

1 THE HEARING RESUMED ON FRIDAY, 20TH MARCH 2026,
2 AS FOLLOWS:

3
4 CHAIRMAN: Good morning, Mr. Greaney.

5 MR. GREANEY: Good morning. You have of course now
6 heard the application made on behalf of the State Core
7 Participants and, first, this morning we'll hear from
8 Mr. Southey on behalf of the family and survivor Core
9 Participants that he represents.

10 CHAIRMAN: Right. Good morning, Mr. Southey.

11 MR. SOUTHEY: Good morning, Sir.

12 CHAIRPERSON: So, whenever you are ready.

13 MR. SOUTHEY: Thank you, Sir.

14
15 SUBMISSION BY MR. SOUTHEY

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17 MR. SOUTHEY: Can I start by repeating something that
18 we have said in our written submissions and that is
19 apologising for the fact that our first representations
20 regarding the specific applications were made without
21 access to the full papers as a result of the mistake
22 made within the legal team that I form part of.

23
24 We appreciate that we - the subsequent representations
25 we made addressing the material that we were not aware
26 of have been included in the bundle and we are grateful
27 to the Inquiry for that.

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29 Can I then turn to what I want to say. We assume,

1 obviously, that the written submissions that we have
2 made have been read, so I am going to try and avoid --

3 CHAIRMAN: And they are adopted.

4 MR. SOUTHEY: Yes, thank you. what I would like to do
5 though is make some general points rather than address
6 the specific applications but at times refer to the
7 specific applications. Can I --

8 CHAIRPERSON: Yes.

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10 [TECHNICAL DIFFICULTIES]

10:39

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12 MR. SOUTHEY: I think I have had a nod, that means I
13 can start, Sir.

14 CHAIRPERSON: Yes.

15 MR. SOUTHEY: I think I sort of made some preliminary
16 comments but can I start in terms of dealing with the
17 substance by emphasising that the significance,
18 certainly as far as the CPS I represent, of these
19 applications as essentially test applications. We do
20 submit that that means they need to be considered with
21 particular rigour.

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23 The CPS are very conscious, essentially, that the
24 decisions taken at the end of these hearings will act
25 as a precedent. We have no doubt, not least because of
26 the repeated statements to this effect, that the
27 Inquiry is very well aware of the importance of
28 openness but from the CPS' point of view it is still
29 worth emphasising that any limitation on openness does

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1 have risks, we would submit, for the effectiveness of
2 the Inquiry. As a consequence, it is important that
3 any precedent which will lay the ground for further
4 applications is properly justified.

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6 Can I then turn to one thing - one feature of our
7 applications that I would wish to emphasise and that is
8 the point we make about how there is a need to consider
9 three different groups effectively when deciding
10 whether anonymity should be granted.

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12 Now in relation to that our starting point is, and I
13 don't think I need to take you to it, everyone is very
14 familiar with it, Section 19 of the Inquiries Act
15 which, in our submission, makes it absolutely clear
16 that it's not enough that there is a justification for
17 a Restriction Order, what is required is that each
18 restriction needs to be justified.

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20 That's important, we submit, for two reasons. Firstly,
21 and this is the primary reason I am making this point
22 at this stage, as I have already indicated, we submit
23 that there are three categories of people who are
24 separately identifiable and who potentially have
25 different interests in disclosure of names. Those
26 three groups are, firstly, the general public. That is
27 a group that we have to accept will include potentially
28 dissident republicans. Secondly, there are the Core
29 Participants. Thirdly, there are the lawyers to the

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1 Core Participants. In our submission, these three
2 groups need to be considered separately partly because
3 the justification for each category receiving the names
4 is different and partly because the safeguards in
5 relation to each group is different.

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7 I'll come back to that second point, but a key point of
8 what we are making -- the reason we want to emphasise
9 this point rather is that we do submit that there is no
10 reason to believe that CPs or their lawyers will pass
11 on information to dissidents and I'll come back to
12 that.

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14 The second reason I emphasise that restriction is, and
15 I know this is going to be considered later today, but
16 it is important to remember this, that there is
17 apparently a significant amount of closed material that
18 is relied upon in support of the applications. When,
19 as I know the Inquiry will, it comes to consider
20 whether some of that material can be made public, in
21 our submission it is again important to recognise there
22 is a potential distinction between the general public
23 and CPs and all their lawyers.

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25 Turning to, in one sense, very briefly why we say those
26 two - that CPs and their lawyers are different. Very
27 briefly, to make the obvious points. CPs have given
28 the Inquiry undertakings. There is, as far as we are
29 aware, no reason to believe that CPs will breach those

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1 undertakings. CPs also have a greater interest in
2 names, and I'll come back to why that is the case, but
3 we do submit that there are good reasons why CPs should
4 have access to names, we'll come on to what they are.
5 We do submit that the approach to operational sensitive 10:47
6 material, which recognises that material may need to be
7 disclosed to CPs when it cannot be made public, is
8 consistent with this, with the points I have just made,
9 which is that CPs are in a different position.

10 Lawyers also, we submit, are in a different position 10:47
11 not just to the public but to CPs. I want to emphasise
12 when I make the submissions that are about to follow
13 that it is not any lawyer's chosen way of proceeding
14 that there should be disclosure to lawyers alone.

15 However, it is important to recognise, in our 10:47
16 submission, that disclosure to lawyers alone is better
17 than no disclosure. Particularly if the alternative is
18 essentially that the material will be considered by the
19 Inquiry and potentially some Core Participants but
20 without any representation on behalf of family Core 10:48
21 Participants.

22
23 Lawyers are, we submit, in a different position because
24 they are regulated, they have an ethical code and all
25 of those matters mean that disclosure is particularly 10:48
26 unlikely.

27
28 Now, we give an example. We recognise that it's to say
29 relatively unusual to provide disclosure to lawyers

1 alone but there clearly are examples of that. In our
2 written representations we have drawn attention to
3 cases which I don't think probably we need to take you
4 to, or a case rather which is a recent upholding of the
5 principle that confidentiality rules are possible in 10:48
6 litigation.

7 CHAIRPERSON: I did read that case, Mr. Southey.

8 MR. SOUTHEY: Yes.

9 CHAIRPERSON: Given that you had drawn my attention to
10 it. It is a fairly lengthy case. 10:49

11 MR. SOUTHEY: Yes.

12 CHAIRPERSON: Amongst other things, it seems to
13 consider fraudulent transactions resulting in millions
14 of pounds in the Middle East and bankruptcy proceedings
15 which took place in the Middle East and the possible 10:49
16 communication of settlement agreements.

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18 In the end of the day, I think I was left with the
19 conclusion that I had very rarely, if ever, read a case
20 which was so far removed from the circumstances that I 10:49
21 was being asked to consider as that was. I did wonder
22 why you hadn't thought it of more help to refer to, for
23 example, the Concordia litigation, which we touched on
24 in the last hearing, and which addressed the concept of
25 a confidentiality ring in relation to public interest 10:50
26 immunity. I would have thought that public interest
27 immunity is far more closely related to what we are
28 dealing with here than bankruptcy proceedings in the
29 Middle East.

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In the Concordia litigation, as you are well aware, there was an exposition of why it's impractical to engage in confidentiality rings in relation to PII material.

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MR. SOUTHEY: My Lord, the reason why we drew attention to it is simply this, we were very conscious of the fact that there remains controversy about confidentiality rings. As far as I could find, it is the most recent case where there was a recognition of the potential still for continuation of confidentiality.

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CHAIRPERSON: That's long been recognised in, for example, competition cases.

MR. SOUTHEY: Yes.

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CHAIRPERSON: And it's a completely different issue from PII in which other considerations have been identified as being prominent and in which clear discussion has taken place as to the limitations on the value of confidentiality rings and the dangers associated with them. I don't think you can just select comments that are made from one area of jurisprudence and try and apply it across the board to entirely different areas.

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MR. SOUTHEY: My Lord, a couple of different things I would say in relation to that. Firstly, I am not aware of any case law specifically on point. Our starting point, which is why I started with it, is the point I made before, which is to look at Section 19 and to

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1 argue that Section 19, putting it slightly differently
2 to how I did earlier but I hope consistent with that,
3 that Section 19 requires justification, requires
4 effectively restrictions to be minimised, each
5 restriction has to be justified. So, the simple point 10:52
6 I was trying to make and maybe I used a bad example,
7 there are other examples which I will come on to in a
8 moment, but the simple point I was trying to make is
9 that it is recognised at times that restrictions are,
10 that it can be acceptable essentially to put in place 10:52
11 restrictions that limit disclosure or limit information
12 to lawyers but not their clients. I mean some - two
13 further examples of, in one sense, of how this may
14 arise. There are bodies, the Parole Board being one
15 example, as was considered in Robson, my Lord. Sir, 10:53
16 you will remember the Mental Health Tribunal is another
17 example of this. There are bodies which have
18 expressed, which have rules that allow effectively for
19 disclosure to take place to lawyer but not client. One
20 of the issues - and we have made reference to this in 10:53
21 our submissions - one of the issues that will
22 potentially arise in this case, is that three members
23 of the legal team that are representing the Fox Law
24 Core Participants, do for the purposes of civil
25 litigation, have restricted access, access in a secure 10:53
26 environment to the McVicar report. That will raise
27 questions at some point in time about whether or not
28 hearings, any hearing, any closed hearing at which that
29 report is considered, should take place in the absence

1 of those legal representatives. So there is already in
2 this particular context a situation where legal
3 representatives do have particular access to material.
4 So I hope that answers the question, Sir?

5 CHAIRPERSON: Well, I know what you say at least. 10:54

6 MR. SOUTHEY: Yes. I am not sure there is much else I
7 can say. One final thing I should emphasise is that we
8 do say, we do recognise that disclosure to lawyers
9 alone is not our chosen way forward. It is obviously
10 much more desirable that material is disclosed to CPs 10:55
11 as well as their legal representatives. But if there
12 is some particular concern about a CP, then we do
13 submit that is better than nothing.

14
15 Can I move on unless there is any other questions in 10:55
16 relation to that to really in one sense the key,
17 possibly the key point that we wish to respond to in
18 relation to the submissions of PSNI? At times it
19 appeared to us that the PSNI submissions essentially
20 came down to this: they appeared at times to say, 10:55
21 essentially, because there is a risk or an increase in
22 risk all restrictions are justified. Now, that
23 submission in our submission is wrong and doesn't
24 reflect the statutory framework that I identified and
25 is, we submit, inconsistent also with the approach in 10:56
26 re L.

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28 In re L, particularly in the context of Article 2 - it
29 may be just worth looking at this. It's in the

1 authorities at page 685. Re L, Lord Carswell, bottom
2 of the page, indicated that the Article 2 test in
3 particular was: "Whether giving evidence would give
4 rise to a materially increased risk to life."

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6 In our submission, if that is read with the
7 obligations, as I say, the terms of Section 19, the
8 obligation to minimise restrictions, actually the key
9 issue in our submission is whether a particular
10 restriction would give rise to -- or a failure to make 10:57
11 a particular restriction will give rise to a material
12 increase in risk.

13
14 So, to be clear about what I am saying, if disclosure
15 to the CP will not give rise to a material increase in 10:58
16 risk, we would submit Article 2, for example, can't be
17 engaged. That must be right, we would submit, for one
18 of two reasons: firstly, our primary reason is that
19 wouldn't engage Article 2 because the decision to
20 disclose hasn't had any impact on the risk to life but, 10:58
21 alternatively, if we are wrong about that, it can't be
22 a reasonable step to take. If in fact the step that's
23 being asked for, which is refusing to disclose to the
24 CPs, will not help to reduce the risk, then it's
25 difficult to see how that's a reasonable step to take. 10:58
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27 So that's why we do submit that the approach of PSNI at
28 times, in our submission, failed to recognise that it
29 must be each restriction that's relied upon. Now, in

1 that context PSNI also placed significant weight on the
2 ruling of Mr. Justice Humphreys in the Coagh inquest.
3 You will remember - I can give you the reference, I
4 don't think we probably need to go back to it because
5 you have already seen it - it's at page 1194 of the 10:59
6 authorities bundle, paragraph 16(I). Mr. Justice
7 Humphreys said: "Anonymity is the minimum if Article 2
8 is engaged or the common law test is satisfied."
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10 Now, a couple of preliminaries. Firstly, as far as I 10:59
11 can read that judgment, there doesn't appear to have
12 been any consideration of the relative risk of
13 disclosure, or the relative impact on risk of
14 disclosure, for example, to someone signing
15 undertakings. It also, in our submission, doesn't 11:00
16 necessarily very easily fit with what is clear, we
17 submit, from the case law, which is the need to conduct
18 the balancing exercise.
19

20 More importantly in one sense, it raises the question 11:00
21 again of what engages Article 2. We submit if, as I
22 have already made clear, if there is no material
23 increase in risk because of disclosure to a distinct
24 group, such as CPs, then Article 2 isn't engaged. So
25 the point of Mr. Justice Humphreys doesn't come into 11:00
26 play.

27 CHAIRPERSON: Look at it differently then, if Article 2
28 is engaged is he right in what he says about the
29 minimum requirement?

1 MR. SOUTHEY: well, I hesitate to say that's correct
2 for this reason because I mean ultimately what the case
3 law indicates is there is a need for a balancing
4 exercise, one needs to take account of what are
5 reasonable steps. Now, conceptually it may well be the 11:01
6 case that there are other steps that can be taken but I
7 recognise that if - if the evidence is that there will
8 be a material increase - and "material", we would
9 submit, has to reflect the Osman test, it has to mean
10 that it's really immediate. 11:01

11 CHAIRPERSON: That's exactly the test that they were
12 applying in Humphreys.

13 MR. SOUTHEY: No, no, I am not disputing that.

14 CHAIRPERSON: Let's deal with the question. If Article
15 2 is engaged is Mr. Justice Humphreys correct in saying 11:01
16 that the minimum response required is anonymity?

17 MR. SOUTHEY: well, the reason I hesitate - in
18 principle it's highly likely to be, I accept, or likely
19 to be - but the reason I hesitate is it must always
20 depend, there is always a balancing exercise is what 11:02
21 the cases, in our submission, indicate. There can be,
22 there at least conceptually be reasons why there will
23 be a highly compelling reason why a particular name is
24 made public.

25
26 So I know it's unattractive in one sense because there
27 is an understandable desire for clarity, so what I am
28 about to say is perhaps an unattractive submission but,
29 ultimately, there does have to be a balancing exercise 11:02

1 and that means there is not going to be a
2 one-size-fits-all, whenever you get into Article 2
3 anonymity is what automatically follows.

4 CHAIRPERSON: So, Mr. Justice Horner didn't apply the
5 test correctly either? 11:02

6 MR. SOUTHEY: I can't remember exactly his language but
7 we do submit that the binding authority is the Court of
8 Appeal, for example, in re Officer L, do recognise the
9 importance ultimately of conducting a balancing
10 exercise. But, my Lord -- 11:03

11 CHAIRPERSON: But the balancing exercise arises not in
12 connection with the question of whether protective
13 measures ought to be taken but in regard to the
14 question of what those protective measures ought to be.
15 If Article 2 is engaged, the State has to act. 11:03

16 MR. SOUTHEY: Absolutely, my Lord, but that's - the
17 obligation is to take reasonable steps and the point
18 that I was making about the ruling of Mr. Justice
19 Humphreys was that Mr. Justice Humphreys can be read to
20 some extent as saying: 'As soon as you get into 11:03
21 Article 2 territory there is automatically a duty to
22 make an anonymity order.' That's where I am pushing
23 back, in one sense. I am pushing back on the basis
24 that I am not saying the State isn't obliged to take
25 reasonable steps but if, in principle, the interests in 11:04
26 a name being made public are sufficiently compelling
27 that they outweigh the interests in anonymity, the
28 State may need to take other steps to protect, my Lord,
29 that's all I am saying.

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Now whether that arises on the facts of any individual case, particularly given, I don't know the full picture, is difficult to say and I recognise it's a very powerful argument to say but all I am saying is that that balancing exercise, in principle, must mean that there are some cases where the interests in naming outweigh the Article 2 obligation and the State has to take other steps.

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CHAIRPERSON: And what would they be?

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MR. SOUTHEY: well, for example, I think the State does have other powers it can take. My learned friend, Mr. Henry, indicated yesterday, there are steps taken sometimes to protect people, such as providing protection, et cetera; there are steps that can be taken by the State.

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CHAIRPERSON: well, what sort of things do you suggest? If we are talking about a real and immediate risk to the life of a former or serving officer but who you say requires to be named for compelling reasons, what sort of reasonable steps could the Court take beyond anonymity? Send them to another country or something?

11:05

MR. SOUTHEY: My Lord, can I just take in one sense a step, a slight step back because, my Lord, said: 'what steps can the Court take?' The duty is on the State and it's the whole of the State. So there are steps - I mean that's why I was talking about protection. It's obviously, in one sense, it's not for the Court.

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CHAIRPERSON: No, you are right. I accept that.

1 MR. SOUTHEY: Yes. So, my Lord, can I give an example
2 in one sense of why we say it must be clear? Obviously,
3 for example, there is a compelling public interest in
4 senior officers of PSNI being known. So the Chief
5 Constable is obviously as a matter of fact public 11:06
6 record. That obviously potentially places him at risk
7 and I am sure that there are steps taken to protect the
8 Chief Constable. All of that is demonstrating how the
9 State meets its -- the public interest is protected and
10 the State meets its obligations. 11:07

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12 All I am, in one sense, given that this is about
13 principles, all I am very cautious about and all I am
14 trying to really push back at is the idea that there is
15 just an immediate sort of, or the only response 11:07
16 effectively to Article 2 is making of anonymity order.

17 CHAIRPERSON: well, maybe if we thought of a
18 precautionary principle, so described, and what
19 Mr. Justice Humphreys and Mr. Justice Horner said as
20 being rather than the only response, the normal 11:07
21 response?

22 MR. SOUTHEY: If it is to be put as the normal
23 response, or a starting point, or something along that,
24 I don't think I have an issue with that. Where I am
25 pushing back at is the idea that it is the only 11:08
26 response. I mean to use an example, in one sense it
27 goes back to the point I made about the Chief
28 Constable, then in some senses if my learned friends,
29 Mr. Henry's arguments were taken to their extreme, if

1 the Chief Constable said: 'I want anonymity', that
2 would suggest potentially he gets it because my learned
3 friend went as far I think at one point of saying:
4 'Basically, it's up to the officer.' That can't
5 necessarily be right, given the level of knowledge 11:08
6 there is about him, et cetera. That's why it
7 ultimately can't be in one sense an automatic because
8 that undermines the balancing exercise. It may be a
9 very powerful factor, it may mean that if you can
10 establish it then -- 11:09
11 CHAIRPERSON: what in this case, do you say, would
12 provide the compelling circumstances to take the
13 question out of the ordinary category?
14 MR. SOUTHEY: well, can I just again put one
15 preliminary point. Our point is obviously you need to 11:09
16 consider each of the separate categories and the
17 engagement in relation to this and so our primary point
18 is in this case in particular in relation to disclosure
19 to CPs, if the test isn't met. But in this particular
20 case it is likely to be - well, firstly, and there is a 11:09
21 recognition of this, I mean the letter from the
22 Metropolitan Police sort of acknowledges this, the
23 reality is that there can be roles where there is
24 perhaps less expectation of privacy because of the
25 nature of the role. 11:10
26 CHAIRPERSON: But we are not talking about privacy, we
27 are talking about Article 2.
28 MR. SOUTHEY: No, but I mean the Metropolitan Police
29 letter seems to suggest that - and this isn't unrelated

1 in the sense it is about what is a reasonable step for
2 the State effectively to take - there is apparently a
3 recognition that senior officers are expected in one
4 sense potentially to be open about their role and that
5 obviously happens to some extent within PSNI, given the 11:10
6 example.

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8 The second thing though I would say, which is probably
9 the more important thing, is how significant the
10 identity is to the issues that the Inquiry needs to 11:10
11 resolve. So to use two examples, and these are
12 hypothetical examples, and I certainly don't know
13 whether they apply to any of the officers who are the
14 subject of the applications. At one end of the
15 spectrum there is probably - there are definitely 11:11
16 witnesses who are effectively corporate witnesses. An
17 example of that is, of course, the timeline evidence
18 you have. That, in those circumstances the name is
19 unlikely to be of any real significance because they
20 are simply giving evidence on behalf of the body to 11:11
21 describe the body's sort of corporate knowledge. At
22 the other end of the spectrum there will be people who
23 are potentially open to significant criticism, whose
24 role is of real importance; so there is the potential
25 need to link them with other materials to see whether 11:12
26 other evidence comes to light. It's that end of the
27 spectrum that we would submit potentially causes more
28 issues where there is a particularly pressing reason
29 for the name to be made public.

1 CHAIRPERSON: All of this, of course, is predicated
2 upon the view that Article 2 is engaged.
3 MR. SOUTHEY: Yes.
4 CHAIRPERSON: I rather understood from your submissions
5 that your Core Participants want me to proceed on the 11:12
6 basis that there will be no risk associated with a
7 former regional head of Special Branch giving evidence
8 openly and without anonymity.
9 MR. SOUTHEY: well, I think - can I just say that I
10 think the submission is slightly - I put the submission 11:13
11 slightly differently, but perhaps not, it may not
12 matter, in the sense that what we would say is that
13 there is no increase in risk and that's the critical
14 point, that's why I took you to Officer L. The
15 question is whether - it's not whether there is a risk, 11:13
16 the question is whether there is a material increase in
17 role.
18 CHAIRPERSON: By doing what?
19 MR. SOUTHEY: Sorry?
20 CHAIRPERSON: By doing what? 11:13
21 MR. SOUTHEY: well, that's where we come back to the
22 point I raised before which is the need to consider
23 issues separately. The first question is, because in
24 one sense it's the most important one from the CPs'
25 point of view, is there any increase in risk associated 11:13
26 by -- is there a sufficient increase in risk, is
27 perhaps a better way of putting it, associated with
28 disclosure of the name to the CPs? That's the first
29 question that one needs to ask because from the CPs'

1 point of view their primary interest, it is not their
2 only interest, but their primary interest is knowing
3 the name themselves so that they can potentially use
4 that during hearings.

5 CHAIRPERSON: well, the first question must be surely 11:14
6 whether there is any basis for anonymity and it moves
7 then by degree onwards. So you can look at it as to
8 whether there is an increase in risk, however that is
9 calculated, or you can look at it from the point of
10 view of whether to give evidence publicly, openly, 11:14
11 without any anonymity, creates a risk to life, to that
12 officer, or former officer.

13 MR. SOUTHEY: Yes.

14 CHAIRPERSON: So you say that doing so would create no
15 risk to the life of that officer? 11:14

16 MR. SOUTHEY: well, the reason I focused on increase in
17 risk is to use Officer 1 for example.

18 CHAIRPERSON: I understand why you do that but it is
19 not the only test; is it? Creating a risk is just as
20 valid a way of looking at it. 11:15

21 MR. SOUTHEY: well, yes, but on the facts, and the
22 reason I am talking about increase is on the facts what
23 Officer 1, for example, and I am using her as an
24 example, what they appear to be saying is: 'I am
25 already under significant risk.' That officer gives 11:15
26 the example of the fact that there was a direct and
27 serious threat to their life in the past. That's why
28 I'm focused on increasing risk because the evidence, as
29 I read it, and I think this is true of all witnesses

1 but we are focusing on Officer 1 partly because of
2 what, Sir, you asked me about Special Branch. The
3 evidence of Officer 1 appears fairly clear, that he is
4 at risk anyway; that's why I am focusing on increasing
5 risk.

11:16

6 CHAIRPERSON: wouldn't it be obvious that if his name
7 was even more widely known than it currently is, that
8 he would be at an increased level of risk?

9 MR. SOUTHEY: well, I don't accept and it's why in one
10 sense we've raised questions about --

11:16

11 CHAIRPERSON: Just tell me the answer to that. What is
12 the position of the Core Participants that you
13 represent, who are members of the Northern Irish
14 community, who understand life in Northern Ireland,
15 what is their position? Is it that there would be no
16 increase in the risk to the life of that senior officer
17 from Special Branch by giving evidence publicly with
18 his name reported in the media and openly for everyone
19 to see. What's the answer to that?

11:16

20 MR. SOUTHEY: well, the starting point is that if you
21 look at his statement, and this is where we focus, he,
22 on the face of it, appears to have been identified by
23 terrorist groups in the past. The first question we
24 have is: why? because the risk from disclosure to the
25 public isn't from the public at large, it is from
26 particular people within the public who are involved in
27 dissident terrorism. The question is, in one sense:
28 if he was known in the past why - how is he forgotten
29 about and why is it that in one sense him giving

11:17

1 evidence would, if you like, result in further
2 knowledge being in the hands of dissidents that they
3 don't already - they may already have?

4 CHAIRPERSON: Because he is not saying that he is known
5 to every dissident. He is saying that he has been 11:17
6 demonstrably at risk before and, therefore, he is
7 likely to be at risk in the future and if he gives
8 evidence without any form of anonymity, more people
9 and, therefore, potentially new and more dissident
10 republicans will be aware of his knowledge. Now what's 11:18
11 the answer to the question I asked you: are your Core
12 Participants, with the knowledge of the life in
13 Northern Ireland that they possess, are they saying
14 that there would be no increase to the risk of the life
15 of that officer if he gives evidence publicly in the 11:18
16 view of everyone with his name published in a
17 newspapers. What's the answer to that?

18 MR. SOUTHEY: They are saying on the basis of the
19 material they have seen and it links to the point I was
20 going to make -- 11:18

21 CHAIRPERSON: They don't need to look at the material,
22 they will know from their experience of life. What are
23 they saying?

24 MR. SOUTHEY: Sir, with respect, the material does
25 matter in the sense that although they know what the 11:18
26 position is in Northern Ireland, and I should say their
27 position is that risk has very substantially reduced in
28 Northern Ireland, and I will come on to that, but what
29 they are saying is that whether or not there is a risk

1 must depend on things that to some extent they don't
2 know, which is the extent to which there is current
3 knowledge of this officer's historic role and the
4 extent to which -- well, yeah, the extent of current...
5 That's a key factor, we would submit, because I think 11:19
6 at one stage my learned friend, Mr. Henry, suggested
7 that prior knowledge might actually mean it's worse
8 giving evidence. We can't see how that's the case.
9 I mean if there is prior knowledge of someone's past,
10 it's difficult to see how giving evidence in public 11:19
11 then increases it. That's our concern.

12
13 So what this officer says is certainly there was
14 awareness in the past among terrorists. He doesn't say
15 whether or not he has given evidence in the past in 11:20
16 public, unlike at least one other officer who does
17 accept he has done that. We do submit, and this may be
18 also a key distinction between us and PSNI, that if
19 there is already widespread awareness of your previous
20 activity, it's difficult to see why naming you adds to 11:20
21 risk, and that's the point we're making, Sir. It's not
22 --

23 CHAIRPERSON: I can hear you making the point. The
24 question is whether there is any validity to it?

25 MR. SOUTHEY: Yes, well, absolutely. That is obviously 11:21
26 a question for you to decide, Sir. Our point here in
27 one sense is, well, probably more about process in one
28 sense than in the sense it is saying if an officer is
29 going to rely effectively on Article 2, it is important

1 that there is full disclosure of matters that are
2 relevant to whether risk was increased. We would say
3 probably the most important of those is the extent of
4 knowledge of that officer's role, particularly
5 knowledge by people who may wish to carry out an attack 11:21
6 rather than the general public.

7
8 But, secondly, my Lord, and this is in one sense at
9 least as important, well it is more important from the
10 CPs' point of view, the second question that arises, 11:22
11 even if we are totally barking up the wrong tree in
12 relation to that, the second question that arises is
13 whether there is any risk associated with naming the
14 witness or providing the name to the CPs. That's
15 significant because obviously two of the officers, I 11:22
16 think it is, if I remember rightly, do accept that
17 partly because there has already been disclosure of
18 their names it would appear in documentation that has
19 been provided, that they have no objection to names
20 being provided to CPs. The other witnesses, on the 11:22
21 face of it, don't appear to engage with that. I know
22 submissions have been made but there is no express
23 statement as to whether they object, what their reasons
24 for objecting are. One shouldn't ignore the fact
25 that -- 11:23

26 CHAIRPERSON: The question of disclosure of names to
27 CPs only.

28 MR. SOUTHEY: Yes.

29 CHAIRPERSON: would only arise if Article 2 was

1 engaged. Otherwise it would just be the witness giving
2 evidence openly.

3 MR. SOUTHEY: well, the reason I slightly hesitate, and
4 it is a point against me, to be blunt, is that I have
5 to accept, based on Officer L, that suppose Article 2 11:23
6 wasn't engaged but an officer says: 'I'm unwilling to
7 have my name given to a CP', that would still be
8 something that the Inquiry would need to consider. We
9 submit it wouldn't necessarily carry as much weight as
10 my learned friend, Mr. Henry, but it would still, I 11:24
11 accept, have to be considered.

12 CHAIRPERSON: On the common law fairness test.

13 MR. SOUTHEY: On the common law fairness test, yes.

14 CHAIRPERSON: If we just stick with Article 2 for a
15 moment, your position is that, first of all, Article 2 11:24
16 is not engaged, so there is no issue.

17 MR. SOUTHEY: Yes.

18 CHAIRPERSON: If it is engaged, then there is no reason
19 why the Core Participants shouldn't be made aware of
20 the identity of the officers even if the public aren't. 11:24

21 MR. SOUTHEY: Can I just suggest that that we would put
22 the issue slightly differently, it may reach the same
23 conclusion, but it is this, and it goes back to the
24 point I made about the structure of Section 19 and the
25 need to consider separately different restrictions. 11:24
26 The first question, in our submission, is, we assume
27 for the moment that you are not with me and there is
28 sufficient material to demonstrate Article 2 is engaged
29 by disclosure to the public, we would submit the next

1 question is: is it engaged by disclosure to the CPs?
2 That's a separate question because it is at least
3 conceptually possible, and we would say practically
4 possible, that you can conclude that there is a real
5 and immediate risk from disclosure to the public but 11:25
6 there is not a real and immediate risk from disclosure
7 to CPs. So, this was the point I was trying to make,
8 perhaps badly, about Mr. Henry's submission. At times
9 they seemed to say, effectively: 'You just need to
10 look at whether Article 2 is engaged and that's it.' 11:25
11 Because it's focused we submit on material increase in
12 risk you have to look at each of the steps that are
13 potentially in issue.
14 CHAIRPERSON: Remind me how many CPs you act for?
15 MR. SOUTHEY: Twenty-seven I think it is, from memory. 11:26
16 CHAIRPERSON: I thought it was more.
17 MR. SOUTHEY: It's 27 groups of families, 54
18 individuals. I think that is right.
19 CHAIRPERSON: If there was a risk to the life of a
20 former senior officer through his identity being made 11:26
21 known publicly, are each of those 54 individuals
22 content to accept the responsibility that goes with
23 being informed of his identity and accept that
24 responsibility in the knowledge that they would have to
25 exercise extraordinary care over ever passing on any 11:26
26 form of information to other members of the public
27 which could identify that officer, deliberately and or
28 inadvertently?
29 MR. SOUTHEY: Sir, they have accepted through their

1 undertakings that they have to keep material
2 confidential with serious --

3 CHAIRPERSON: The undertakings presently in place are
4 completely different. They do not relate to
5 information which, if disclosed, would put at risk the 11:27
6 life of another individual. So are they prepared to
7 accept that responsibility or not?

8 MR. SOUTHEY: I am not sure we have asked the question
9 in precisely that way but they are willing to accept
10 that they will be subject to obligations to keep any 11:27
11 information like that confidential.

12 CHAIRPERSON: well, I have explained to you what the
13 difference between the two is; if we can't take that
14 any further forward, we can't.

15 MR. SOUTHEY: well I hear what you say, Sir, in 11:28
16 relation to it, the reason I slightly hesitate, I
17 wouldn't necessarily accept that the distinction is as
18 clear as you've indicated.

19 CHAIRPERSON: well, I suspect many members of the
20 public would not wish to bear such a responsibility 11:28
21 because it's not just a question of deliberately or
22 maliciously passing on information, it's a question of
23 what might happen accidentally or inadvertently and
24 it's a life-long obligation.

25 MR. SOUTHEY: well, two things I would say in relation 11:28
26 to that is, one, of course, some of the material that
27 they will have access to is already sensitive material
28 in the sense that it would potentially be of value for
29 people who want to carry out serious violent acts.

1 CHAIRPERSON: Yes, but it is not putting the life of an
2 identifiable individual at risk.

3 MR. SOUTHEY: I suppose - at least theoretically - it
4 could put an unidentified individual at risk. But,
5 secondly, in any event, the fact of the matter is that 11:29
6 providing that information, making it available,
7 doesn't mean that anyone who doesn't want to access it
8 will in fact access it. It simply means that those who
9 wish to, despite the risk, will be able to access it,
10 it also means that the lawyers will be access it. 11:29

11 I should say that, as has been made clear, they already
12 do know some officers names. I mean the officers who
13 are willing to have their names shared with CPs are
14 doing that because the names are already there. So...

15 CHAIRPERSON: We are not talking about that. We are 11:30
16 talking about a particular example of a particular
17 officer with particular circumstances. Now, we have
18 taken that as far as we can. I mean I know what your
19 position is. I understand the extent to which that's
20 been canvassed with your Core Participants and we can 11:30
21 probably just leave it there.

22 MR. SOUTHEY: Yeah. Can I say, in any event, in
23 relation to the officers who don't expressly say that
24 they consent to disclosure to CPs, we would submit that
25 again one of the issues with these applications is that 11:31
26 they don't expressly deal with this issue of disclosure
27 to CPs. There seems to be, as far as we see it, an
28 assumption by PSNI that non-disclosure is what they
29 seek, non-disclosure to CPs is what they seek but,

1 actually, it's unclear whether they seek that. It's
2 unclear whether they have given any thought to that as
3 a separate issue, because it's simply not addressed.
4

5 We do submit that Officer L makes it clear that if 11:31
6 what's in issue is subjective fear in relation to
7 disclosure to CPs, we do submit it's subjective fear,
8 those reasons matter. Can I correct one thing that my
9 learned friend, Mr. Henry, said about our submissions.
10 He, I think, characterised our submissions as being 11:32
11 that officers who were objecting to CPs receiving the
12 material had irrational fears. That wasn't what we
13 said. What we said was where there aren't any reasons
14 given, one can't know whether the fears are rational or
15 not. One can't know whether they can be addressed by, 11:32
16 for example, reassurances. It may be possible to
17 reassure.
18

19 I don't know whether, Sir, you need me to take you to
20 the decision but the same reasons for fear are relevant 11:33
21 if it's not - at least certainly if it's not an Article
22 2, it's not an Article 2 case. It's not simply, as my
23 learned friend said, a personal decision. One needs to
24 look at potentially the reasons for submissions.
25

26 In that context can I also make clear that PSNI,
27 obviously in their written submissions and orally, made
28 some submissions which may or may not reflect, say, the
29 reasons given by individual officers. There are two

1 things that we would say about those submissions, about
2 the risk associated with disclosure to CPs. The first
3 is that some of the submissions, we submit, it's
4 unclear how they link to whether there would be an
5 increase in risk and whether CPs can be trusted to 11:34
6 comply with their undertaking. We say that for this
7 reason; for example, one of the points that is made by
8 PSNI in writing is anonymity can be difficult to
9 maintained in a small community. But that, we submit,
10 doesn't say anything about whether CPs are likely to in 11:34
11 some way deliberately or mistakenly breach their
12 undertakings. In any event, the question here is not
13 whether there is any risk. I mean the reality is
14 obviously whatever we do it is impossible to eliminate
15 risk. The question is whether the risk is real and 11:35
16 immediate from disclosure to CPs. That Rabone makes
17 clear - if you need the reference it's page 651, para
18 38 and 39 - that means the risk has to be more than
19 remote or fanciful and it needs to be imminent.

20
21 We submit in terms of CPs, given their undertakings,
22 given their backgrounds, et cetera, it is difficult to
23 see how the risks associated with disclosure to them
24 aren't remote or fanciful or not imminent - or how they
25 are imminent. Of course there is always the 11:35
26 possibility that something will go wrong, but there is
27 always that possibility in normal life. I mean if you
28 think about, for example, the position in the rest of
29 the UK where people give evidence openly most of the

1 time, there is always the possibility - there is always
2 a risk that something will go wrong, that someone will
3 want to take out a reprisal, but that risk can't be
4 said to be imminent and it can't be said to be anything
5 other than remote.

11:36

6
7 Now, I just made reference to in one sense the
8 distinction between the approach that is adopted in
9 Northern Ireland and the approach that is adopted in
10 the rest of the United Kingdom. We do submit that the
11 submissions of PSNI about risk need to be viewed with
12 care and, in particular, one needs to be cautious about
13 over-stating, in one sense, the risk of terrorist
14 attack. Firstly, the JTAC risk assessment, as my
15 learned friend, Mr. Henry, fairly accepted, indicates
16 there has never been an attack on a witness at an
17 inquiry or inquest. My learned friend says that's
18 because anonymity is often granted, but --

11:36

11:37

19 CHAIRPERSON: And you accept that anonymity is often
20 granted in inquests?

11:37

21 MR. SOUTHEY: Yes. Yes, I accept that.

22 CHAIRPERSON: One might wonder why that is.

23 MR. SOUTHEY: Well, I am going to come on to that
24 because we do submit there has been - it's important to
25 look at the current situation in Northern Ireland and
26 there clearly has been an improvement in the security
27 situation in Northern Ireland. Some of that, we
28 submit, is perhaps the result of historic concerns.

11:37

1 what I would also point to though is I am not aware in
2 the evidence that my learned friend has taken me to of
3 any evidence of an attack on any police witness
4 essentially in any context.

11:38

5
6 Now my learned friend highlights the fact that the JTAC
7 risk assessment indicated, and one needs to be quite
8 cautious about this, in our submission.

9 CHAIRPERSON: Sorry, Mr. Southey, what do you mean by
10 that? You say that you are not aware in the evidence
11 that Mr. Henry has taken you to, any evidence of an
12 attack of any incident on police witnesses? You mean
13 witnesses as opposed to officers?

11:38

14 MR. SOUTHEY: No, I mean so police officers giving
15 evidence in general proceedings is what I meant by
16 that. Sorry, I probably didn't express that very well.

11:39

17 CHAIRPERSON: So no evidence of attacks on police
18 officers in their capacity as witnesses?

19 MR. SOUTHEY: Yes. Yes, that's a better way of putting
20 it. Sorry, Sir, that's my fault. Can I turn to

11:39

21 perhaps the detail of the JTAC risk assessment and two
22 things about that that relate to the overall Northern
23 Irish republican terrorist threat (the NIRT) which is
24 identified as substantial, which means an attack is
25 likely. The first thing is, in our submission, my
26 learned friend, Mr. Henry, made a link that is not
27 necessarily clear on the evidence. What he said, if I
28 heard him correctly, was that you start from the point
29 that an attack is likely. You note when reading this

11:40

1 that witnesses are highly likely to be regarded as
2 legitimate targets, so it's likely that an attack will
3 take place on a witness. In our submission that
4 doesn't follow because what the risk assessment is
5 talking about, when it talks about the overarching 11:40
6 threat level, is some form of an attack not simply an
7 attack on witnesses.

8
9 Secondly, when looking at that risk assessment of
10 substantial, it's important to recognise, and this is 11:40
11 clear from - it's the second bundle of PSNI documents,
12 it cannot be quite hard to read but I have been to the
13 underlying document. If you go to internal - it's not
14 actually got an internal page that I can read. It's
15 two pages before 219. So I presume it's 217 of the 11:41
16 second bundle. The internal pagination, is tab 25.

17 CHAIRPERSON: Tab 25.

18 MR. SOUTHEY: Tab 25 of the internal, it's sort of, I
19 don't quite understand the numbering but-- The Inquiry
20 bundle reference is page 219 but I think that would 11:41
21 probably mean it's - yeah, that would probably mean
22 it's 217, but for some reason I think page numbers
23 don't seem to entirely follow in this bundle, that's
24 the problem I am having looking at it. It's - sorry,
25 actually I have got the wrong... Sorry, it's tab 23 I 11:42
26 should be looking. Sorry, I have misread my
27 references, and it's Inquiry reference to page 215. So
28 I think it's page 213 on the internal. Sorry, I got my
29 references wrong there for a moment.

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It's a document headed: "Terrorism Threat Levels", it's an MI5 document, I think, if I remember rightly. It is very difficult to read on the version we have got, certainly the hardcopy version, because of size.

11:43

CHAIRPERSON: Yes, I have got it.

MR. SOUTHEY: The reason I am taking you to it is for two reasons because it demonstrates that substantial is only the third highest level and, second, but more importantly in one sense, it demonstrates it's the same level of risk as there is in relation to the UK as a whole from terrorism. That demonstrates, in our submission, that's the result in one sense of a reduction in risk in Northern Ireland in 2024, as we understand it, and that demonstrates in one sense a quite an important factor, which is that the distinction between Northern Ireland and the rest of the United Kingdom does appear to be reducing with time.

11:43

11:43

11:44

So, if you compare that with a document that you were taken to yesterday by my learned friend which is at - it is the first bundle of PSNI material. It's page 80 on the sort of internal pagination, or page 82 in the Inquiry bundle. It's part of the report of the independent reviewer of the Justice and Security (Northern Ireland) Act 2007. Covering 1st of August 2016 to the 31st of July 2017. You will see that at that stage the reviewer, perhaps unsurprisingly, drew a

11:44

1 distinction - highlighted a distinction in threat
2 levels - it's at para 4.2 - highlighted the distinction
3 between threat levels in Northern Ireland and those in
4 the United Kingdom.

5
6 That's important, in our submission, because the risk
7 assessment recognises that there has been a significant
8 downward trajectory in terms of terrorist violence
9 since 2010. The documents provided by PSNI, the most
10 recent sort of statistics document, for example, which 11:45
11 is at Inquiry bundle page number 300, internal 298,
12 which is back to bundle 2, has graphs showing levels of
13 terrorist-related incidents and shows them, we would
14 submit, broadly decreasing with time, given that this
15 is considering a 10-year period, the peak seems to be 11:46
16 around 2016, 2017, but then has been dropping. That's
17 despite the fact that what that is relating to is
18 security-related incidents. The definition - and I
19 will just give you, the next page is the one, for
20 example, in relation to deaths - the definition is 11:47
21 actually pretty wide for terrorist acts and so would
22 include, for example, inter terrorist activity.
23 Indeed, the last death, as far as we can work out, in
24 Northern Ireland was one of that nature. That is
25 important. 11:47

26
27 when my learned friend, Mr. Henry, took you through at
28 length in one sense reporting on a series of incidents,
29 but a lot of them, and this is where he started, were

1 from a time where on the reports themselves, and the
2 reference is page 343 of the same bundle, it's the
3 report of the death of Constable Stephen Carroll, the
4 murder of Stephen Carroll, that was from a time where
5 there was said to be a surge of dissident republican 11:48
6 activity, and that was in 2009. The risk assessment,
7 as I have already taken you to, recognises a downward
8 trajectory since that time.

9
10 Actually, if you think about my learned friend's 11:48
11 submissions what you saw, we would submit, is incidents
12 became less frequent. Two other features, we would
13 say, of those incidents was - or one of the features of
14 those incidents was save for the issue of a wildlife
15 camera being used to gather information, none of the 11:48
16 attacks appeared to have been on retired officers. The
17 focus seemed to have been on serving officers. There
18 was the issue of the bonfire, the very tasteless
19 bonfire last year that was highlighted.

20 MR. GREANEY: If my learned friend is moving to a 11:49
21 slightly different point, could I indicate that we do
22 need to take a break for 15 minutes for the benefit of
23 the stenographer.

24 CHAIRPERSON: Yes, I was wondering about that,
25 Mr. Greaney. Mr. Southey, you will remember of course 11:49
26 that the expectation had been that we would be hearing
27 closed submissions in the course of today.

28 MR. SOUTHEY: Yeah.

29 CHAIRPERSON: On the theory that we would have finished

1 our open submissions yesterday. Now, we didn't do
2 that, of course, because it took perhaps a bit longer
3 to go through Mr. Greaney's submissions and Mr. Henry's
4 submissions in light of first been anticipated. But I
5 had been given to understand that you thought you might 11:49
6 only be about 20 minutes in your submissions. You have
7 spoken for an hour-and-a-half already, how much longer
8 do you expect to be?

9 MR. SOUTHEY: My Lord, partly that was because
10 obviously in one sense I hadn't anticipated quite how 11:50
11 long PSNI submissions would be and also, absolutely
12 fairly, my Lord, so you have asked me significant
13 questions. I would hope I can finish in 15, 20 minutes
14 but I do have some material to cover. I mean what I am
15 covering at the moment is material gone through in some 11:50
16 detail by my learned friend.

17 CHAIRPERSON: I thought last night your position was
18 that today you would only be about 20 minutes?

19 MR. SOUTHEY: I am not sure I gave that estimate after -
20 I may be wrong. 11:50

21 MR. GREANEY: I think 20 to 30 was what I was told
22 yesterday.

23 MR. SOUTHEY: I thought the time estimate may have been
24 given earlier in the day but I may be wrong about that;
25 yes, I may be wrong about that. 11:50

26 CHAIRPERSON: Anyway you have got more to go?

27 MR. SOUTHEY: Yes.

28 MR. GREANEY: If we could come back around about 12.10,
29 please?

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THE HEARING ADJOURNED

THE HEARING RESUMED AS FOLLOWS:

12:09

CHAIRPERSON: Mr. Southey.

MR. SOUTHEY: Sir, I was talking about the risk. Can I just deal very briefly, hopefully, with one submission that my learned friend, Mr. Henry, made based on you will remember the BBC article where there was no reference to the prosecutor's name?

12:09

CHAIRPERSON: Yes.

MR. SOUTHEY: It led to a sort of more general submission that there were sort of greater security arrangements in Northern Ireland. We would submit that it is very difficult to draw anything from the particular point about prosecutor's names. There is no reference to a court order. It's unclear if the prosecutor said anything that the journalist wished to report. I should say that if you Google, as we did after the hearing yesterday, or during the hearing I think it was, briefly, you come up with, firstly, we located very easily the person who prosecuted - or at least one of the prosecutors in the Seamus Daly case, because they put it on their Bar Library profile, suggesting that they were not concerned about being identified as a prosecutor. We identified criminal judgments with prosecutor's being named.

12:09

12:10

12:10

1 It is fair to accept that there are greater security
2 arrangements still in Northern Ireland in relation to
3 things like the judiciary but it's unclear when those
4 decisions were taken, unclear what the reasons were
5 and, more importantly, in one sense, there is no in one 12:10
6 sense downside, if I can put it that way, to providing
7 security for judges; there is no open justice
8 implications of that.

9
10 That links in to what our more fundamental concern is 12:11
11 about the risk assessment and that is that what they
12 don't do, or what the risk assessments don't do, is
13 they don't take account of the extent to which things
14 may already be in the public domain. They don't take
15 account of the specific risk of disclosure to the CPs. 12:11

16
17 Now, in that context my learned friend, Mr. Henry, said
18 there is no need for individual risk assessment. We
19 don't necessarily accept that's correct because we
20 submit the factors will be case-specific, but even if 12:11
21 that is correct it is still, and this is probably the
22 more important point, important that the risk
23 assessment does take account of matters such as whether
24 risk is increased by disclosing to CPs and the extent
25 to which risk is increased in circumstances where 12:12
26 someone may already be known. That's why we say at the
27 moment the risk assessments are inadequate. Those are
28 factors that whether generically or in relation to
29 individual cases, need to be considered.

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we do submit linked to that, and I have already touched on this to some extent, officers, such as Officer 1, potentially need to provide further information. So, in relation to Officer 1 he doesn't say, to use this as an example, unlike Officer 7, whether he has given evidence in the past without reporting restrictions. He doesn't say whether there has been public reporting of his role. All of those, we submit, are potentially relevant to risk in light of the submissions I made before, which is the question is: is risk - is disclosure going to increase risk?

A further area where we submit there is a need for further information is in relation to policies. One of the points we make is, as already indicated, is that the Met appear to have a policy, their letter draws a distinction between those below the rank of Superintendent and those above the rank of Superintendent. We would sort of assume that PSNI have similar approaches, that certain officers above a certain level can expect, in one sense, to have the risk, bear the risk of having names published, potentially with associated security steps being taken. As far as we are aware, there is no policy that's been produced in relation to that and no statement as to whether there are relevant policies.

So we do submit, as I say, in light of those factors

1 there is a need for further material potentially to
2 support an application, so that one can properly assess
3 the risk in individual circumstances.

4
5 what we would also emphasise, and I won't go through 12:14
6 the case law, we set it out fully in our written
7 submissions, I won't go through the case law unless it
8 would assist you, Sir. What we do submit is also that
9 there are obvious and well-established reasons why
10 names are important. It's partly for open justice 12:15
11 reasons but partly also because it enables effective
12 investigation of the evidence.

13
14 Now my learned friend sought to distinguish the case
15 law - my learned friend, Mr. Henry, sought to 12:15
16 distinguish the case law that we rely on, on the basis
17 it didn't concern Article 2. That is correct. As
18 already indicated, we don't dispute the fact that
19 Article 2 requires ultimately a great weight to be
20 given to the need to protect the right to life. So it 12:15
21 can outweigh the benefits of reducing a name. But it
22 is still important to take account of those benefits
23 and it goes back to the submission I made earlier which
24 you, Sir, probed me about at some length, which is
25 whether there is in fact a balancing exercise and the 12:16
26 sorts of cases where potentially a disclosure of a name
27 was required. Ultimately, it is the benefits of the
28 name that, in our submission, are to be placed in the
29 balancing exercise.

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My learned friend also said or made a submission effectively that ciphers aren't a problem. In our submission ciphers don't answer all the points that are potentially benefits, all the matters that are potentially benefits in names being disclosed. For example, it doesn't address the open justice matter; it doesn't address the possibility of evidence coming to light because someone is identified in reporting. But probably more importantly one of the things that was clear yesterday from the update given by counsel to the Inquiry, has been clear from earlier stages in this, is there is a very substantial volume of documents. It is proving a challenge, a challenge which clearly the Inquiry is doing a great job at seeking to address. But it clearly is a challenge the volume of documents. To then have to cipher that volume of documents for potentially a significant number of names, if anonymity is routinely granted for PSNI officers as well as Security Service employees, that is adding to that burden. In our submission ciphers shouldn't be seen as being a sort of easy fix to these problems, for those reasons.

As I say fundamentally Sir, we submit that in light of partly the points I already made about the nature of the test and, in particular, the need to consider whether particular steps increase risk, in light of the fact that we would submit each case ultimately will

1 need to be determined on its own merits, there isn't a
2 one-size-fits-all approach, the material that's been
3 disclosed so far is insufficient to justify these
4 applications. That doesn't obviously mean that further
5 applications can't be made on behalf of the officers 12:18
6 with the sorts of material we have identified as
7 potentially being needed. But for the moment we submit
8 the applications should be rejected as being
9 insufficient to justify the need.

10
11 Can I just check? Sir, I have got the sign off from
12 those on either side of me that I have covered
13 everything, so that I think - unless, there is further
14 questions, Sir?

15 CHAIRPERSON: There is one point I wanted to ask you 12:19
16 about in relation to your submission referring to
17 officer 2.

18 MR. SOUTHEY: Yes.

19 CHAIRPERSON: It's in the second of your submissions,
20 the ones dated the 11th of March. 12:19

21 MR. SOUTHEY: Yes.

22 CHAIRPERSON: The point you make there - actually it's
23 in relation to both, I think, Officers 1 and 2. Is
24 that Internet searches --

25 MR. SOUTHEY: Yep. 12:19

26 CHAIRPERSON: -- seem to show the publication of the
27 name of an officer of an equivalent rank.

28 MR. SOUTHEY: Yep.

29 CHAIRPERSON: And you give a reference to the Internet

1 web-site.

2 MR. SOUTHEY: Yep.

3 CHAIRPERSON: I'm not just sure what you want me to
4 make of that, but I don't think I would want to mention
5 the name of the web-site just in case it should 12:20
6 encourage others to use it, to go searching for
7 information.

8 MR. SOUTHEY: Sir, we have no objection to that
9 approach. We deliberately - I don't think I am
10 betraying anything I shouldn't betray if say we gave 12:20
11 very careful consideration to whether, for example,
12 further details of those searches should be provided
13 and we felt we needed to provide the web-site to
14 demonstrate why we were raising the issue but we
15 shouldn't go any further. 12:20
16

17 The point we were seeking to make about that is not
18 that necessarily - well, the point we were seeking to
19 make about that was that it does demonstrate why,
20 potentially demonstrate why it is important there is a 12:21
21 clear statement essentially from each officer as to
22 what is in the public domain already about them and
23 that's the only point we are making because clearly
24 Google searches, for example, can produce information
25 but we can't - we have no way of, in one sense, 12:21
26 conducting the most obvious search and knowing what
27 information has been provided, but that's why it is
28 important in one sense there is a clear statement from
29 officers about what reporting there has been, if any,

1 of them in the past.

2

3 CHAIRPERSON: The PSNI in their submissions explain
4 that as an organisation they don't publish the name of,
5 for example, the officers in Special Branch. Some of 12:21
6 the material, or some of the information that one finds
7 on the Internet is of more value and more reliable than
8 others is.

9 MR. SOUTHEY: Absolutely.

10 CHAIRPERSON: The web-site that you draw attention to 12:22
11 describes itself as a "collaborative project" authored
12 and edited by a voluntary association of individuals
13 and groups who are developing a common resource of
14 knowledge. It says anyone that the editors of the site
15 approve as a user, can alter its content. 12:22

16 MR. SOUTHEY: Yes.

17 CHAIRPERSON: Then it goes on to say that: "Nothing
18 found here has necessarily been reviewed by
19 professionals with the expertise required to provide
20 complete accurate or reliable information." 12:22

21 MR. SOUTHEY: Yes.

22 CHAIRPERSON: It says: "The content of any given
23 article may recently have been changed or vandalised by
24 someone whose opinion doesn't correspond with the state
25 of knowledge in the relevant fields." That tends to 12:23
26 suggest I shouldn't pay terribly much attention to
27 that.

28 MR. SOUTHEY: I should say, sir, because we looked at
29 this as well, both, if I remember rightly, and Mr. Fox

1 will correct, because I think he undertook this task,
2 both names identified were in fact then found on news
3 reports, albeit news reports that suggested that both
4 individuals were in fact dead now. But it's not - the
5 reason we have mentioned that site was that was the 12:23
6 site that came up from Googling "Special Branch
7 officers", effectively, but there is other material
8 that confirms the particular names identified, if I can
9 put it that way.

10
11 The key point I am making is not that, in one sense,
12 these names are the critical point. The point I'm
13 making is individuals will know whether there has been
14 reporting. If someone had to give evidence for
15 example -- I mean the default may be that Special 12:24
16 Branch officers are not named, but if someone has had
17 to give evidence that would potentially identify them.
18 That is why it is important there is a clear statement.
19 It may be that the officers come back and say: 'As far
20 as I am aware there is nothing that names me currently 12:24
21 in the public domain and, for example, that is
22 available on-line.' But we are saying there ought to
23 be that statement. If the statement is simply: 'There
24 is nothing', that's highly relevant. Equally, if the
25 statement is: 'Actually, you can find me in this or 12:24
26 there was contemporaneous news reporting, for example,
27 about me.' Obviously, the Internet is not necessarily
28 complete when you are looking at historic matters, in
29 particular.

1 CHAIRPERSON: All right. Thank you.

2 MR. GREANEY: Sir, the only other Core Participants who
3 have made submissions in writing on this issue, in
4 accordance with the timetable that was set, are those
5 represented by Mr. Toal. So this would be his
6 opportunity to make his submissions. 12:25

7

8 SUBMISSION BY MR. TOAL

9

10 CHAIRPERSON: Mr. Toal. 12:25

11 MR. TOAL: Chair, in respect of the submissions this
12 morning, for those of us who routinely deal with cases
13 where anonymity applications are made, it is somewhat
14 frustrating and often feels like groundhog day because
15 the same arguments are routinely rolled out and the end 12:25
16 result generally is that anonymity is granted. The
17 submissions that we have made to you suggest that with
18 that one additional piece of evidence, namely an
19 individualised risk assessment, that the Tribunal could
20 move to make these decisions without any fear of 12:26
21 challenge in the future.

22

23 We say that because the reality of these anonymity
24 applications is that they will likely be granted and
25 the officers who have provided the personal statements 12:26
26 have put forward cogent reasons as to why their
27 identities should be withheld from the public and,
28 indeed, from the Core Participants and the lawyers.

29

1 But as a matter of principle, and just so that you
2 understand why we made submissions on this point, those
3 that we represent when they are faced with these
4 applications, they see it as disturbing that there is
5 any suggestion that they would, even inadvertently, 12:27
6 supply the name of a person that would aid Dissident
7 Republicans in their cause, and they say that as
8 victims of Dissident Republicans.

9
10 So for that reason we made some submissions which we 12:27
11 hope assist you and we pointed, in particular, towards
12 the Coagh Inquest. When you look at the Coagh Inquest,
13 what you have in that case is 13 applications for
14 anonymity and they were all granted but what
15 Mr. Justice Humphreys had was the benefit of 12:27
16 individualised risk assessments in that case and some
17 of them came back and said that the risk was low but if
18 there is publication then that increases. That gave
19 him an evidential platform to grant all of those
20 applications. 12:27

21
22 So there is an air of inevitability about all the of
23 these applications, but we simply pointed out that in
24 inquests the Coroner hearing those cases had that added
25 benefit of that individualised risk assessment. In 12:28
26 particular, if you look at paragraph 4 of C's
27 application, you will see the genesis for that and you
28 will see that in inquests, which are obviously also
29 inquisitorial processes here in Northern Ireland, there

1 is a protocol whereby those individualised risk
2 assessments are provided to the Coroner in each case.
3 We say that there is a good basis for that and it leads
4 to a decision-making process that can't really be
5 impugned after the fact and can't be challenged by way 12:28
6 of judicial review.

7 CHAIRPERSON: But we don't have that in this case. We
8 have got something slightly different.

9 MR. TOAL: We do.

10 CHAIRPERSON: So, what am I to do with that? 12:28

11 MR. TOAL: We are not saying that there is a rigid
12 legal requirement to have those individualised
13 assessments, we are saying that it is desirable. One
14 of the reasons that we --

15 CHAIRPERSON: But I don't have them in this case, so 12:29
16 maybe it is desirable but I don't have them. So what
17 should I do?

18 MR. TOAL: In the circumstances, you can delay the
19 decision until they are provided. It is my
20 understanding that they are not particularly onerous. 12:29

21 The decision that you take can then be on a fully
22 informed basis. But if that is not practicable, and
23 you are forced to make that decision, then we would
24 accept that the arguments that have been put forward
25 through the individual statements are compelling and 12:29
26 the general risk assessment can be utilised to
27 supplement those particular factual assertions. You
28 could, in theory, make a decision that Article 2 is
29 engaged and that anonymity is required from all of the

1 participants; we accept that that can happen.

2

3 We are saying that ideally you would have that extra
4 layer of evidence in order to formulate your decision.
5 In particular, Chair, because when you come to apply 12:30
6 the restrictions, if you have that individualised
7 assessment, then it would allow you an evidential
8 platform to say, 'I have a document here from the
9 Security Service that says even the release of this
10 name to one single person would increase the risk.' 12:30
11 CHAIRPERSON: But I don't have any of that, Mr. Toal.
12 MR. TOAL: Yes, I appreciate that.

13 CHAIRPERSON: So, let's not waste our time talking
14 about what we might have. What am I to do with the
15 material that I do have? You have heard the 12:30
16 submissions. You have outlined already a summary of
17 the legal position. Your submissions tell me that I
18 should take care and that I should treat each
19 application individually. I understand all of that,
20 and happy to do so, but what should the outcome be? 12:31
21 MR. TOAL: Our submission to you, in trying to assist
22 you in this task, is that it would be ideal if you
23 requested that further layer of information. If you
24 are not prepared to do that, then you have to make the
25 decision on the present material. We are saying that 12:31
26 it is possible to still decide that and to apply the
27 restrictions and, in particular, anonymity.

28 CHAIRPERSON: Should I do so or not? Let's look at the
29 individual officers. On the basis of the evidence

1 outlined by Mr. Henry yesterday, in relation to
2 officers 1 and 2, should I or should I not grant
3 anonymity?
4 MR. TOAL: My application is that you should delay that
5 decision until you have the individualised risk 12:31
6 assessments. Because in Northern Ireland geography
7 matters and personal circumstances matter. You do not
8 have that information before you from --
9 CHAIRPERSON: If I don't do that, if I decide to simply
10 make a decision upon the basis of the evidence placed 12:32
11 before me, what should the outcome be?
12 MR. TOAL: Our respectful submission to you is that
13 your decision is more susceptible to challenge in those
14 circumstances and that ideally it would be more
15 advisable -- 12:32
16 CHAIRPERSON: It is always susceptible to challenge if
17 I do the wrong thing. So you tell me what the right
18 thing to do is?
19 MR. TOAL: In our submission it is to delay the
20 decision until you receive that extra layer of 12:32
21 evidence.
22 CHAIRPERSON: Putting that aside, maybe I will do that,
23 but let's put that aside and look at what I should do
24 if I don't delay the decision. What is your submission
25 about the right thing to do, based on the evidence that 12:32
26 I have heard?
27 MR. TOAL: If you were forced into that decision today
28 and you were applying the precautionary principle, then
29 you would grant anonymity in the terms that is sought.

1 I do not dissent from that.

2 CHAIRPERSON: So you don't oppose the application then
3 on the basis of the evidence that I have heard?

4 MR. TOAL: No, and I hope, Chair, that that has not
5 come across in our written submissions that we are
6 taking a stance where we are opposed to these
7 applications in principle. That is not our position.

12:33

8
9 We were saying that we can see a need for anonymity in
10 many of these cases and what we are simply saying is
11 that in our experience there is usually an additional
12 layer of evidence that better assists the
13 decision-maker when arriving at a decision to grant
14 anonymity and also the extent of that anonymity.

12:33

15 CHAIRPERSON: There is one passage in your submissions
16 that I would appreciate a bit of assistance with.

12:33

17 MR. TOAL: Yes.

18 CHAIRPERSON: It's paragraph 17, which is the
19 concluding paragraph, under the heading of "The Legal
20 Framework", and you explain that: "The potential for
21 instances of media coverage is simply a price that
22 requires to be paid in the normal course of events for
23 having an open and transparent system of justice and
24 living in a democracy." I wasn't quite sure what that
25 meant.

12:34

12:34

26 MR. TOAL: Yes. I believe that reference is linked to
27 the subjective fears and, again, it ties back to our
28 principal concern in this case about the individualised
29 risk assessments. The point being made in the written

1 submissions is that even the officers themselves would
2 be assisted by these individualised risk assessments
3 because it may well be that their subjective fears are
4 unfounded.

5 CHAIRPERSON: well, maybe it is but I am still not 12:34
6 following what you mean in paragraph 17?

7 MR. TOAL: Yes. That is tied to the subjective fears
8 that in circumstances where the Inquiry would move to
9 consider that as a reason for granting anonymity that
10 the Inquiry would also consider that subjective fears 12:35
11 may be counterbalanced by media rights and the right to
12 open and transparent justice.

13 CHAIRPERSON: Yes, I see. All right.

14 MR. TOAL: Unless you have anything further, those are
15 our submissions. 12:35

16 CHAIRPERSON: So you don't oppose the granting of
17 anonymity?

18 MR. TOAL: No. None of the people that we represent
19 oppose it in principle and, indeed, they can see
20 compelling reasons in some of the evidence. 12:35

21 CHAIRPERSON: But you don't oppose it on the basis of
22 the evidence I have heard?

23 MR. TOAL: No, we don't. We are simply trying to
24 assist you by saying that from our experience in
25 similar types of proceedings that extra layer of 12:36
26 evidence may well assist you in arriving at a decision
27 that is less susceptible to challenge.

28 CHAIRPERSON: well, it won't be challenged by you if
29 you think I am doing the right thing by granting it.

1 MR. TOAL: I hope I have made that clear; we don't
2 intend to challenge you. We are trying to assist you
3 in whatever way we can.

4 CHAIRPERSON: Thank you.

5 MR. GREANEY: Sir, before we ask the State Core 12:36
6 Participants whether there are any matters upon which
7 they feel they need to reply, we ought to deal with the
8 position in relation to the media.

9
10 The note on anonymity that we mentioned yesterday, so 12:36
11 that is to say the note that was published on 2nd
12 February of this year, made provision for the media to
13 be provided with information about these applications
14 and, moreover, to make submissions upon them.

15 12:36
16 Paragraph 52 of the note provided as follows: "All
17 open documents will be circulated by the Inquiry legal
18 team to the Press Association for onward circulation to
19 media organisations on Monday the 2nd of March 2026."
20 And, Sir, that was done. 12:37

21
22 Paragraph 53 then went on to say: "By 4 pm on Tuesday,
23 10th of March 2026, the media may file responsive
24 written submissions and insofar as appropriate,
25 evidence." 12:37
26

27 So it seemed to us, as a courtesy to the media, and
28 also for your information, we ought to indicate that
29 having received all open documents, no media

1 organisation has made any submissions on the
2 applications for anonymity of either PSNI or HMG.

3
4 So, sir, that deals with the position in relation to
5 the media. 12:37

6
7 Could I next ask Mr. Henry whether there are any
8 matters upon which he feels he needs to reply on behalf
9 of PSNI?

10 12:38
11 REPLY BY MR. HENRY

12
13 MR. HENRY: My Lord, just one factual point of
14 clarification, if I may, and I am going to make this
15 point through reference to page 105 of the hearing 12:38
16 bundle. It's a table contained within the PSNI written
17 submission. So, again, that's page 105.

18 CHAIRPERSON: Yes.

19 MR. HENRY: You will see there, my Lord, Officers 1, 2,
20 3, 5 and 7 and a description of their roles and in the 12:38
21 third column, on the left-hand side, the level of
22 anonymity sought. It is specified in relation to each
23 of the three officers, this is answering a point that
24 Mr. Southey raised during the course of his
25 submissions, and it's really of a factual nature. We 12:38
26 wish to confirm that those positions were based on the
27 instructions that were provided to us by each of those
28 officers. So those who were willing for their names to
29 be passed to the Core Participants said so explicitly

1 in their statements. That's the only point that I wish
2 to raise in reply. Thank you very much, Mr. Chair.

3 MR. GREANEY: Sir, we will next ask Ms. Fee whether she
4 wishes to reply on behalf of HMG?

5 MS. FEE: No, thank you, Mr. Chairman.

12:39

6
7 SUBMISSION BY MR. GREANEY

8
9 MR. GREANEY: Sir, at the beginning of the hearing of
10 the applications for anonymity yesterday, we indicated
11 that we might make some short final remarks. As it's
12 turned out there is one issue on which we might be able
13 to provide assistance in light of the argument that you
14 have heard today and topic upon which we might be able
15 to provide assistance is confidentiality rings. It
16 seems to us that we ought to draw your attention, Sir,
17 to the fact that the possibility of a confidentiality
18 ring was raised in both the Dawn Sturgess Inquiry and
19 the Independent Inquiry relating to Afghanistan.

12:39

12:39

20
21 The ruling of Lord Justice Hadden-Cave in the
22 Afghanistan Inquiry is not one that will take
23 Mr. Southey by surprise and that is because, Sir, as
24 you indicated that ruling featured in the examination
25 of whether there was a power to appoint special
26 advocate that took place before you.

12:40

12:40

27
28 The ruling of Lord Justice Hadden-Cave is dated the
29 24th of July 2023. It addressed a number of issues,

1 including the appointment of special advocates, but
2 also the suggestion that there should be a
3 confidentiality ring.
4

5 That issue, the confidentiality ring, was addressed in 12:40
6 paragraphs 166 to 170 of the ruling and in the
7 authorities bundle for the hearing before you, Sir,
8 that ruling is at tab 48, starting at page 1258.
9

10 Sir, I will just read out the relevant part of the 12:41
11 ruling of the chairman of that Inquiry, so that
12 everyone understands what we are talking about.
13

14 At paragraph 173 Lord Justice Hadden-Cave referred to
15 the case of Concordia, to which you, Sir, yourself 12:41
16 referred earlier today. He said, "In Competition
17 Market Authority and in Concordia International...", he
18 then gave the citation, "...the Court of Appeal
19 emphasised at paragraph 71, in clear terms...", he then
20 quoted: "...the fundamental principle that once a 12:41
21 court has held material as protected by PII it cannot
22 be disclosed whether into a confidentiality ring or
23 otherwise."
24

25 At paragraph 177 of his ruling, which within our 12:42
26 authorities bundle was page 1297, the chairman ruled:
27 "I have decided that the use of confidentiality rings
28 or private hearings are not appropriate or practical
29 for this Inquiry. Having heard argument on the topic,

1 I share the view as previous judicial colleagues who
2 have been asked to consider this question...", and in
3 brackets he placed, "... (see above)...", as I will
4 explain in a moment, one of the decisions he relied
5 upon was the decision of Lord Hughes in Sturgess. 12:42

6
7 He continued by summarising what his judicial
8 colleagues had decided in those cases: "...namely,
9 that the problems and risks inherent in confidentiality
10 rings or private hearings render them unworkable and 12:42
11 impracticable."

12
13 Lord Justice Hadden-Cave then listed five reasons why
14 he considered that so: "First, the concept would run
15 the risk of Afghan families' solicitors and counsel 12:43
16 finding themselves in the difficult and invidious
17 position of having access to materials and knowledge of
18 significance but being barred from sharing that
19 information with their clients, let alone advising
20 their clients about it." 12:43

21
22 "Second, the concept would prevent the Afghan families
23 having full and unfettered access to their lawyers and
24 potentially undermine the client/lawyer relationship of
25 trust." 12:43

26
27 "Third, whatever the good intentions, the concept use
28 would run the risk of blurred line no matter what
29 safeguards are put in place and the danger of

1 inadvertent disclosure."

2
3 "Fourth, the concept would add an unnecessary layer of
4 complexity and uncertainty to the Inquiry process and
5 potentially involve significant delays which would run 12:43
6 contrary to the Inquiry's stated aim to proceed at
7 pace. It would mean that justice further delayed in a
8 case where the events in question took place over a
9 decade ago."

10
11 Just pausing there, Lord Justice Hadden-Cave is 12:44
12 exploring the suggestion that UK Special Forces carried
13 out extrajudicial killings in Afghanistan between 2010
14 and 2013.

15
16 Then finally: "Fifth, ultimately the concept runs the 12:44
17 risk of being more likely in the long run to hinder
18 rather than enhance a collective participation by the
19 Afghan families in the inquiry."

20
21 One of the decisions, as I have indicated, that Lord 12:44
22 Justice Hadden-Cave referred to in his own decision was
23 the decision of Lord Hughes on the 19th of August 2022
24 in the Dawn Sturgess Inquiry; so the killing of Dawn
25 Sturgess in Salisbury by agents of the Russian State. 12:45
26

27
28 In his ruling, Lord Hughes had rejected a
29 confidentiality ring and said at paragraph 12: "I have

1 considered whether there is any practical alternative
2 to a Restriction Order where one or more of the
3 identified risks exists. If there were the order would
4 not be necessary. I have considered...", and then he
5 identified at sub-paragraph (c) as follows: "... 12:45
6 permitting disclosure on a very limited basis to
7 counsel appearing for particular Core Participants who
8 are themselves DV cleared...", so high-level security
9 clearance, "...and who would be prepared to give strict
10 undertakings not to reveal the information to anyone 12:45
11 else. Having considered oral and written submissions
12 on this issue, I am satisfied that this is wrong in
13 principle for the reasons explained in Concordia.
14 Further, it places counsel in an impossible position
15 vis-a-vis their clients and, indeed, their colleague 12:46
16 lawyers."

17
18 Sir, that is all we consider we need to say in light of
19 the helpful argument that you have heard over the
20 course of the last day. Unless, Sir, there is anything 12:46
21 that you wish to ask us or say to us, that will
22 conclude the open hearing of the anonymity
23 applications.

24
25 It may, as we indicated during the first part of 12:46
26 yesterday, it may be that a further procedural hearing
27 to assess progress will be needed in May, but subject
28 to that we will next meet here, Sir, at Bradford Court,
29 on the 7th of September, for the open part of the

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closed material Restriction Order process.

CHAIRPERSON: Thank you, Mr. Greaney. Have you finished, Mr. Greaney?

MR. GREANEY: we are finished, sir, yes. Thank you.

12:47

THE HEARING ADJOURNED

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