquiry must not act in a way which is incompatible with the article 8 rights of the witness concerned. If it proposes to act in a way that interferes with the witness's rights under article 8(1), that interference must be justified on one or more of the grounds identified in article 8(2).
33. It follows that the test to be applied in respect of an application for evidential restrictions based on Article 8 will be:
- (i) Absent the order, would the Inquiry's act of calling the witness and/or disclosure of his name/appearance/address/current position amount to interference with his article 8(1) rights?
  - (ii) If so, is that interference:
    - (a) necessary in a democratic society in the interests of national security, public safety or the economic well-being of the country, for the prevention of disorder or crime, for the protection of the health or morals, or for the protection of the rights and freedoms of others; and

(b) proportionate?

### Reporting Restrictions

34. The first stage of the test to be applied in an application for reporting restrictions based on article 8 will be the same as for an application for evidential restrictions: would a failure to grant the order result in an interference with the witness's rights as protected by article 8(1)?
35. In the event that the answer to this question is yes, the Inquiry will need to consider the competing rights of the witness, as protected by article 8, and of the press, as protected by article 10. The approach to be adopted when balancing rights of this nature may be distilled from the decisions of the House of Lords/Supreme Court in *Ahmed* (cited above), *In re S(A Child) (Identification: Restrictions on Publication)* [2005] 1 AC 593, *Campbell v MGN Ltd* [2004] UKHL 22 and *In re BBC* [2009] 3 WLR 142:
- (i) Neither article has, as such, precedence over the other, and there should be no presumption in favour of one rather than the other: *In re S*, para. 17; *Campbell*, para. 55.
  - (ii) When the values protected by the two articles are in conflict, the determinative issue will be the extent to which it is necessary to qualify the one right in order to protect the underlying value which is protected by the other: *Campbell* para. 55; *In re BBC*, para 17.
  - (iii) The extent of the qualification must be proportionate to the need: *In re S*, para 17.
  - (iv) The assessment of what is necessary and proportionate will depend upon the facts of each individual case: *Ahmed*, para. 51.
  - (v) The essential question that will need to be addressed in each case is whether there is sufficient general, public interest in publishing a report of the proceedings which identify the witness to justify any resulting curtailment of his right, and his family's right, to respect for their private and family life: *Ahmed* para. 52.

## **Relevant Considerations**

### **Article 8(1) Interference**

36. The considerations that are likely to be relevant to the first stage of the Inquiry's assessment, namely whether the a refusal to make the order sought would result in interference with the witness's article 8(1) rights include:

#### Career/Reputation

- (i) In what way does the witness believe his career/reputation would be damaged without the protection of the order (other than as the result of any criticism of him the Inquiry may make)? For example, will sensitive posts no longer be available to him if his image is publicly recognised?
- (ii) On what basis does the witness form this belief? What evidence is there in support of the witness's belief?
- (iii) How serious would be the damage to the witness's career/reputation?
- (iv) Does the witness's employer support the application?

#### Private/Family

- (v) In what way does the witness believe his personal/family life, or that of his family, would suffer without the protection of the order?
- (vi) On what basis does the witness form this belief? What evidence is there in support of the witness's belief?
- (vii) How serious would be the damage to the personal/family life of the witness and/or of his family?
- (viii) Is there any evidence of potential adverse health consequences for the witness and/or his family were the order to be refused?

### **Article 8(2) Justification**

37. If the Inquiry concludes that a refusal to grant the order sought will result in an interference with the article 8(1) rights of the witness and/or his family then the order

38. The extent to which the work of the Inquiry is conducted in public is subordinate to the effective discharge of the Inquiry's Terms of Reference, and should not be pursued as an end in itself. In support of this proposition the Inquiry is invited to note:

- (i) The Article 6 requirements of a public hearing are of no direct application to the Inquiry. The Inquiry is not a trial and the general proposition that trials must be conducted in public does not apply. Inquiries need not necessarily be held in public at all. This was the case prior to the Act (see *Persey v Secretary of State for Environment, Food and Rural Affairs* [2003] QB 794), and s.19 of the Act provides a mechanism whereby the Minister, or the Chairman of an Inquiry, can impose restrictions if they deem them to be conducive to the Inquiry fulfilling its terms of reference.
- (ii) Even in the context of criminal and civil trials it is well established that the effective discharge of the Court's functions may require that restrictions be imposed: see, for example, *R v Legal Aid Board ex p Kaim Todner* [1999] QB 966, per Lord Woolf at 977; CPR rule 39.2; and ss.23-25 of the Youth Justice and Criminal Evidence Act 1999. In particular, it is recognised that the quality of the evidence of a witness, and the Court's ability to identify the truth, may be compromised if the witness is exposed to fear or distress as a result of giving evidence without restrictions in place.
- (iii) Previous inquiries, including Bloody Sunday (see para. 27 above), have recognised that their ability effectively to fulfil their terms of reference may be significantly enhanced by the imposition of restrictions. Witnesses are likely to be more candid and co-operative with the work of the Inquiry if they do not fear that giving evidence may seriously harm their career, or lead to significant interference with their private/family lives, or those of their family.

#### Article 8/10 Balance

39. The extent to which a restriction on the reporting of a witness's personal address or contact details will impact on the rights protected by article 10 will almost always be negligible and, although the Inquiry has left open the possibility that information of

40. The question of whether article 10 should be given precedence over the article 8 rights of the witness when considering additional restrictions will depend primarily on the extent to which publication of the information in issue would make a material contribution to a debate of general public interest: see *Von Hannover v Germany* (2005) 40 EHRR 1 at para.76. The investigation of the events giving rise to this Inquiry is plainly a matter of general public interest and debate but it does not necessarily follow that the identification of particular individuals would make a material contribution to that debate. On the contrary, and for the reasons discussed above, there may be instances where the quality of the debate (and the evidence by which it is informed) will be damaged by a decision not to grant reporting restrictions.
41. The interference with an individual witness's article 8 rights, in a case where such interference will result from a refusal to order restrictions, is likely to be significant and direct. Any competing interference with the rights protected by article 10 is likely to be less significant and indirect. The principal public interest at stake in this Inquiry is that a thorough investigation is conducted with public access, insofar as appropriate, to the relevant evidence. It is likely to be a rare case in which the article 10 imperative to name an individual in circumstances where to do so would amount to an interference with his article 8 rights would be so strong as to override those rights.

#### *Issue 4 - Public Interest Applications*

##### **The Test**

42. The test to be applied in the context of public interest applications is set out in the Act. Pursuant to s.19(3)(b), a restriction order may specify restrictions that the Chairman considers to be conducive to the Inquiry fulfilling its terms of reference, or to be necessary in the public interest, having regard in particular to the matters mentioned in subsection (4).
43. Subsections (4) and (5) provide:

- “(4) *Those matters are:*
- (a) *the extent to which any restriction on attendance, disclosure or publication might inhibit the allaying of public concern;*
  - (b) *any risk of harm or damage that could be avoided or reduced by any such restriction;*
  - (c) *any conditions as to confidentiality subject to which a person acquired information that he is to give, or has given, to the inquiry;*
  - (d) *the extent to which not imposing any particular restriction would be likely-*
    - (i) *to cause delay or to impair the efficiency or effectiveness of the inquiry, or*
    - (ii) *otherwise to result in additional cost (whether to public funds or to witnesses or others).*
- (5) *In subsection (4)(b) “harm or damage” includes in particular-*
- (a) *death or injury;*
  - (b) *damage to national security or international relations;*
  - (c) *damage to the economic interests of the United Kingdom or of any part of the United Kingdom;*
  - (d) *damage caused by disclosure of commercially sensitive information.”*

### **Relevant Considerations**

44. Relevant considerations on the facts of individual cases are likely to include the following:

- (i) Would the proposed restriction significantly inhibit the allaying of public concern and what would be its impact on the openness of the Inquiry?
- (ii) Would the restriction avoid or reduce risk of serious harm or damage?
- (iii) Would a failure to impose the restriction impair the effectiveness of the Inquiry?

45. These submissions will be further developed, based upon the facts of the particular case, in support of any application for an order.

**NEIL GARNHAM QC**

**NEIL SHELDON**

**25<sup>th</sup> May 2010**

**APPENDIX 1**  
**LIST OF AUTHORITIES**

ECtHR

1. *Niemietz v Germany* (1992) 16 EHRR 97
  
2. *Chahal v UK* (1997) 23 EHRR 413
  
3. *Osman v United Kingdom* [1998] 29 EHRR 245
  
4. *Von Hannover v Germany* (2005) 40 EHRR 1
  
5. *Pfeifer v Austria* (2007) 48 EHRR 175

Domestic

6. *R v Legal Aid Board ex p Kaim Todner* [1999] QB 966
  
7. *R(A) v Lord Saville* [2000] 1 WLR 1855
  
8. *Persey v Secretary of State for Environment, Food and Rural Affairs* [2003] QB 794
  
9. *Campbell v MGN Ltd* [2004] UKHL 22
  
10. *In re W's application* [2004] NIQB 67

11. *In re Officer L* [2007] 1 WLR 2135

12. *In re S (A Child) (Identification: Restrictions on Publication)* [2005] 1 AC 593

13. *In the matter of an application by A and others (Nelson Witnesses) for Judicial Review* [2009] NICA 6

14. *In re BBC* [2009] 3 WLR 142

15. *HM Treasury v Mohammed Jabar Ahmed and Others* [2010] UKSC 1