Neutral Citation No: [2024] NICoroner 13	*Ref:* **HUD12418**
*Judgment: approved by the court for handing down (subject to editorial corrections and proofing prior to publication)**	*Delivered*: **21/02/2024**

IN THE CORONERS COURT FOR NORTHERN IRELAND

_____

BEFORE THE CORONER
MR JUSTICE HUDDLESTON

_____

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

_____

SOLDIER A's APPLICATION FOR MEDICAL EXCUSAL

_____

HUDDLESTON J

Introduction

[1] Soldier A (the witness) has made application to be excused from further participation in this inquest (ie the giving of evidence in either oral or written form). I have received a number of submissions on his behalf (both before and after the oral hearing convened to hear medical evidence) but, in essence, it is asserted that he be excused "on the basis that there is a real and immediate risk to his life should he engage in these inquests." In support he relies on articles 2 and 3 ECHR and the common law requirement of fairness to witnesses.

[2] The application is strenuously contested on behalf of the next of kin who, likewise, have filed detailed written submissions in respect of the matter both before and after the hearing convened on 15 January 2024 (the "hearing") to hear the medical experts. As regards those experts Soldier A has provided me with two medical reports in support of his application. The first is from Professor Neil Greenberg, a Consultant Forensic Psychiatrist, dated 1 February 2023. The second was from Professor Seena Fazel, a Professor of Forensic Psychiatry, which is dated 26 April 2023. The third substantive report was prepared by Dr Ajat Sanikop, another consultant in forensic psychiatry, instructed by the Coroner's Service of Northern Ireland (CSNI) and dated 9 November 2023. Finally, there is an addendum report from Professor Fazel dated 13 December 2023 in which he acknowledges the (negative) comments of the (then) Presiding Coroner in relation to his evidence in the inquests into the deaths of McNally, Ryan and Doris (otherwise the Coagh

Inquest) and comments, in particular, on mitigation measures which are suggested by Dr Sanikop.

[3] It was to afford each of these experts an opportunity to provide evidence and be questioned on the reports that the hearing was convened.

Legal framework

[4] There is no express statutory test governing an application for the excusal of a witness. Section 17A(1) of the Coroners Act (NI) 1959 provides the coroner with power to require a person to attend to give evidence at an inquest and section 17A(2) provides that a coroner may, by way of notice, require a person to provide evidence in the form of a statement. The complication regarding Soldier A is that he resides outside Northern Ireland but does live within the United Kingdom, as such, therefore, he is beyond the remit of section 17A(2) and any statement, therefore, would have to be given voluntarily. To compel him to attend would require a subpoena to be issued pursuant to section 67(1) of the Judicature (NI) Act 1978 in which case the test is whether it is "proper to compel" the witness to attend. This has been considered in the case of *M4 v Coroner's Service* [2022] NICA 6 which, in essence, directs us to a position that that test ought to be considered in light of the provisions of the Coroners Act. The result is that where a witness (such as Soldier A) does not wish to provide evidence he/she may claim under section 17A(4) that either:

(a) they are unable to comply with a notice (served under section 17A); or

(b) [that] it is not reasonable in all the circumstances to require compliance.

[5] It is that which is in play here. The coroner, thus, is vested of a broad discretion in determining whether or not to excuse a witness taking into account all of the circumstances of a particular case. The statutory test, therefore, rather subsumes the common law test of "fairness."

[6] Both the Next of Kin and those who represent Soldier A in their respective written submissions rely upon the Human Rights Act 1998 and Article 2 of the European Convention of Human Rights (ECHR) with, however, entirely opposing emphasis.

[7] Soldier A relies upon Article 2 to assert that requiring him to give evidence breaches his right to life under that provision and would cause harm (for the purposes of Article 3). It is suggested that it would not, therefore, be "proper to compel" him within the language of section 67A of the Judicature Act 1978 or otherwise be a "reasonable" course of action in the language of section 17A of the Coroners Act (NI) 1959 as it would be incompatible with his Convention rights (and therefore a breach of s6 of the Human Rights Act 1998) to do so. In contrast and against that the next of kin highlight the importance of the investigative function of

an inquest – particularly in the circumstances of this one – to fully investigate the circumstances by which Messrs Doherty and Fleming came by their death.

[8] In the balancing act which inevitably arises, I am very mindful that both the Next of Kin highlight (and his own representatives acknowledge) that Soldier A is an important witness. He is only one of three known eyewitnesses to the shootings by which the deceased met their deaths. Each of those three witnesses, including Soldier A, admitted in statements made to police in 1984 to firing shots at one or both of the deceased in the incident. The other two eyewitness (and, thus, firers of shots) are not available to this inquest. Soldier B is outside the jurisdiction of the United Kingdom and Soldier C is dead.

[9] Self-evidently, therefore, Soldier A is a person of interest in relation to the investigation with which this inquest is faced. The question for me is if it is reasonable in all the circumstances or "proper" for me to require him to provide evidence.

The Next of Kin submissions

[10] Counsel for the Next of Kin are unequivocal in their assertion that for me to ensure the adequacy of this investigation (as per the comments of Sir Thomas Bingham in *ex parte Jamieson* [1985] QB 1) I must ensure that:

> "the relevant facts are, fully, fairly and fearlessly investigated … [and] exposed to public scrutiny."

[11] As to the standard of that scrutiny in the context of witnesses, I was also referred to the comments of the European Court in *Jordan v The United Kingdom*, specifically on the question of the compellability of witnesses in inquests such as this. That decision (and the other judgments issued by the Court on the same day), as we know, led to the implementation of the Coroners (Practice and Procedure) (Amendment) Rules (NI) 2002, in essence resulting in a position where those that are suspected of causing a death are compellable witnesses but, once sworn, still able to avail of the privilege against self-incrimination. That is the default position I have adopted in this Inquest unless there are vitiating circumstances.

[12] The Next of Kin urge that the correct procedure is that Soldier A is called to "enable any satisfactory assessment to be made of either his reliability or credibility on crucial factual issues" and that his lack of availability would detract from the overall effectiveness of the inquest. Again, basing themselves in *Jordan's Application* (at the Court of Appeal level para [103]) they assert that:

> "The essential purpose of such an investigation is to secure the effective implementation of the domestic laws which protect the right to life and in those cases involving

> State Agents or bodies, to ensure their accountability for deaths occurring under their responsibility …"

[13] As a principle I accept that, but the principle is one that must be applied to the actual circumstances.

Submissions on behalf of Soldier A

[14] As I have already said, counsel for Soldier A in their legal submissions assert that the position of Soldier A engages Article 2 and 3 ECHR and the common law test of fairness. In terms of Soldier A's Convention rights it is asserted that a positive duty rests on the inquest to protect against what they identify as a real risk of death (Article 2) or serious harm (Article 3) as evidenced by the medical reports supplied. Further, they say that the threshold for assessing what is "real" is not high but acknowledge that is one that it is "substantial' or '[a] significant risk not a remote or fanciful one" per *Rabone v Pennine Care NHS Foundation Trust* [2012] 2 AC 72 at [38]. They also highlight that in the Court of Appeal in *Rabone* the court found that a risk of 5-20% would be sufficient to be "real" – see [2010] EWCA Civ 698 at [73]. They say that even where there is no actual assumption of responsibility by the State there is nonetheless a positive obligation pursuant to Articles 2 and 3 to take preventative operational measures to protect an individual whose life is at risk – *Osman v UK* [2000] 29 EHRR 245 at [115]. They cite *Re Officer L and others* [2007] in the House of Lords per Lord Carswell at [22] in support of Soldier A's claim based on common law fairness:

> "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."

[15] Taking that position, in the present case they say that there is cogent evidence on behalf of Soldier A that (i) he is at an increased risk of suicide, (ii) that he is at an increased risk of self-harm and (iii) compelling him to provide evidence would lead to an exacerbation of his underlying mental health issues and, finally, (iv)that the measures open to the court to seek to address or obviate such risks do not provide adequate or sufficient safeguards. They cite the medical report of Professor Fazel at para [5.09] that any such measures "would [have] little or no effect if he decides to take his life." This, they argue, "supersedes any procedural obligation" facing the Inquest. Finally, they cite both the Civil Evidence (NI) Order 1997 and the Criminal Evidence (NI) Order 2004 which provide an alternative to the provision of oral evidence in certain circumstances – such as here – where a person is unfit due to his physical or mental health. To this deliberation they argue that I should take a protective approach erring on the side of caution (per *Re L* [2007] NICA 8) as it is only that approach which is consistent with the duties that arise under Articles 2 and 3.

Consideration

[16] There is authority in the case of *Osman v UK* (supra) (the *Osman* duty) that there is a positive obligation on state/public authorities (such as courts) to take steps to protect the life of individuals under Article 2 (or by extension Article 3 in the case of harm). That obligation only arises where there is a "real and immediate" risk. It is self-evident that the risk, therefore, must be more than fanciful and (in the case of a real risk) be "objectively verified." If such a risk exists one must then consider if the risk is both "present and continuing." It is clear from the very helpful guidance set out in *Officer L* that the proper approach in this context is to firstly ascertain, by reference to the evidence, whether a witness, such as Soldier A, if he were to give evidence would, in fact, be subject to a materially increased risk to his life (or serious harm). It is only if that evidential hurdle has been reached that one then needs to consider whether the relevant increase crosses the threshold so as to amount to a "real and immediate" risk to life, such as would engage the operational duty under Article 2. This is discussed by Lord Carswell at para [29] of that case.

[17] The House of Lords in *Rabone* (supra) on a very different factual basis, having found that the operational duty was engaged, considered that there was a real risk that the patient (in that case) would take her life when allowed home and that risk continued and increased during the two days she was at home in a manner which was sufficient to make the risk immediate. In summary it had to be established that the authorities knew (or ought to have known) the existence of a real and immediate risk to the life of the individual and that, with that knowledge, they failed to take adequate measures within the scope of their powers which, judged objectively, might have been expected to avoid the risk (*Younger v The United Kingdom (GC) (Fernandez de Oliveira v Portugal* (GC)). There are, I feel, resonances there to the present case. I will come on to the detail of the medical evidence below, but I can state that I have no difficulty in accepting from the consensus view of the experts that Soldier A is and remains subject to a suicidal risk. I also accept that it is an "immediate" risk and one that would be exacerbated if Soldier A is called to give evidence – in either written or oral form.

[18] Nonetheless, even with that in mind one could envisage a situation where a decision is made to require Soldier A to give his evidence **notwithstanding** that it gives rise to a real and immediate risk of suicide **providing** I am satisfied that all that could reasonably be expected of me is done to avoid that risk. This, admittedly fine line, was commented on by Lord Girvan in *Re C* at [44]:

> "To conclude that a real risk is one which is not fanciful or trivial does not impose on the state an excessive burden bearing in mind the requirement for a balanced and graduated response to deal with situations of risk impacting on the lives of citizens."

[19] One finds parallels for this approach in other jurisdictions (for example child law). In the case of *Re A (A Child) (Vulnerable Witness)* [2013] EWHC 1694 (Fam) the court concluded (on the facts of that case) that there was no right answer from a psychiatric perspective as to whether the child should participate before concluding that the "balance [came] down decisively in favour of striving to devise a set of circumstances in which X can be assisted to make a personal contribution to the hearing in some form or another."

[20] I am conscious that the court was concerned that justice may not be achieved absent the child's evidence (of sexual abuse). The approach though could equally apply in the context of an Inquest.

[21] In considering this aspect, I am also mindful that in the present instance Soldier A has expressed (albeit to the medical experts) a certain desire that he "be heard.' That (and, indeed, the other comments which he has made to the medical experts) arguably disclose a certain point of view in respect of these proceedings which I feel quite rightly can be taken into account in weighing up all of the circumstances.

[22] In short, I can see an argument that given the public interest and the desire to fulfil the investigative role that falls to me he be required to give evidence.

[23] I must, however, look at the specific circumstances of Soldier A. Looking at the authorities taken together it seems to me that the proper course is to (a) consider, by reference to the evidence available to me, whether if Soldier A were to give evidence, this would give rise to a material increase in terms of a risk to his life/serious harm. As I have already said, on that point the medical evidence satisfies me that it does; (b) if that threshold is met, to consider whether that amounts to a "real and immediate" risk by reference, again, to the (primarily) medical evidence before me. Again, on the facts of this case I also think that the risk is "real and immediate."

[24] This approach is consistent with the comments of Lord Carswell in *Officer L* to which I make reference above and, indeed, the two-stage approach adopted in *Rabone.*

[25] I come to this view after a consideration of the facts which are germane to Soldier A's application:

- In terms of A's background there is evidence both self-reported but also, importantly, in his medical notes of him having experienced a violent family upbringing (primarily at the hands of his father) and early self-harming (when a teenager).

- Post the period of his service in the military he lost an eye in 2003. The exact circumstances of that are unclear from the evidence. It is suggested that this

may have been as a result of a fight with another individual or, potentially, an example of self-harm/enucleation. The reports vary and none of the experts rely upon the incident in reaching their views - probably on the very basis that neither the reporting by Soldier A nor the medical evidence is decisive on the point.

- By reference to the medical records there was an attempted suicide by overdose in 2015.

- There is evidence of constant and continuing alcohol abuse and cannabis misuse. The experts' reports tend to support the view that this is exacerbated in times of stress.

- In terms of his personal relationship history, A's first wife committed suicide. He had a subsequent failed marriage and two subsequent failed relationships. He now lives alone but derives support and structure through looking after a number of pets.

- There is evidence of mental health and dependency issues in his family background.

- He has recently (post his interview with Professor Greenberg) been diagnosed as suffering from depression for which he is in receipt of prescribed medication by his GP.

[26] Having considered each of the medical reports in detail it is fair, I think, to say that given his background, A has factors which have led the medical experts to unanimously conclude that he is susceptible to mental health issues which, in turn, has led him to a degree of dependency on alcohol and cannabis.

[27] Each of the experts are settled in their diagnosis that Soldier A suffers from PTSD. Professor Greenberg's summary is:

(i) Soldier A meets the criteria for Post Traumatic Stress Disorder (PTSD);

(ii) His PTSD symptoms have fluctuated over time but increased approximately two years ago when he ceased work – which, it is alleged, coincided with the current legal proceedings;

(iii) That he meets the diagnostic criteria for alcohol and most probably cannabis dependence;

(iv) That he suffers depressive symptoms likely to be related to both his PTSD and alcohol/cannabis dependency; and

(v) That involvement in this inquest is likely to have a "substantial detrimental impact upon his mental health."

[28] Professor Greenberg continues in his report (at paras 21.8-21.9):

> "In my view his mental health is likely to be substantially negatively impacted by having to both prepare a witness statement for the court and in giving evidence (including by videolink) … in seeking to cooperate with the coroner his PTSD symptoms are likely to become substantially more severe and his reliance on alcohol and cannabis as a way of coping is likely to increase, the consequences of this deterioration are likely to be wide ranging including decreased quality of life, negative impact on his physical health as a result of poor self-care and increased use of alcohol and cannabis and potentially self-harming or suicidal behaviours."

[29] Professor Fazel, when he assessed Soldier A in April 2023, largely concurred with that assessment opining that:

> "reading and preparing for an inquest would likely lead to an exacerbation of underlying mental health problems (which appears to have been exacerbated already based on changes in his mental state described in GP records) and Soldier A's self-report. His sense of hopelessness and injustice, which in turn would increase suicidal thoughts in frequency and intensity."

[30] Professor Fazel continues:

> "It is not clear whether the reported protective factors of his dogs and family are strong enough to mitigate this risk, and family factors did not deter him from a previous severe overdose (although I note Soldier A has stated to the contrary)."

[31] Professor Fazel does emphasise that if A is required to give evidence that "social support will be important, maintaining medication adherence and regularly reviewing his treatment, reducing his alcohol consumption, frequent review of a suicide risk by his GP may assist."

[32] He concludes in his April 2023 report, however, that "it is my view that the impact of these measures based on Soldier A's personality and the strength of the underlying risk factors will have little to no effect if he decides to take his own life" – the para 5.09 comment referred to above.

[33] It was by reason of these opinions that the Coroner's Service (NI) under my direction appointed another, third, medical expert, Dr Sanikop, who conducted an assessment on Soldier A on 30 October 2023 and then provided a report on 9 November 2023. The help which I derived from Dr Sanikop's report is as follows:

- At [para 87] Soldier A has experienced significant adverse childhood experiences which would make him vulnerable to develop mental health problems as an adult;

- At [para 88] He reports self-harming from a young age but there is no evidence in his GP records, and he has not been consistent in his reporting of the same;

- At [para 90] he was not clearly able to identify any mental health explanation for [those inconsistencies]

[34] He notes the alcohol misuse and at para [93] concludes "on balance I agree with the diagnosis of PTSD and depression [which] may have developed after the assessment of Professor Greenberg."

[35] What was more interesting to me, however, was Dr Sanikop's view that "any known risks can be managed." I was interested to interrogate the experts when they gave evidence at the hearing if mitigation measures could be implemented to obviate any/some of the risk. On that point Dr Sanikop opines (in his written report) as follows:

> "To what extent services [meaning Health Services] can manage the risks and the necessity to taking a certain course of action to increase the risk needs to be considered by the coroner … the risk management does involve a number of resources and also participation of the individual. Considering the likelihood of risk increasing the current level of support is unlikely to safely manage the risks, he is likely to be referred to secondary care services and may need the intensive input initially, namely from the home Treatment Team, who will monitor risks and offer support on a daily basis."

[36] To this he suggests early reporting to the GP of possible risks and that the GP may consider the adoption of additional measures to militate against them. At para [102] of his report, however, Dr Sanikop concludes:

> "The chronic risk of suicide remains whether he takes part in the inquest or not, as he states he will consider

> suicide to be the better option other than being in a care home."

[37] Professor Fazel in his addendum report emphasises that such secondary care services "would need to be place before any hearing" but counters that "Soldier A's current condition would not, in [his] opinion reach the threshold for the involvement of community mental health services." Referring back to Professor Greenberg's report he notes the assessment that evidence would lead to a "substantial detrimental impact upon [A's] mental health" and that "his PTSD is likely to become substantially more severe [as is] his reliance on alcohol and cannabis as a way of coping likely to increase. Professor Fazel opines that based on the risk factors including PTSD that there is empirical evidence to suggest that the risk of suicide increases by 60/70% in men in the age range of 65-74 although he admits that is compared to a relatively low baseline of 12-13 deaths per 100,000 people.

[38] That leaves me with the position where:

(a) there is consensus of diagnosed PTSD;

(b) the experts seem to agree that PTSD is, to some measure at least, a risk factor to be taken into account in assessing the risk someone may have of committing suicide;

(c) it is clear from each of the reports that Soldier A has both mental health and dependency issues which I would have to accept from the evidence before me is likely to become heightened if he were required to participate in this Inquest.

(d) it seems to me, again on the evidence, that he becomes more dependent on alcohol and/or drugs in situations which exacerbate his underlying mental health issues;

(e) whilst not determinative, statistically Solder A falls within a class of person who are already at greater risk of suicide;

(f) that whilst he has protective factors in his life, they are not largely determinative and certainly those that would be of greater assistance, (eg secondary medical assistance) are probably not available to him as matters rest;

(g) that the amelioration that could be provided through secondary care is not guaranteed and would require evidence of resource availability (when there is none before me) and individual cooperation.

[39] In the hearing and having heard the experts, amongst whom there was a large degree of consensus, I asked whether any felt that the mitigation measures

open to me would be sufficient to mitigate the risk. Again, there was consensus amongst the experts that even if I were to adopt special measures for this witness in addition to those that I have already made available to Former Military Witnesses (eg time to give evidence and/or structured questions), they did not think that the risk to soldier A would be ameliorated.

[40] Nor, did I derive any comfort whatsoever, from their responses about the availability of community medical and/or mental health services which would be of assistance in supporting Soldier A either before, during or, more particularly, after the provision of his evidence.

[41] Taking all of that into account, I am of the view that, on the evidence, requiring Soldier A to give evidence either by way of statement or orally would materially increase a risk of suicide/serious harm, that risk (or the increase in it) amounts to a real and immediate risk.

[42] I am also satisfied on the balance of probabilities that none of the measures which I could implement could substantially avoid or mitigate the risk and that in all of the circumstances, in fairness to the witness, that it is neither "proper" for me to compel his attendance or further co-operation nor "reasonable in all the circumstances." Accordingly, I rule that he be excused from participating further in this inquest.

[43] In coming to that view, however, I am also mindful that I have already the benefit of his 1984 statement. Whilst I am speculating here to some degree, I am of the view that even if I were to compel Soldier A to produce a statement and/or provide oral evidence I am far from convinced that I would achieve any greater knowledge than that which is set out in that 1984 statement. It is my experience where other similar witnesses do appear the statements which they provide are couched in careful terms and that in terms of the answers to the questions which are put to them they generally avail, as they are entitled to, of the privilege against self-incrimination. In all the circumstances I am, therefore, content to rely on the statements attributed to Soldier A which are already available to me.

[44] There is one further issue that arises. In what I thought was an uncontroversial approach, I suggested that, prior to the oral hearing of the experts, a joint meeting be held to narrow issues as between them. The day before the hearing, my counsel, Ms Doherty KC, shared with counsel for the PiPS a note of her advices to me on the very issues that are the subject of this ruling. It would appear that unknown to me (or my counsel, or indeed, the other PiPS) this note was shared with Professors Greenberg and Fazel, and the questions which were posed in it were put to them with some form of oral briefing. Those same questions were adopted, in effect, as an agenda for the subsequent meeting with Dr Sanikop which occurred in the 45 minute period prior to commencement of the oral hearing itself.

[45] There has been substantial comment/counter-comment from both the Next of Kin and those that represent Soldier A on the circumstances surrounding those events. It was, self-evidently, not appropriate that questions which are essentially the preserve of this inquest were put to the experts in that form. Those experts were instructed to assess Soldier A and to provide evidence as experts in accordance with the Practice Direction. It was not – and never could be – their role to usurp the functions of this inquest in relation to the subject matter of this ruling. In the circumstances, I have disregarded the contents of the joint note completely. I am, however, satisfied that there is sufficient consensus amongst the experts both in terms of their written reports and, more particularly, the oral evidence which they provided to me during the hearing in January for me to reach the conclusions I have. The statistics to which I was referred may be open to various interpretations but on balance and in a general sense they support the case for excusal.

[46] I am satisfied that requiring Soldier A to participate in this Inquest would exacerbate the present risk and lead to a spiral of greater alcohol/drug misuse and ever increasing risk to Soldier A.

[47] In relation to the experts' view as to whether or not there are any mitigating factors there is unanimity that even with the adoption of special measures there is little or nothing which would or could manage any perceived risks.

[48] I am certainly not convinced that relying on community mental health services would be sufficient.

[49] For all of those reasons Soldier A will be excused further participation in this Inquest.