

1 THE INQUIRY RESUMED ON MONDAY, 20TH JULY 2026 AS
2 FOLLOWS:

3
4 CHAIRMAN: Good morning, Mr. Greaney.

5 10:04

6 INTRODUCTORY REMARKS BY MR. GREANEY:

7
8 MR. GREANEY: Good morning. Can I begin by reminding
9 everyone that we are broadcasting on YouTube on a delay
10 of 10 minutes, so that those who are present at the
11 venue in Omagh are watching the proceedings with no
12 delay.

10:04

13
14 Sir, on the 23rd of January of this year the Inquiry
15 legal team issued a note on anonymity applications.
16 That note set out a process which invited Core
17 Participants to file a document listing all anonymity
18 applications which they had in mind seeking, along with
19 a representative selection of applications. The
20 intention behind that process was that the
21 representative applications might be capable of leading
22 to a ruling which determined issues of principle and
23 fact which were common across a cohort of applications.
24 And which might, therefore, provide guidance for the
25 resolution of most other applications made on behalf of
26 that Core Participant.

10:05

10:05

10:05

27
28 In due course, the Police Service of Northern Ireland
29 made applications in respect of four retired officers

1 who were referred to in these proceedings as officers
2 1, 2, 3 and 5. You heard argument in respect of those
3 applications on the 19th of March. In a ruling dated
4 the 5th of June, which I should say is available on the
5 Inquiry's website, Sir you granted each of those four 10:06
6 applications, however, in the penultimate paragraph of
7 your ruling, so paragraph 79 you said this:

8
9 "Part of the intention conveyed in the Inquiry legal
10 team note on anonymity applications had been that a 10:06
11 consideration of representative applications might
12 identify issues of principle and fact which were common
13 across a cohort of applications and thus provide
14 guidance for the resolution of future applications."

15 10:06
16 As matters have turned out and I intend no criticism in
17 this, Sir, you said:

18
19 "The four applications tendered do not really have that
20 effect. Two relate to former senior Special Branch 10:06
21 officers for whom particular concerns arise as
22 described in the statement from the Head of the
23 Intelligence Branch. Putting those two aside, I am
24 left with two officers who had virtually
25 indistinguishable policing histories and similar 10:07
26 exposure to direct terrorist threats, in reality one
27 sample type. The question which arises, and which I do
28 not think has been adequately addressed, is whether any
29 other applicants seeking anonymity would have to

1 demonstrate similar professional histories to this
2 sample type or be able to vouch similar experiences in
3 relation to threats in order to succeed. It seems to
4 me that this question is best considered in a focused
5 manner at a fresh hearing in light of my ruling in
6 respect of the present applications."

10:07

7
8 Sir, alongside your ruling of the 5th of June you
9 provided Core Participants with a note that set out
10 four questions that you would welcome assistance in
11 respect of. In response, you received submissions in
12 writing from the Police Service of Northern Ireland,
13 from the Core Participants represented by PA Duffy &
14 Co., Campbell & Haughey Solicitors and Roche McBride
15 Solicitors and from the Core Participants represented
16 by Fox Law.

10:08

10:08

17
18 Sir, today is the fresh hearing to which you made
19 reference in paragraph 79 of your ruling and we will
20 today invite oral submissions first of all from
21 Mr. Henry KC on behalf of the Police Service of
22 Northern Ireland and then we will invite submissions
23 from Mr. Toal on behalf of the first group of Core
24 Participants that I mentioned. And, Sir, just pausing
25 for one moment it may be that Mr. Toal KC will not need
26 to say anything orally to you today although he will of
27 course answer questions that you have. He has been
28 good enough to tell me that discussions have taken
29 place between himself and Mr. Henry over the course of

10:08

10:08

1 the weekend and that those discussions have led to a
2 large measure of agreement between his position and the
3 position of the Police Service of Northern Ireland.
4 And I'm told that Mr. Henry will set out what that
5 agreed position is during the course of his submissions 10:09
6 which may avoid the need, as I've indicated, for
7 Mr. Toal to say anything orally today.

8
9 Once Mr. Toal has said anything that he does feel it's
10 necessary to say, Sir, we will call upon Mr. Southey to 10:09
11 make his submissions on behalf of the second group of
12 Core Participants to which I have referred. And,
13 finally, Mr. Mansfield of KC has told me that he may
14 wish to say something brief on behalf the Rush family.
15 And so, Sir, having made those brief introductory 10:09
16 remarks we will call upon Mr. Henry to make his
17 submissions.

18 CHAIRMAN: Good morning Mr. Henry.

19 MR. HENRY: Good morning, my Lord, may I just check
20 that you can hear me okay, my Lord? 10:10

21 CHAIRMAN: I can, thank you.

22
23 SUBMISSION BY MR. HENRY:

24
25 MR. HENRY: Thank you very much for the opportunity to 10:10
26 make these submissions and we note that the purpose of
27 today's hearing is to try and assist with the provision
28 of further guidance insofar as is possible for the
29 anonymity applications.

1 what I propose to do, my Lord, is set out, in very
2 brief terms, a summary of the police position and then
3 go on to discuss some of the issues arising from it,
4 then go on to address your questions, Questions 1 to 4
5 that Mr. Greaney has already referred to, and then, 10:10
6 finally, address the other CPs' written submissions.

7
8 As your Lordship might have anticipated, in terms of my
9 submissions today they will focus almost exclusively on
10 the Article 2 test, although I will touch briefly on 10:10
11 the common law test as well.

12
13 So in relation to the police position, a useful
14 starting point is just to remind that the Article 2
15 test is made up of two different stages, stage No.1 is 10:11
16 identify whether or not there is real and immediate
17 risk to life. Stage No.2, if the answer to the first
18 question is yes then what is the proportionate measure
19 to put in place to discharge the State authority's
20 operational duty arising from that real and immediate 10:11
21 risk?

22
23 Now, we say respectfully, my Lord, that on the
24 materials provided in this Inquiry and, in particular,
25 the JTAC assessment, the stage 1 test is satisfied, and 10:11
26 that's in respect of the real and immediate risk.

27
28 We say that test is satisfied without reference to the
29 individual circumstances of the retired officers.

1 we also respectfully say that it's at the second stage
2 of the sequential test, so assessing what's the
3 proportionate measure, it's at that stage where the
4 individual applicant's personal circumstances are
5 considered. And the most obvious reason why an 10:12
6 application might fail on consideration of those
7 personal circumstances is if their anonymity has
8 already been lost. A useful label we say which was
9 provided by Mr. Justice Schofield in the Springhill
10 decision was that anonymity was decisively lost and 10:12
11 that's something I'll return to in due course.
12

13 I just pause for a moment, my Lord, to say that that is
14 not the only potential reason why an application might
15 be refused on individual circumstances, I'm not going 10:13
16 to postulate any particular hypothetical scenarios but
17 we simply don't close the door to there being other
18 exceptional circumstances or circumstances relating to
19 the individual applicant which might lead to an
20 application being refused. 10:13
21

22 So, that's a summary, my Lord, of the police position.
23 I'm just going to ask that you turn to paragraph 79 of
24 your ruling which Mr. Greaney has already referred to
25 this morning and you'll find that on page 224 of the 10:13
26 bundle.
27

28 And, my Lord, you'll see taking our lead from the top
29 of the page, about four lines down the sentence begins:

1 "Two relate to former Special Branch officers..." and
2 then it goes on to describe the two other officers who
3 occupied investigative roles during their police
4 careers. So, essentially, you have two different
5 cohorts on the one hand Special Branch, on the other 10:14
6 hand investigators and all of whom had experienced
7 issues with their personal security. And the question
8 which you pose seven lines from the bottom is as
9 follows:

10
11 "The question which arises, and which I do not think
12 has been adequately addressed, is whether any other
13 applicant seeking anonymity would have to demonstrate
14 similar professional histories to this sample type or
15 be able to vouch similar experiences in relation to 10:15
16 threats in order to succeed."

17
18 So, in simple terms, does a future applicant need to
19 have the same kind of, or occupy the same kind of role
20 or job within the police and do they have to have had 10:15
21 the same kind of personal security problems that the
22 sample applicants had in order for their request for
23 anonymity to be granted? And we respectfully say the
24 answer to that is no insofar as satisfying stage No.1
25 of the Article 2 test is concerned. 10:15
26

27 Now, my Lord, there are really two issues in relation
28 to personal circumstances raised in paragraph 79. The
29 role or the job performed by the officer during their

1 time or service in the police. That could vary from
2 year to year, police officers, dare I say most police
3 officers will not have occupied the same role
4 throughout their entire police careers. And the second
5 issue is the personal security. Now, I'm going to 10:16
6 refer to those collectively if I may for the purpose of
7 these submissions simply as their personal
8 circumstances and, if needs be, draw a dividing line
9 between them in due course.

10 10:16
11 Now, if I might turn to the materials, my Lord, that we
12 say ground the submission that the first stage of the
13 Article 2 test is satisfied on the materials provided.
14 I'm going to start with the JTAC assessment. It begins
15 at page 144 of the bundle. I'm going to ask the 10:17
16 Inquiry though to focus on page 145, please. And, my
17 Lord, I'm going to make the following observations.
18 Before reading any portions of the assessment itself
19 I'll make the following general observations, and some
20 of this repeats what I said in the earlier hearing. 10:17

21
22 No.1, the risk, the overarching threat level in
23 Northern Ireland is substantial, which means an attack
24 is likely. The Dissident Republicans are assessed as
25 highly likely to view officers and former officers as 10:18
26 legitimate targets for any future attack. And the
27 assessment is that giving evidence without anonymity
28 would create a realistic possibility that the threat to
29 those individuals will increase.

1 Now, that assessment is specific to this Inquiry and is
2 specific on a sectoral basis to serving and retired
3 officers. And it's on that basis that we respectfully
4 say the first stage of the Article 2 test is satisfied
5 on that assessment alone if it is accepted - and we say 10:19
6 that there is no good reason not to accept it.

7
8 I further observe respectfully, my Lord, that --
9 CHAIRMAN: Is it not a sectoral assessment specific to
10 former officers? 10:19

11 MR. HENRY: If you just bear with me one moment, my
12 Lord. You're quite right, my Lord, the third paragraph
13 of the first stage. I beg your pardon, my Lord. So
14 during the course of the first hearing I placed some
15 reliance on open source materials and took your 10:20
16 Lordship through a chronology of various attacks on
17 serving and a retired police officer and also other
18 attempts to gain information about those officers.
19 That evidence provides support for the JTAC assessment
20 but the expert assessment within the JTAC document 10:20
21 would be sufficient of itself, we respectfully say.

22
23 Now, I do emphasise, in case there's any discomfort
24 with the suggestion that that creates a class-based or
25 category-based automatic grant of anonymity for all 10:20
26 former officers within the context of this Inquiry,
27 that's not correct because we do say that the personal
28 circumstances can be taken into account at the second
29 stage.

1 I'll make some further observations, my Lord, about
2 those two categories of material so the JTAC assessment
3 first of all.

4
5 You will not find within page 144 or 145 any reference 10:21
6 to the particular duties of the former officers to whom
7 the assessment relates. Similarly, you will not find
8 any reference within the assessment to their personal
9 security situation experiences. And the significance
10 of that, my Lord, is that the assessment which I've 10:22
11 outlined and particularly the last couple of paragraphs
12 of page 145, apply irrespective of whatever duties the
13 former officer performed in service and irrespective of
14 what their personal security experiences were.

15 10:22
16 I move on to the open source materials, my Lord, and
17 I'm not going to go back through those in any
18 particular detail but just to make a couple of brief
19 observations. You will recall the reference to the
20 murder of Constable Carroll. For your Lordship's note, 10:22
21 in the current trial bundle you'll see information
22 about him on page 121 but I'm not going to ask the
23 Court to turn that up just at the moment. You will see
24 that he was a TCG officer and he was responding to a
25 call, the call had been made with the intention that 10:23
26 police would respond to it so that whoever responded
27 could be attacked. And on that basis, my Lord, it
28 doesn't appear that an individual officer as such was
29 targeted. It was whoever was going to respond.

1 Now, you will have also heard at the first hearing, my
2 Lord, that that was a constable who was close to
3 retirement at the end of his career.
4

5 Constable Kerr you also heard reference to, my Lord, he 10:23
6 was tragically killed a short time after
7 Constable Carroll. He is the young constable who was
8 at the very beginning of his career and the
9 descriptions in the open source material say that he
10 was the community officer. And he was killed as a 10:24
11 result of a bomb being placed under his vehicle. So he
12 was specifically targeted. And then your Lordship will
13 also recall -- sorry, just before I move on, if you are
14 looking for references in the current materials to
15 Constable Kerr, you'll find them in several places but 10:24
16 at page 119 onwards.
17

18 Your Lordship will also recall, then, the wildlife or
19 spy camera that was placed in the hedge of the retired
20 officer. There was a recent conviction in relation to 10:24
21 that offending, the offending having taken place in
22 2016. And so that retired officer was specifically
23 targeted. The reason I draw those brief examples to
24 your Lordship's attention is that at first blush there
25 certainly doesn't appear to be any particular emphasis 10:25
26 placed on the duties that were performed by the officer
27 or their own personal security experiences in relation
28 to the attacks or the efforts made against them. But
29 the more persuasive argument, I respectfully say, is

1 the absence of any such references within the JTAC
2 assessment.

3
4 Now, my Lord, and I think this might be an observation
5 that the Inquiry made within its ruling but some 10:26
6 officers are obviously at higher risk than others, that
7 may be as a result of the particular role they played
8 in service, that may be as a result of their personal
9 security experiences, that may be for some other
10 reason. But we do respectfully say that all of the 10:26
11 retired officers captured by the JTAC assessment have
12 baseline, as it were, which is set out within that
13 document is sufficient to satisfied the first stage of
14 the Article 2 test.

15 10:26
16 Now, my Lord, what I'd like do next, if I may, is take
17 you to some of the authorities with the intention of
18 trying to persuade the Inquiry that the ratio of the
19 decisions to grant anonymity based on first of all
20 stage No.1 of the test being satisfied, were based on 10:27
21 the risk assessments available to the coroners or the
22 judges at that time rather than the personal
23 circumstances.

24
25 Now in making that observation, my Lord, I do add one 10:27
26 caveat, on some occasions the rulings are effectively
27 gathered into one, quite often the common law and the
28 Article 2 decisions are gathered together and follow
29 recitation of their personal circumstances but there

1 are instances, I respectfully say, where it's quite
2 clear that the Judge or the Court was making the
3 decision based in relation to stage 1 on the risk
4 assessment that was available at that time.

5
6 So if I could ask the Court to start with the decision
7 of then Mrs. Justice Keegan in the Ballymurphy Inquest
8 and that decision starts at page 1120 in the bundle. I
9 am going to ask that the Court turn up paragraph 21 on
10 page 1132.

11
12 Now, if your Lordship has paragraph 21 in front of you,
13 you'll see within it then Mrs. Justice Keegan
14 identifies the test from C's application case or
15 officer C case decided by the Court of Appeal in 2012.
16 She states:

17
18 "Having regard to the observations of the Northern
19 Ireland Court of Appeal on the engagement of Article 2
20 in In the matter of an application by Officers C, D, H
21 and R [2012] NICA 47, the question arises as to whether
22 the evidence before the Coroner establishes a real risk
23 to life that is neither fanciful nor trivial and that
24 is present or will be present if a particular course of
25 action is or is not taken."

26
27 And just pausing there, that's very clearly a reference
28 to Lord Justice Girvan's decision, in particular
29 paragraph 43 of that decision. She goes on to observe

1 at the end of paragraph 21:

2
3 "In that case..."

4
5 So C's application.

10:30

6
7 "...the decision was directed at police officers
8 serving in Northern Ireland and whilst this may
9 comprise a particular category the risk remains for
10 military personnel who have served in Northern Ireland 10:30
11 who may be asked to come to Northern Ireland and/or
12 retired police officers."

13
14 So moving down to the next page, my Lord, to paragraph
15 No. 23, the decision reads:

10:30

16
17 "Of course, the present evidence relates to an ongoing
18 dissident threat that has been evidenced by a number of
19 incidents in Northern Ireland and I was provided with
20 press briefings in which that threat was very
21 definitely described as real, continuing and present.
22 So it is clear that Article 2 is engaged in these
23 cases."

24
25 Just pausing for a moment, my Lord. There isn't any 10:31
26 reference to what I'm referring to as personal
27 circumstances within the ratio of that decision. I'm
28 going to take you back a few paragraphs in the decision
29 where there is a reference to personal circumstances

1 but it clearly doesn't feature within the determination
2 that stage 1 of the tests satisfied. I'm also going to
3 take, you my Lord to, this is, if you like, the global
4 decision, there's an annex to it in which a number of
5 individual anonymity decisions are taken, I'll take you 10:31
6 to an example to one of those as well.

7
8 If I may ask your Lordship to go back to paragraph
9 number 17, so this is on 1129. And if your Lordship
10 has that available, I am going to start half way down 10:32
11 through the paragraph at the end of the page, the
12 sentence begins, "hence, I tried to streamline..."
13 prior to that she's talking about the procedure. She
14 says:

15 10:32
16 "Hence, I tried to streamline applications in this
17 inquest for the benefit of future inquests as follows.
18 The procedure is that there is an initial submission of
19 an application which must be in writing. It is
20 important that there is a separate application
21 submitted for each applicant because along with
22 objective evidence of risk for an applicant coming to
23 give evidence in an inquest in Northern Ireland
24 consideration must be given to subjective fears which
25 an applicant may have." 10:33
26

27 I am going to respectfully invite the Inquiry to
28 consider that in the following way; she is referring to
29 the objective evidence, so the threat assessment and

1 open evidence in relation to the objective threat,
2 stage 1 of the Article 2 test. And she, I respectfully
3 say, is clearly referring to the personal circumstances
4 and the subjective fears in relation to the common law
5 test.

10:33

6
7 So, my Lord, I said I would take the Inquiry to one of
8 the individual decisions annexed to the Ballymurphy
9 findings --

10 CHAIRMAN: Just before we do that, Mr. Henry, could we
11 look again at paragraph 23.

10:34

12 MR. HENRY: Certainly, my Lord.

13 CHAIRMAN: Here the Lady Chief Justice explains that
14 the evidence related to an ongoing dissident threat was
15 evidenced by press briefings.

10:34

16 MR. HENRY: Rather than the assessment, yes.

17 CHAIRMAN: And she says that those press briefings
18 demonstrated the threat was very definitely real,
19 continuing and present. So it's clear that Article 2
20 is engaged in these cases. So, does that mean that one
21 could determine that Article 2 was engaged on the basis
22 of these open source material alone without taking
23 account of the threat assessment?

10:34

24 MR. HENRY: I think so, my Lord. You're not left in
25 that position where that is all you have. And you'll
26 see by reference to the individual decisions in the
27 annex, annex No.2, that equally that was not the
28 position that Mrs. Justice Keegan was left in.

10:35

29 CHAIRMAN: No.

1 MR. HENRY: But, arguably, one could draw that from
2 paragraph 23. I'm not going as far as that because we
3 don't have to, you are in a similar position to the
4 Coroner in that case where you have both sets of
5 materials and it may be that if you have an expert 10:35
6 assessment of risk that perhaps is a better starting
7 point and then that is fortified by the open source
8 materials, but one could arguably say on the open
9 source materials and a common-sense approach to the
10 chronology of attacks that they set out that that is 10:35
11 enough for stage 1 of itself.

12 CHAIRPERSON: And if one was doing that then that would
13 point away from the need for individualised threat
14 assessments?

15 MR. HENRY: At stage 1, yes, my Lord. 10:36

16 CHAIRPERSON: Thank you. So you were going to ask me
17 to look at the addendum section I think?

18 MR. HENRY: Yes, my Lord, it's quite a bit further
19 down, page no.1171. And I should say, my Lord, there
20 are more than one individual decisions so I'm just 10:36
21 choosing a sample, I don't wish the Court to think that
22 this is the entirety of these anonymity decisions.

23
24 And so once your Lordship reaches page 1171, at the top
25 you'll see the individuals, former soldiers by their 10:37
26 ciphers, each beginning with "M." You'll see the date
27 of the decision and it's paragraph 3 is what I would
28 like the Inquiry to focus on please.

29 CHAIRPERSON: Yes.

1 MR. HENRY: If your Lordship has 3 in front of you then
2 it reads:

3
4 "In reaching my conclusion..."

5
6 which was a positive one.

7
8 "...I have reflected on the argument that the threat
9 level is described as low, however, in my view it is
10 sufficient that this could potentially rise."

11
12 That is clearly in reference to stage 1 of the Article
13 2 test. She comes back to the Article 2 test in just a
14 moment.

15
16 She also says:

17
18 "Also, the fact that nothing has happened to military
19 personnel in the past does not mean that something
20 could not happen in the future. In this regard, I bear 10:37
21 in mind the recent events in Northern Ireland and the
22 nature and profile of this inquest.

23
24 Having consideration to all of the above, I am
25 satisfied that Article 2 is engaged in each of these 10:38
26 cases."

27
28 And then she goes on to describe a positive decision
29 and that anonymity is the bare minimum.

1 Now I appreciate that by the time she reaches the grant
2 of anonymity she has come to the conclusion of stage 2,
3 I'm only focusing on stage 1 at the moment. But it is,
4 in my respectful submission, relatively clear that the
5 ratio of the decision there is reached on the basis of
6 the threat assessment on stage 1.

10:38

7
8 My Lord, I'm taking the judgments in the order that
9 they appear in the bundle so we're going to head a
10 little bit back in time next, unless your Lordship has
11 any queries about the Ballymurphy decision. I'm going
12 to ask you to turn up C's application, so this is Court
13 of Appeal decision and specifically Lord Justice
14 Girvan's judgment within it. That is page 1225 and
15 1226.

10:39

16 CHAIRPERSON: what were the page numbers again sorry,
17 Mr. Henry?

18 MR. HENRY: The bottom of 1225, and it's paragraph 43
19 which has received a lot of attention already, you'll
20 forgive me, my Lord, for going back to this but I'll
21 not labour it.

10:39

10:40

22
23 So at the beginning of 43, Lord Justice Girvan states:

24
25 "Those authorities..."

10:40

26
27 which he has reviewed above.

28
29 "...albeit in a different context, together with

1 Lord Dyson's contrast between a fanciful risk and a
2 significant risk lends support to the view that a real
3 and immediate risk points to a risk which is neither
4 fanciful nor trivial and which is present (or in a case
5 such as the present will be present if a particular
6 course of action is or is not taken)."

7
8 Pausing there. So that is the test, as it were, which
9 is repeated in a number of different Northern Ireland
10 decisions following this judgment. Lord Justice Girvan 10:40
11 goes on to say then:

12
13 "In a stable and law abiding society the risk of
14 homicidal attacks on individual is fortunately rare and
15 statistically will be a very uncommon occurrence.
16 Before the state can be fairly criticised for failing
17 to prevent a homicidal attack it is right that the
18 circumstances must bring home to the state authorities
19 that a person is under a threat of substance."

20
21 And over the course of the next couple of lines, Lord
22 Justice Girvan refers to the French text of Osman
23 decision which sets out the operational duty. After
24 that he says:

25
26 "In the context of Northern Ireland which has been
27 subjected to decades of homicidal attacks on
28 individuals by organised terrorists the threat to life
29 has been real, though for the bulk of the population it

1 is not a threat directed at them individually so that
2 for most the risk is not present and continuing in the
3 sense of immediate to them."

4
5 Here we get into the important territory for the
6 purposes of the present application. He continues:

10:42

7
8 "For some, such as members of the police force, the
9 level of threat has been and continues to be at a much
10 higher level and it is much more immediate. It cannot
11 be considered as anything close to fanciful and it is
12 significant. The requirement to give evidence imposed
13 on officers involved in this inquest will, according to
14 the evidence, increase a present threat possibly
15 significantly depending on the nature of the evidence
16 and other unknown contingencies arising out of the
17 inquest. The risk accordingly must qualify as real,
18 continuous and present."

19
20 I'm going to respectfully suggest, my Lord, that the
21 reference to the "present threat" which is being
22 described there is not informed by the individual
23 circumstances of the officers in that case. And what
24 Lord Justice Girvan is saying there is that that of
25 itself is sufficient and that line or that approach has
26 been adopted by the coroners and judges in the
27 decisions which have followed, and without challenge.
28 CHAIRPERSON: It talks about the requirement to giving
29 evidence increasing a present threat. You say that

10:43

10:43

1 that's the thrust of the decision there and the fact
2 that that threat might increase significantly for some
3 is neither here nor there?

4 MR. HENRY: Correct, my Lord. I'm not sure whether
5 it's within the C decision itself, I'm quite sure it is 10:44
6 in fact within Lord Justice Girvan's discussion that
7 the amount of the threat might increase, so whether the
8 increase is significant or not is incalculable. So
9 it's impossible for an accurate assessment for that to
10 be undertaken and for quite understandable reasons, the 10:44
11 difficulties in making those kind of prospective
12 predictive decisions.

13 CHAIRMAN: So, for example, you might have what I think
14 you've touched on in your own submissions as something
15 you might think of as a so-called high risk target and, 10:44
16 accordingly, for someone like that the threat would be
17 increased significantly if they gave evidence. But for
18 another officer who didn't warrant that categorisation
19 the threat would increase and that would be sufficient.

20 MR. HENRY: That's correct, it wouldn't increase to the 10:45
21 same magnitude necessarily. So take a hypothetical,
22 for example, the head of Special Branch or the head of
23 a regional Special Branch office might face a greater
24 level of risk than a constable who was performing
25 routine day-to-day duties which he is required or she 10:45
26 is required to speak to during the course of this
27 Inquiry. The magnitude of the increase in risk might
28 be different between the two of them but for either
29 it's sufficient. It's that basic point of some

1 officers face higher risks than others but the baseline
2 is sufficient to satisfy stage 1.

3
4 Now, if you just bear with me one moment please, my
5 Lord. Yes, the incalculable extent of the risk is 10:46
6 referenced, I'll not read it out for your Lordship but
7 it's referenced within paragraph 46 of Lord Justice
8 Girvan's judgment and then also repeated by

9 Mrs. Justice Keegan (as she was then), Mr. Justice
10 Huddleston and Mr. Justice Schofield subsequently. 10:46

11 That's C's application judgment. I'm going to move on
12 next to the Springhill Inquest judgment. And I'm going
13 to ask that your Lordship go to 1798 and starting
14 briefly at paragraph 29. That's 1798, paragraph 29. I

15 simply take you to paragraph 29, my Lord, so you can 10:47
16 examine the subtitle above it, because it's to place
17 into context that this judgment is dealing with a
18 number of different issues, one of which is anonymity
19 so the discussion about anonymity begins at

20 paragraph 29. You'll see reference within it to the 10:47
21 Article 2 test, C's application. At paragraph 30, you
22 will see a discussion in general terms about the common
23 law test. And then at paragraph 31 you'll see
24 reference to the threat assessments provided in
25 relation to those, the applications in the Springhill 10:48
26 Inquest.

27
28 There is quite a detailed discussion about the contents
29 of those risks assessments and the low risk assessment

1 which was uniform across all of the applicants, with
2 some differences about how they would work out
3 depending on whether the individual gave evidence
4 within Northern Ireland or within Great Britain.

5 CHAIRPERSON: If we pause at paragraph 31, we can see
6 that Mr. Justice Schofield explains that he has been
7 provided with a number of threat assessments and he
8 says they are now in a standard form.

10:48

9 MR. HENRY: Yes, my Lord.

10 CHAIRMAN: And he explains that the points being made
11 to him that there is not a threat assessment for each
12 witness. Now, when you presented your principal
13 submissions to me, if I remember correctly, I think I
14 touched on this in the ruling, you explained that there
15 was a process agreed which resulted in JTAC taking
16 responsibility for providing threat assessments and
17 that the timing of that was --

10:49

18 MR. HENRY: 2024.

19 CHAIRMAN: 2024, yes. So, is that what Mr. Justice
20 Schofield is describing as well?

10:49

21 MR. HENRY: I can't speak definitively, my Lord, to
22 which side of the threshold that falls on, whether it's
23 pre or post JTAC taking over responsibility, but what
24 one might reasonably infer is, and you will have seen
25 this in a number of the legacy inquests anonymity
26 decisions that whilst individual assessments were being
27 provided for each applicant, the contents were the same
28 and one can make a reasonable inference as to how we
29 arrive at a situation where JTAC now do sectoral

10:49

10:50

1 assessments approximate for individuals falling within
2 the same category rather than, say, supply five or 10
3 individual assessments which all the same thing, but
4 have an individual officer's cipher at the top.

5 CHAIRMAN: Even before that if we think back to what 10:50
6 Lady Justice Keegan said in the Ballymurphy Inquiry,
7 risk assessments appeared to have been of a generic
8 nature.

9 MR. HENRY: That's correct, my Lord.

10 CHAIRMAN: So what did you want me to look at in -- 10:51

11 MR. HENRY: It was paragraph -- so, bearing in mind we
12 have this fairly detailed discussion moving on from
13 paragraph 31 and 32 about the nature and content of the
14 threat assessments, if I could respectfully draw your
15 attention down to paragraph 38 please. Now, this 10:51
16 immediately follows that detailed discussion about
17 those threat assessments. Mr. Justice Schofield says:

18
19 "Notwithstanding this..."

20
21 He is referring to the low assessments and so forth. 10:51

22
23 "...I still consider it reasonable and proportionate to
24 grant anonymity in these cases. The grant of anonymity
25 would plainly be appropriate, in my view, if the 10:51
26 witnesses were required to come to Northern Ireland.
27 The question is whether they should be deprived of that
28 protection merely because for now they are not required
29 to do so."

1 The context of that, my Lord, was that the former
2 soldiers were being granted live link applications to
3 give evidence from elsewhere in the UK.

4
5 He then goes on to say:

10:52

6
7 "In the Doherty and Fleming Inquest, Huddleston J.
8 indicated expressly that he was going to adopt 'a
9 precautionary approach'."

10
11 And he was urged to do the same with reference to
12 Jordan. Then below that:

10:52

13
14 "In a variety of recent legacy inquests, former
15 military witnesses have been granted anonymity even
16 though they have also been permitted to provide
17 evidence remotely."

10:52

18
19 At paragraph 39 my Lord:

20
21 "Bearing these matters in mind, I consider it
22 appropriate to grant anonymity even though the
23 witnesses will not (presently) be required to attend
24 court in Northern Ireland for the purpose of this
25 inquest. I have concluded this to be the case on the
26 basis of both article 2 and at common law."

10:52

27
28 Now, I appreciate, my Lord, I mentioned earlier
29 sometimes it's difficult to disentangle the ratio

10:52

1 between the Article 2 decisions and the common law
2 decisions. I do respectfully suggest that in relation
3 to the first stage of the Article 2 test it appears
4 fairly obvious that Mr. Justice Schofield is relying
5 exclusively on the threat assessments.

10:53

6
7 My Lord, I have one further example which is Doherty
8 and Fleming, now I'm quite happy to take the Inquiry
9 through it or if you would prefer me to simply provide
10 you with the page and paragraph numbers, I'm equally
11 happy to provide those and move on to my next point,
12 whatever the Inquiry's preference would be

10:54

13 CHAIRMAN: We have three Doherty and Fleming decisions,
14 I'm familiar with each of them so if you want to just
15 direct me to the passage that you're interested in,
16 that would be fine.

10:54

17 MR. HENRY: Yes. So it is the [2023] Northern Ireland
18 Coroner 17 decision. The particular paragraphs that I
19 rely on are paragraph 10 on 1831. And also in the
20 addendum to that judgment, my Lord, paragraphs 8 and
21 10, so they deal with two different former police
22 officers. So paragraphs 5 and 10 and they are both
23 found on 1833. I beg your pardon, 1833 and 1834.

10:55

24
25 The submission is exactly the same, my Lord, one can
26 reasonably deduce from those paragraphs that the
27 stage 1 Article 2 decision was made on the basis of the
28 assessments.

10:55

1 So with your Lordship's permission what I would intend
2 do next is turn to the second stage of the Article 2
3 test. As you've heard already, the PSNI accepts that
4 personal circumstances are relevant to that.

5
6 It's fairly obvious, my Lord, from the wealth of legacy
7 inquest decisions that we have and decisions outside of
8 the legacy inquest forum but still within Northern
9 Ireland, that frequently these kinds of applications
10 are granted for former police officers. Although I
11 appear only for the police, they are frequently granted
12 for military witnesses as well or former military
13 witnesses, but not always.

14
15 One of the examples as to when such an application was
16 refused was in one of the Doherty and Fleming
17 decisions, so it's the [2024] decision. It related to
18 the former officer by the cipher PW9. For your note,
19 my Lord, that decision starts in the bundle at 1786.
20 The key paragraph for present purposes is
21 paragraph no.6 on page 1787. And if your Lordship
22 would just bear with me one moment until I turn that
23 up.

24
25 By this stage we've already had -- at least there are
26 two Doherty and Fleming decisions prior to this within
27 the bundle, both relating to 2023. Mr. Justice
28 Huddleston has already gone through the law in those.
29 He goes on then in relation to PW9, at paragraph 6 to

1 say the following:

2
3 "The present application was made late in the day
4 insofar as information in relation to PW9, principally
5 his name was already known."

10:58

6
7 And then he says:

8
9 "(See above). That being the case I see no strength
10 whatsoever in his claim for anonymity. His application
11 is based primarily on the grounds that he remains
12 concerned for his own safety and that of his family.
13 Even though PW9 has expressed concerns, and I accept
14 that he may have a genuine basis for doing so, the
15 question for me is what is appropriate in the present
16 scenario. Firstly, as I have said his application was
17 made late in the day. Secondly, it was made at a point
18 in time when his name had already been known in
19 connection with these proceedings for a significant
20 period of time. Finally, his name has already been
21 repeated (according to the NoK in excess of forty
22 times) in public connection with these proceedings."

23
24 And the public reference is not unimportant my Lord.

10:59

25
26 "In those circumstances I, in conducting the balancing
27 test, have concluded that he is not entitled to
28 anonymity. That is what distinguishes this case from
29 my early rulings on the question of anonymity."

1 which had been largely successful for the former
2 security forces applicants.

3
4 so there we have a clear example of a member of the
5 judiciary decided that it wasn't appropriate to grant 11:00
6 anonymity on the basis that anonymity had already been
7 lost, that was self-evidently on both the Article 2
8 test and the common law test but in those
9 circumstances, my Lord, the former officer, PW9, was,
10 so far as the first stage of the Article 2 test was 11:00
11 concerned was in exactly the same position as the other
12 former officers who were all successful.

13
14 Unless your Lordship has any queries about paragraph 6
15 or that decision in general I'm going to move from 11:01
16 Doherty and Fleming back to the Springhill judgment
17 from Mr. Justice Schofield where he touches upon this
18 issue of loss of anonymity. And in particular I'm
19 going to ask the Inquiry to go back to page 1802, so
20 that's 1802 and paragraph 42. 11:01

21 CHAIRPERSON: Can I just check before we do this,
22 Mr. Henry, just how we stand in relation to the
23 stenography. Do we need a break?

24 MR. HENRY: Thank you, my Lord. Now where I'm asking
25 the Inquiry to pick up here is at paragraph 42, now by 11:02
26 this stage in the judgment we know that the other
27 applications for anonymity have already been granted
28 but he is carving out two applications in particular
29 for separate consideration. Both of the applicants

1 were former Royal Military Police investigators. And
2 you'll see within paragraph 2, he states, it was
3 brought to his attention to the next of kin that those
4 two individuals had already given evidence under their
5 own name in the original inquest proceedings in 1973. 11:03
6 And so, quite understandably, the next of kin's
7 submission in the subsequent inquest before Mr. Justice
8 Schofield was, 'well, we already know their names,
9 they've already been disclosed in these proceedings,
10 therefore, their applications for anonymity should be 11:03
11 refused.' Ultimately, that submission was unsuccessful
12 because ultimately Mr. Justice Schofield granted their
13 applications for anonymity.

14
15 But at paragraph 43 he refers to PW9, the decision that 11:03
16 I have just taken you to. There appears to have been
17 another refusal as well, PW35 by Mr. Justice Huddleston
18 also referred to in paragraph 43 of Springhill albeit
19 we don't have, at least I don't think we have that
20 decision for you in the bundle. But it's paragraph 44 11:03
21 that I'm going to take you to next, my Lord.

22
23 Mr. Justice Schofield says:

24
25 "I have considered the rulings in those cases..." 11:04
26

27 So PW9 and PW35.

28
29 "...to my mind Mr. Justice Huddleston was making the

1 common-sense point that if anonymity had been lost to
2 such a degree that the applications plainly pointless
3 and granting it would therefore bring the procedure
4 into dis repute, the application should be refuse you
5 had. This will be appropriate, for instance, where, as 11:04
6 there appears to have been in those cases there has
7 been recent and widespread publication of a witness's
8 name in connection with the very proceedings in which
9 anonymity is sought.

10
11 I have referred to this at paragraph 38 above in the
12 shorthand phrase of anonymity having been decisively
13 lost."

14
15 Just pausing there, my Lord. The Inquiry will take its 11:05
16 own course but the PSNI would respectfully promote that
17 as being quite a useful label to attach to this area.
18 Continuing with the judgment then, Mr. Justice
19 Schofield says:

20
21 "Obviously, each case will turn on its own facts and 11:05
22 will be context specific. However, in the case of
23 SM344 and SM346, I do not consider them to fall into
24 the category where the absence of anonymity in 1972 and
25 1973 means that there is no purpose to be served by it 11:05
26 being granted now. It is unclear whether there was any
27 reporting of either witnesses' name some 50 years ago."

28
29 There is limited, if any, evidence of their names being

1 disclosed publicly, albeit they may have been available
2 to someone who had access to the original inquest
3 papers.

4
5 "There is no evidence of their names having become 11:05
6 known in a widespread way recently or otherwise in
7 connection with the present proceedings."

8
9 So that's how he arrived his decision in respect of
10 those two individuals." 11:06

11
12 Now, we respectfully observe, my Lord, that in order to
13 arrive at a decision on whether anonymity has been lost
14 that necessarily requires consideration of the personal
15 circumstances of the individual. And that could fall 11:06
16 under a number of different sub-headings, I wouldn't
17 wish to be prescriptive in relation to that. Their
18 previous role and/or their previous personal security
19 experiences may be relevant to that but the focus will
20 be on the issue of whether anonymity has been lost, or 11:06
21 as Mr. Justice Schofield says, decisively lost.

22
23 He uses the language of "widespread and recent
24 publication" or publicity in relation to their names.

25 11:07
26 Now, in our written submissions we used an example at
27 the extreme to demonstrate how that might pan out
28 within the context of this Inquiry. We chose the
29 former Chief Constable from 1998 and if he made an

1 application for anonymity in connection with these
2 proceedings within this Inquiry, although he would
3 still satisfy the stage 1 test, consideration of his
4 personal circumstances would mean that a grant of
5 anonymity would be - using Mr. Justice Schofield and 11:07
6 Huddleston's language pointless and, perhaps, bring the
7 process into disrepute because his anonymity would have
8 already been lost and obviously so.

9
10 Just one final observation to make in relation to this 11:07
11 area, my Lord, and I think I touched on this in the
12 opening. There may be other unforeseen reasons towards
13 the extreme, aside from anonymity or a loss, a loss of
14 anonymity as to why an application could be refused at
15 the second stage. We're not suggesting the Inquiry 11:08
16 should close the door to that. We have difficulty
17 foreseeing hypothetically what that may be but we did
18 acknowledge it in our written submissions at
19 paragraph 63, the penultimate paragraph of our
20 conclusion section and said there may be other 11:08
21 circumstances which warrant refusal and so respectfully
22 we don't suggest closing the door on that.

23
24 So, my Lord, if I might then turn to your four
25 questions please. They appear in the bundle on pages 11:08
26 225 and 226.

27 MR. GREANEY: Sir, the stenographer said she could go
28 for another half hour, but bearing in mind we are
29 moving to a different topic we could have a break.

1 CHAIRPERSON: would that be convenient, Mr. Henry?

2 MR. HENRY: Certainly, my Lord.

3 MR. GREANEY: If we have a break until, say, 11:30.

4
5 THE INQUIRY ADJOURNED BRIEFLY AND RESUMED AS FOLLOWS:

11:10

6
7 CHAIRMAN: Yes, Mr. Henry.

8 MR. HENRY: Thank you, my Lord, where we left off before
9 the break was at the point when I was beginning to
10 attempt to answer the questions you posed and the
11 questions begin on page 225. And the first question
12 refers to the [2024] decision of Mr. Justice Huddleston
13 in Doherty and Fleming. And you ask about two aspects
14 of paragraph 3 and they are as follows; firstly:

11:31

15
16 "The risk to former members of the security forces
17 including former police officers remains both
18 objectively and subjectively something that is real and
19 not fanciful."

11:32

20
21 And the second component of paragraph 3 states:

11:32

22
23 "Even taking into account the threat assessment now
24 provided, one could not discount the possibility that
25 giving evidence without the benefit of special measures
26 could increase the security risk to those who attend
27 and give evidence."

11:32

28
29 Now, just pausing for a moment in dealing with the

1 first of those two components. In our written
2 submissions, perhaps in a more laboured way than we
3 ought to have done, we just drew attention to the
4 distinction between the objective and subjective
5 components of the risk and that insofar as Article 2 is 11:33
6 concerned, and in particular stage 1 of the Article 2
7 test, we are only concerned, well we are principally
8 concerned with the objective test.

9
10 The question that you have posed after those two -- 11:33
11 CHAIRMAN: Mr. Henry, could I ask you just to pause for
12 a moment, something seems to have happened to my
13 transcript. It's back again. Thank you.

14 MR. HENRY: So, my Lord, the question that you posed or
15 after those two components was this: 11:33

16
17 "Do these two factors describe the circumstances in
18 which Article 2 is likely to be engaged in respect of a
19 former police officer witness?"

20 11:33
21 And rightly or wrongly, my Lord, I have understood the
22 word "engaged" to be a reference to the stage 1 of the
23 Article 2 test and that being the case we say firmly
24 that the answer is yes.

25 11:34
26 The consequence of that is that you then move on to the
27 second stage of the test. So unless your Lordship has
28 any queries in relation to that I'm going to move on to
29 question No.2, it asks as follows:

1 "Proceeding on the basis that it is correct to assume a
2 general or background level of risk to former police
3 officers which is objectively real and not fanciful,
4 what is the consequence of giving effect to the
5 following two components of the JTAC threat assessment 11:34
6 dated 22nd of July 2025?"

7
8 Now, those two components are:

9
10 1. Dissident Republicans highly likely view former RUC 11:34
11 and PSNI witnesses at the Inquiry as legitimate targets
12 for attack; and '

13
14 2. Should any former RUC or police witness give
15 evidence without anonymity there is a realistic 11:35
16 possibility that the Northern Ireland-related terrorism
17 threat to those individuals will increase.

18
19 And we say simply, my Lord, that the consequence of
20 giving effect to those two components is that the 11:35
21 Article 2 test is met. I should say stage 1 before one
22 moves to stage 2.

23
24 Now question No.3 then:

25
26 "Is the second mentioned component of the JTAC
27 assessment to be read and applied literally?"

28
29 So that's the reference to the realistic possibility of

1 increase in risk. And we say the answer to that is
2 yes, it should be applied literally. In our written
3 submissions we expand on that a little bit more and
4 describe it being the expert assessment as reliable as
5 the Inquiry is going to obtain.

11:36

6 CHAIRPERSON: I wonder if I've may be been a little
7 less clear than I could have been in relation to this
8 question. What I really had in mind was the import of
9 the word "any" and I think I would now understand your
10 answer to that would be that that brings into play the
11 concept of decisive loss of anonymity.

11:36

12 MR. HENRY: I think that's a fair assessment, my Lord,
13 I wouldn't disagree with that.

14
15 So my Lord question No.4 deals with the precautionary
16 approach. And your query in very simple terms was:

11:36

17
18 "Does it apply to stage 1 or does it apply to stage 2
19 or does it apply to both?"

20
21 And within the parameters of the question you've
22 reference had the Doherty and Fleming decision in which
23 it appears to refer to the stage 1 and some other
24 decisions where it appears to have been applied at
25 stage 2. Not in advance of drafting our written
26 submissions but in preparation for today, my Lord, I
27 noticed that Mr. Justice Schofield appeared to have
28 endorsed what Mr. Justice Huddleston said in Doherty
29 and Fleming when he was drafting the Springhill

11:37

11:37

1 decision so there might be further support for it
2 applying to stage 1 beyond Mr. Justice Huddleston's
3 approach, but that's something the Inquiry can consider
4 in due course.

5
6 So we reflected on this general question carefully,
7 stage 1, stage 2 or both. And our respectful
8 submission is that it can apply to both as a valid
9 consideration. And in order to arrive at that position
10 we went back to the reasons for the precautionary 11:37
11 approach articulated by Mr. Justice Stephens (as he was
12 then) in the Jordan decision. At paragraph 118, which
13 I won't take the Inquiry to just at the moment, in very
14 simple terms he referred to, the precautionary approach
15 was not acting without good reason or evidence but one, 11:38
16 the consequence was serious, namely death, and No.2,
17 there is an inherent difficulty in making a predictive
18 decision, one doesn't know what future events are going
19 to unfold. One doesn't know what is going to happen
20 during the course of the Inquiry with the requisite 11:38
21 degree of certainty. One doesn't know what a witness
22 is going to say, one doesn't know what publicity will
23 be attracted, one doesn't know how a Dissident
24 Republican or a group of Dissident Republicans are
25 going to react or what attention they're going to be 11:39
26 paying, and so forth. All of those uncertainties make
27 the predictive decision-making process very difficult.

28
29 Bearing in mind the underlying reasons for the

1 precautionary approach it's difficult to think of a
2 good reason why it shouldn't apply at the first stage
3 as well as the second stage. The Court or an inquiry
4 might feel that there's no need to rely on it at the
5 first stage because if one applies or accepts the 11:39
6 assessment within the JTAC assessment or whatever
7 threat assessment is provided in another case, if
8 that's sufficient and one is suitably satisfied by the
9 assessment that is set out within that document, there
10 isn't a need for a cautious approach or a precautionary 11:40
11 approach in those circumstances. But in principle, my
12 Lord, I see no reason why it couldn't apply at the
13 first stage.

14
15 And in relation to the second stage, what measure 11:40
16 should be employed in relation to or by the State
17 authority to discharge its operational duty obligation?
18 It does fit naturally there that a precautionary
19 approach would be applied because of those two
20 underlying reasons. The seriousness of the consequence 11:40
21 and the difficulty in predicting what's going to
22 happen.

23
24 So those are my respectful observations in relation to
25 Question 4, my Lord. If there are no further queries 11:40
26 about that I would move on to the final and brief
27 observations that I would make in relation to the other
28 Core Participants' submissions.

1 So before I make these observations, my Lord, I just
2 say one thing and this is just as a consequence of
3 timetabling, it's not intended to be critical in any,
4 shape or form. When each of the CPs who were
5 responding in writing for the purposes of this hearing 11:41
6 were drafting their submissions we hadn't seen one
7 another's written submissions and so that's why we had
8 a constructive dialogue between counsel over the course
9 of the weekend to see whether there was any measure of
10 agreement or a lesser measure of disagreement between 11:41
11 us. And I know that with everyone having reflected on
12 what the others have said I know that Mr. Toal, for
13 example, isn't advancing the category submission which
14 is contained in the written document provided in
15 advance. 11:42

16 CHAIRPERSON: Did the individual submissions prepared
17 by Core Participants not get circulated to the others?
18 MR. HENRY: We all saw one another's, but not -- but,
19 if you like it's the police application but Mr. Southey
20 and Mr. Toal wouldn't have had the benefit, I don't 11:42
21 think, of seeing my submission before they drafted
22 their own. And that was simply a matter of the
23 condensed timetable. Normally they are sequential, so
24 normally in most instances ours would go first and the
25 non-State CPs will reply to those but I just think in 11:42
26 this situation because, of the short timeframe within
27 which those submissions were required everyone was
28 given - I'm subject to correction but I think everyone
29 was given the same deadline and I know it's different

1 in other jurisdictions but that was in the run-up to a
2 very busy term period in Northern Ireland as well.

3 CHAIRMAN: I just seem to remember myself receiving all
4 of them quite some time ago?

5 MR. HENRY: That's right, my Lord, but they were
6 drafted without sight of one another's and that's the
7 observation I make.

11:43

8 MR. GREANEY: Sir, I can confirm that is the position
9 there was a single date before they received the full
10 submissions.

11:43

11 MR. HENRY: That date was given, my Lord, when this was
12 an earlier hearing date and that date was fixed to give
13 everyone a fair opportunity to read those written
14 submissions prior to that hearing date, so that's why
15 we readily understood that there was the same date for
16 everyone.

11:43

17
18 So with that in mind my Lord, I make two final
19 observations, No.1, the key concern that I drew out of
20 both CPs' written submissions was their concern about
21 individual consideration of applications. And insofar
22 as I'm talking about stage 2 of the process, of the
23 Article 2 test requiring individual consideration then
24 I don't think there is a difference between us.

11:43

25
26 And insofar as there is any requirement, if the
27 Article 2 test is not satisfied, to turn to the common
28 law test then it's obvious to all involved, I think, at
29 that stage that personal circumstances are a

11:44

1 significant consideration in the common law test
2 process.

3
4 The final observation relates to what I would call the
5 accountability or public interest point that is raised 11:44
6 in both sets of non-State CP submissions. And in very
7 simple terms, my Lord, the point that has been made is
8 if a witness is particularly important then there
9 should be a greater reticence about granting anonymity.
10 And our answer to that in relation to Article 2 is that 11:45
11 it has no place, it has no valid place for
12 consideration. So if we break that down, my Lord,
13 stage No.1, is there a real and immediate risk? That
14 query is answered obviously without reference to the
15 importance or absence or lesser important of an 11:45
16 individual witness's evidence.

17
18 That's the easier consideration.

19
20 Stage No.2 then, what is the proportionate measure to 11:45
21 employ in response to a real and immediate risk? Well,
22 it's important when considering that, my Lord, to think
23 about what the Inquiry or in a different context in
24 court is being asked to do. It's being asked to judge
25 what is a proportionate measure to employ to protect 11:45
26 life and it would not be an acceptable position for any
27 inquiry or court, we say, to reach a conclusion where
28 it is said, 'well, there is a risk to this witness's
29 life but that is tolerable because their evidence is

1 particularly important for the purposes of those
2 proceedings,' that would be completely outwith the
3 spirit of the Convention which gives rise to Article 2.
4

5 My Lord, I am very grateful for your patience with me 11:46
6 this morning, those are my respectful submission. If
7 you have any additional queries I'd be happy to try my
8 best to address them but otherwise that's all I have to
9 say this morning.

10 CHAIRMAN: Thank you very much, Mr. Henry. 11:47

11 MR. GREANEY: Mr. Toal has confirmed separately to me
12 that on reflection and following his discussions with
13 Mr. Henry, he is not persisting in the submission which
14 is based upon a categorisation of witnesses that is set
15 out at paragraph 37 of his written submissions. And, 11:47
16 moreover, the anxiety that those he represents have
17 had, that you might be encouraged to determine
18 applications on a class basis has been dispelled by the
19 submissions of Mr. Henry this morning, that they make
20 no such submissions. And in those circumstances, it 11:47
21 may be that Mr. Toal does not feel that there is
22 anything he wishes to say already but I will check that
23 with him. That is the position.

24 CHAIRPERSON: well, I think I need to know just a
25 little about what to make of the other paragraphs in 11:48
26 Mr. Toal's submissions as well.

27 MR. GREANEY: Mr. Toal has been very clear with me that
28 if there are questions that you have for him he will,
29 of course, answer them.

1 CHAIRPERSON: So, Mr. Toal, can I just be clear then,
2 in paragraph 37 where you suggest that an approach of
3 identifying different categories we can put that to one
4 side.

5 MR. TOAL: Yes.

11:48

6 CHAIRPERSON: What about paragraph 18 where you say
7 that before anonymity is granted a variety of different
8 issues should be considered?

9 MR. TOAL: Just give me one moment please. Yes, that
10 is aligned with the earlier submission, Chair. So that
11 is not necessary in the circumstances.

11:49

12 CHAIRMAN: I can put that aside as well?

13 MR. TOAL: Yes, please.

14 CHAIRPERSON: And what about those paragraphs from,
15 say, 28 to 33? There's an issue of accountability
16 brought into play and an approach suggested should be
17 taken according to things such as whether or not the
18 witness is central to the narrative of preventability,
19 intelligence handling, threat assessment, et cetera.

11:50

20 MR. TOAL: Insofar as Article 2 is concerned they are
21 not relevant but obviously the common law test will
22 require all available factors to be considered, Chair.

11:50

23 CHAIRMAN: What about this suggestion which is very
24 similar to what was advanced in the initial hearing
25 that there should be a sort of dissection of anonymity
26 distinguished between disclosure to various individuals
27 and other factors of that sort?

11:51

28 MR. TOAL: No, you have already ruled upon that and we
29 accept that ruling, Sir.

1 CHAIRMAN: All right, then thank you Mr. Toal.

2 MR. GREANEY: Thank you. Mr. Toal. Sir, as I
3 indicated at the outset of the hearing we will now
4 invite Mr. Southey to make submissions on behalf of
5 those that he represents. 11:51

6
7 SUBMISSION BY MR. SOUTHEY:

8
9 MR. SOUTHEY: I start by making clear a couple of
10 things which hopefully should be clear from our written 11:52
11 submissions. Firstly, we're not seeking to reargue or
12 repeat submissions that we made during the last hearing
13 in relation to anonymity. That's to some extent why
14 we've focused on questions and in oral submissions
15 today I am going to focus on your questions. 11:52

16
17 I should add to that as my learned friend Mr. Henry
18 indicated, there were helpful exchanges over the
19 weekend between all counsel and I agree with him that
20 there may not be a huge difference between him and I in 11:52
21 relation to what we're seeking.

22
23 Linked to that, I should make it clear, before I go
24 into the detail of the case law, that we accept that in
25 principle it would be open to the Inquiry to reach what 11:53
26 might be described as generic findings that are a
27 starting pointy, essentially, when assessing individual
28 cases, but there still needs to be individual
29 consideration. The most obvious reason why there needs

1 to be individual consideration is because, in practice,
2 anonymity would make no difference. The most obvious
3 example of that we agree with Mr. Henry is where
4 anonymity has effectively been lost. But there can be
5 other cases. So an example which may or may not arise 11:53
6 on the facts, for example, someone who is resident in
7 Australia at an address totally unknown to people, for
8 example, where he would be or she would be unlikely to
9 be located.

10
11 Picking up from that on a submission that Mr. Henry
12 ended with, we would also argue that importance of the
13 naming of the individual could, at least in principle,
14 potentially justify naming them even if there is a real
15 and immediate risk resulting from them giving evidence. 11:54
16

17 Sir, you will remember, I'm sure, what is said in
18 Osman, it is at page 609 of the bundle the relevant
19 passage, para 116, but that makes it clear that the
20 requirement effectively - and I'm paraphrasing but I 11:54
21 hope not inappropriately - that makes it clear that the
22 obligation on the authorities are to act where there is
23 a real and immediate risk but they're not required to
24 take disproportionate steps. And in our submission, at
25 least conceptually, it could be the case that the 11:55
26 importance of a name is such, in the particular
27 circumstances of the case, that it becomes
28 disproportionate to make an anonymity order as opposed
29 to providing some other form of protection.

1 And to give, in one sense, an example of that - and I
2 should make it clear on the material we've seen so far
3 I'm not suggesting actually necessarily this arises in
4 the circumstances of this case, but if you think about
5 policing in Northern Ireland it would plainly be 11:55
6 unacceptable for the senior leadership of the police to
7 be unknown. Chief Constable, his deputies, are known.
8 MR. MANSFIELD: I'm so sorry to interrupt, but I have
9 had a message that those on the link are finding it
10 particularly difficult to hear, I'm not saying he 11:56
11 shouldn't sit down but perhaps there could be a slight
12 adjustment. I'm so sorry.

13 MR. SOUTHEY: That's helpful, sorry. Can I just move
14 the microphone forward, I have got problems with table
15 space, if I can put it that way. 11:56
16

17 Hopefully I don't know if those messaging Mr. Mansfield
18 can confirm whether or not that's better? I suspect it
19 may be.

20 MR. MANSFIELD: I think so, already, yes, thank you. 11:56

21 MR. SOUTHEY: I won't repeat myself but the point I was
22 making was about importance. For accountability
23 reasons it's obvious that the Chief Constable has to be
24 a public figure, the Chief Constable gets provided with
25 protection and that's something that is a proportionate 11:56
26 response. All I'm saying is that one shouldn't rule
27 out the possibility of importance being a factor,
28 particularly, in one sense it's a factor that may need
29 to be kept under review. If, for example, there was

1 something very serious that was said about a particular
2 officer it shouldn't be ruled out, the fact that
3 importance might in those circumstances justify naming
4 the individual. But I would emphasise, I've seen
5 nothing, I'm not making that point about a particular 11:57
6 application or a particular officer at this stage.

7 CHAIRMAN: I think this is a point you touched on at
8 the previous hearing, Mr. Southey, and if I remember
9 correctly what I tried to acknowledge in the ruling was
10 that whilst that might well be right there wasn't an 11:57
11 example of it.

12 MR. SOUTHEY: No.

13 CHAIRMAN: So you're holding on to the principle and I
14 don't really have any difficulty with that.

15 MR. SOUTHEY: I was only really holding on to it 11:57
16 because it had been expressly raised in Mr. Henry's
17 oral submissions and that's why I was responding to it,
18 because in one sense what I'm trying to do is identify
19 in one sense where the differences are between us.

20 CHAIRMAN: The door is open to other considerations, as 11:58
21 Mr. Henry recognised, and they would just be dealt with
22 on an individual basis.

23 MR. SOUTHEY: Absolutely, and I recognise that. It was
24 just the particular submission I thought I should put a
25 marker down that we don't accept. 11:58
26

27 Turning then in one sense to perhaps more substantial
28 issues, clearly there doesn't appear to be any dispute,
29 the ruling makes it clear that there are two stages to

1 the Article 2 obligation, one is the assessment of
2 whether or not there is a real and immediate risk. The
3 test that applies in relation to that is clear. And,
4 secondly, what is a reasonable step? Now as I read
5 your previous ruling you, Sir, appeared to accept, and 11:59
6 I reference particularly para 17, 61 and 64, that at
7 some stage - and this may be an area where there is
8 dispute between myself and Mr. Henry, albeit, it may
9 not matter in practical terms as well - you appear to
10 accept, we submit correctly, that what one needs to at 11:59
11 some stage at least consider is whether the action of
12 giving evidence will result in a material increase in
13 risk. And that's clearly why both parties, well not
14 both parties but why there has been a focus on the
15 submissions on the issue of whether or not anonymity, 11:59
16 effectively, has been lost, because, obviously, if
17 anonymity has been lost it's difficult to see how there
18 will be an increase in risk.

19
20 Mr. Henry says that only comes into play at the second 11:59
21 stage when looking at whether or not the steps are
22 reasonable. we submit it comes into play at the first
23 stage and we submit it comes into play at the first
24 stage because, ultimately, the question is, is the
25 state effectively interfering with the rights of an 12:00
26 individual by putting them at risk? And if the actions
27 of the State, which in case would be the failure to
28 grant anonymity, are not putting the person at risk, we
29 say Article 2 isn't in play.

1 Having said that, I'm not sure in one sense it makes a
2 huge amount of difference because both parties agree it
3 has to be considered. And if ultimately the question
4 is is there a material increase in risk that's a
5 factual question that both parties agree needs to be 12:00
6 considered and indeed in the individual circumstances
7 of the case that's where issues such as loss of
8 anonymity feed in and it may not matter. And it may
9 not matter also given what I've already said which is
10 we accept that what the case is demonstrating is its 12:01
11 legitimate approach, effectively, to start by making
12 some general findings about the level of risk in
13 Northern Ireland and then applying them in individual
14 circumstances. So that's why, as I say, it may not
15 make any real difference. 12:01

16
17 An example, which we would say is consistent with our
18 argument that it's real and immediate risk stage, but I
19 accept it may not be 100% clear where the issue of
20 individual consideration was applied, is the Re C. The 12:01
21 relevant passages are at 1226 and you've already been
22 taken to, and I won't take you to it again, it's
23 obviously very familiar now to anyone who's been
24 involved in these two hearings, you were taken to para
25 43 from the judgment of Lord Justice Girvan. 12:02

26
27 what I would emphasise in that context, and I accept to
28 some extent it's a little unclear quite how the learned
29 judge is applying it, but what is clear from the use of

1 the language "possibly significant" in the second last
2 sentence -- I don't know whether you've got that, it
3 talks about an increase depending on the evidence,
4 essentially, an increase of present threat possibly
5 significant depending on nature of the evidence and 12:03
6 other unknown contingencies. So what Lord Justice
7 Girvan was recognising, in our submission, was the
8 extent to which risk would increase in a particular
9 case, it may depend on the particular circumstances of
10 the case. And consistent with that, in our submission, 12:03
11 at paragraph 46, he then talks about and this is about
12 15 lines into paragraph 46, it is a sentence that
13 starts:

14
15 "The State authorities know that evidence, if given 12:04
16 openly, could expose the witnesses to an increased
17 risk, that increase could be significant."

18
19 what in my submission Lord Justice Girvan there is
20 recognising is the increase, it may depend upon the 12:04
21 particular circumstances and that's why, ultimately, in
22 the appeal, the way it was disposed of and you see this
23 from para 47, is that the matter remitted essentially
24 for the Coroner to redetermine matters. And so, even
25 though there were some generic findings about risk, 12:04
26 findings we would submit that to some extent one has to
27 treat with a degree of caution given the passage of
28 time, and I'll come back to that, ultimately there
29 needed to be consideration of the individual

1 circumstances because, as the subsequent judgments
2 demonstrate, matters such as loss of anonymity may mean
3 effectively there is no increase in risk from an
4 individual giving evidence.

5
6 That submission, we would submit, is consistent with
7 the approach adopted by Mrs. Justice Keegan (as she
8 then was) in the Ballymurphy Inquest. If you go to one
9 132 of the bundle my learned friend highlights para 23,
10 but I would highlight as well para 24 where the learned 12:05
11 judge made it clear that she was considering each case
12 on its own facts. And that's consistent with the
13 example she gave, my learned friend took you to
14 page 1171. But if you look at, for example, 1169 nine
15 which is another example, what the learned judge was 12:06
16 careful to do, and you see this at the end of para 11,
17 para 12, para 13, she makes individual findings about
18 the engagement of Article 2 and then rules essentially
19 on anonymity.

20
21 One other feature of this, that I would highlight,
22 which is, perhaps, of some significance if you come to
23 make generic findings, is that when one looks at the
24 findings at 1171, in particular paragraph 3, which is
25 the paragraph my learned friend highlighted, the 12:07
26 learned judge talks there, five lines into that
27 paragraph, about the need to bear in mind the nature
28 and profile of the inquest. That's one thing I would
29 just draw attention to because on re-reading the

1 Springhill judgment and I am going to come to this, the
2 Springhill judgment over the weekend, one thing that is
3 striking in that determination is the weight that
4 Mr. Justice Schofield places on the nature of the
5 allegations that the security forces faced in the 12:08
6 Springfield (Springhill) Inquest, that was a case where
7 the actions of the security forces were said to have
8 been a massacre. Perhaps something that I have given
9 insufficient or drawn insufficient attention to and
10 perhaps need some consideration if you are going to 12:08
11 make generic findings in this context, is that, of
12 course, in Omagh this isn't like a number of The
13 Troubles inquests where the allegations against State
14 agents are that they carried out direct and unlawful
15 killings, this is a situation where the allegations 12:09
16 against State agents are of a very different nature.
17 There's no doubt. And I'll come back to that when one
18 sees the Springfield (Springhill) Inquest because it is
19 something that is highlighted by the judge.

20 12:09
21 So turning then to the questions. The first question
22 related to the findings of Mr. Justice Huddleston in
23 the Doherty Inquest and the relevant page in the bundle
24 is 1786. And the passage that was particularly drawn
25 attention to, if my notes are correct, in relation to 12:10
26 the questions, started -- it was essentially
27 paragraph 3 and it was particularly (b) and (c). Can I
28 just start by noting the context because it may be of
29 some relevance if one is going to make generic

1 findings. At that time the risk, as was made clear in
2 sub-paragraph (a), the risk in Northern Ireland from
3 Northern Irish terrorism was described as severe. You
4 will remember from the previous hearing and from the
5 JTAC threat assessment that the risk in relation to
6 Northern Ireland has reduced, it is now substantial.

12:10

7
8 I make that point not because it obviously doesn't need
9 to be given careful consideration but because there is
10 a danger, in my submission, in applying the factual
11 findings that were made by, for example, Mr. Justice
12 Huddleston, because the situation is changing, it
13 continues to change in our submission and that's a
14 concern I'll come back to when I make some reference to
15 the factual matters highlighted by Mr. Henry this
16 morning.

12:11

12:11

17 CHAIRPERSON: Can you just remind me what the
18 difference between the two is, Mr. Southey?
19 Substantial?

20 MR. SOUTHEY: Sorry I have got that in my notes
21 somewhere, it's difficult to read. You can see it, you
22 can see it on the -- in the original, there was --

12:11

23 MR. GREANEY: Sorry, if I can help, the difference is
24 that severe, means an attack is highly likely,
25 substantial means that an attack is likely.

12:12

26 MR. SOUTHEY: Yes. Can I give you the reference as
27 well, Sir, because that's what I was looking for to
28 find it. You'll remember that there was a bundle of
29 original documents for the first hearing, it's

1 page 215, it's not necessarily easy to read on that but
2 that's where you will find the underlying document that
3 makes that point. And I shall come back to that, I was
4 going to come back to that for a different point and I
5 will come back to it.

12:12

6
7 But your ruling, Sir, we say correctly, recognised
8 there was a general downward trajectory. And that's
9 important. All we're saying in relation to that is one
10 needs to be cautious in one sense about simply adopting
11 factual findings. Obviously, even more so in relation
12 to Re C because that was sometime in the past.

12:12

13
14 We then turn to the specific paragraphs that the
15 question asks about, if I may. The first one is (b),
16 that is the paragraph which talked about the risk being
17 real. That, we accept, obviously reflects the first
18 element of the Article 2 test, it doesn't deal with
19 whether it's immediate, but probably more importantly
20 it doesn't deal with the actual impact of giving
21 evidence. But it's obviously an important starting
22 point and we accept that language reflects the first
23 part of the first limb of the Article 2 test.

12:13

12:13

24
25 The second finding that was highlighted in the question
26 is (c) and that language, in our submission, doesn't
27 necessarily reflect the Article 2 test because it talks
28 about how there could be an increase in risk. How that
29 relates to the Article 2 test may depend on this

12:13

1 dispute which, I accept, as I have already indicated,
2 may be slightly academic, this dispute as to where, in
3 the context of the Article 2 test, the need for an
4 increase in risk fits in, but wherever that is, in our
5 submission, there needs to be established that there is 12:14
6 an increase in risk. What this language recognises, in
7 our submission, consistent with what obviously happened
8 in the circumstances is that one couldn't say
9 necessarily that in every case there will be an
10 increase in risk. That's why, obviously on the facts 12:14
11 of the case, what the learned judge did was
12 acknowledge, because of the widespread knowledge of the
13 witness's name that there was no increase in risk, you
14 see that at para 6.

15
16 So, what we submit, which is consistent with what I've
17 already said about generic findings is that what the
18 approach of Mr. Justice Huddleston demonstrates is that
19 it is acceptable, indeed probably pragmatic and a
20 sensible use of time to make generic findings 12:15
21 essentially about risk. But, that doesn't mean that
22 one doesn't go on to consider the individual
23 circumstances. That's consistent, we would submit with
24 the Springhill Inquest which is obviously one that PSNI
25 place significant weight on. 12:16
26

27 Now, PSNI, turning to the Springhill Inquest, the
28 relevant passages start at page 1799. The PSNI started
29 by drawing attention to what is said in para 31 about

1 reference to standard form. What appears to have
2 happened in Springhill was that there were
3 individualised risk assessments but they were all
4 generic, effectively. What in our submission that
5 demonstrates, and what we submit is important in one 12:17
6 sense, is that if there is going to be a sort of
7 generic set of findings that will act as a starting
8 point, it's important then that State authorities who
9 are making applications on behalf of witnesses give
10 some consideration, and make it clear that they've 12:17
11 given some consideration, as to whether there are
12 reasons for departing from that. For example, it may
13 only be State authorities who have an idea of the
14 profile of an individual, it may only be State
15 authorities who know whether the individual now lives 12:17
16 in Australia and somewhere that is unknown.

17
18 The second feature, though, that's important to note
19 also about what was before the Coroner in the
20 Springhill case, before Mr. Justice Schofield, is set 12:18
21 out at para 37, and in that case there were specific
22 risk assessments which used the sort of categorisation
23 that's already been referred to this morning, of the
24 risk of giving evidence. We come on to what the JTAC
25 assessment says in this case but we do submit that's 12:18
26 important given, as I say, the importance of not just
27 the risk to police officers but the risk to police
28 officers and former police officers from giving
29 evidence.

1 Now, that's the first point about the context I would
2 draw attention to. The second point, just to link back
3 to something I already made reference to, is para 34.
4 And para 34 is where Mr. Justice Schofield made clear
5 that one of the factors that was relevant was the 12:19
6 perception, essentially, that there had been a massacre
7 and that soldiers and what's an issue primarily was
8 anonymity of the soldiers, that soldiers were
9 responsible for that and that might increase, and I'm
10 not saying in any way that is necessarily 12:19
11 determinative, but I do submit it is a relevant factor
12 in this case and needs, potentially, to be taken
13 account of.

14 CHAIRMAN: well, I don't doubt it's a relevant factor,
15 Mr. Southey, in the sense that the individual 12:19
16 circumstances lying behind any inquest or inquiry will
17 be relevant.

18 MR. SOUTHEY: Yes.

19 CHAIRMAN: what I'm not seeing so easily is how one
20 would begin to rank these individual circumstances, or 12:20
21 to put it rather differently, how one would compare one
22 tragedy with another?

23 MR. SOUTHEY: My Lord the point, as I understand it,
24 that's being made and I'm paraphrasing but hopefully
25 not unfairly by Mr. Justice Schofield is because the 12:20
26 individual military witnesses, at least in some cases,
27 would have been seen as being responsible for
28 committing, or were seen by some as being, potentially,
29 responsible for committing serious human rights abuses,

1 that made them higher risk as a target and that's part
2 of the context in which he was then having to assess
3 the risk to those individuals. We're talking about a
4 situation here where there is no obvious basis for that
5 sort of targeting of people involved and that, to some 12:20
6 extent, reduces risk. And what I would also point out
7 is that the Springhill Inquest was certainly not the
8 only inquest of that nature, a number of the ones we
9 are looking at are ones where there were those sorts of
10 allegations and they clearly fed into the assessments. 12:21

11
12 Turning then to, perhaps, what is most significantly or
13 the most significant point that's in one sense made by
14 PSNI in relation to this inquest and Question 1, I
15 suppose, certainly where it fits in, in PSNI's 12:21
16 submissions. PSNI highlight para 39 and the language
17 of "decisively lost." And their written submissions
18 certainly argue that is a high threshold.

19
20 We submit there is a danger in sort of applying 12:22
21 language such as "decisively lost" which is that it
22 loses sight of really what the fundamental
23 consideration should be. And that fundamental
24 consideration should be, does what has happened in the
25 past mean that anonymity will have little or no effect? 12:22
26 If you think about the Doherty case all that was
27 sufficient, what was sufficient essentially to mean
28 that there was a conclusion that there should be no
29 anonymity order was the fact that the name had been

1 mentioned on a significant number of occasions in the
2 past during the inquest.

3
4 That, in our submission, should be the focus. The
5 focus should be not on some, in one sense, sort of 12:23
6 linguistics barrier, effectively, to the lifting of
7 anonymity or departure from a sort of starting point of
8 anonymity, the focus should be, effectively, on will
9 anonymity make any difference? And either anonymity
10 has effectively been lost, so it will make no 12:23
11 difference, or it hasn't been.

12
13 So turning back to the question, what we submit the
14 findings of Mr. Justice Huddleston demonstrate is not
15 that, necessarily, Article 2 was engaged, because 12:24
16 ultimately there needed to be consideration of whether
17 there had been an increase in risk, what they
18 demonstrate, in our submission, is how it's open to
19 judicial decision-makers and to you, Sir, to make
20 generic findings that provide a starting point but that 12:24
21 starting point doesn't undermine the need for
22 individual assessment.

23 CHAIRPERSON: I understand that, Mr. Southey, and I
24 don't disagree with it, I suppose the only question is
25 the extent to which one would engage in that individual 12:24
26 assessment and what factors one would take into account
27 and give weight to. And what I can see in the various
28 inquest decisions that have been drawn to my attention
29 are a number of examples in which anonymity has been

1 granted.

2 MR. SOUTHEY: Yes.

3 CHAIRMAN: And in probably all of those there is
4 something said about the individual circumstances of
5 the applicant. Now, in PW9 we know that anonymity was 12:25
6 refused and it's for the very reasons you've just been
7 talking about. But if we look at some of the others,
8 we see circumstances in which anonymity was granted,
9 with very little by way of telling individual
10 circumstances that they would appear to point in that 12:25
11 direction. So what I was wondering about is, and what
12 might be helpful would be if you were able to identify
13 for me any example of an application which has been
14 refused and draw my attention to the personal
15 circumstances which led to that beyond PW9. 12:26

16 MR. SOUTHEY: Well, obviously, there would appear to
17 have been another witness, who, as my learned friend
18 indicated, in the Doherty case who lost anonymity or
19 wasn't granted anonymity in part because anonymity had
20 already been lost. I can't think of -- I've not been 12:26
21 able to locate in the Northern Ireland context a case
22 where anonymity was refused where sought in
23 circumstances other than where, effectively, anonymity
24 has already been lost. I'm not aware of any. It's
25 almost the most difficult thing as a lawyer to say 12:27
26 nothing exists because you don't know what you don't
27 know, but all I'm in one sense saying, and it goes back
28 to a submission I made last time and, to some extent,
29 already touched upon before, is that when making, and

1 I've made clear I don't dispute the idea that you can
2 do what effectively happened for example, in the
3 Doherty case where there are starting point generic
4 findings, all I would also urge on the Inquiry is that
5 when making those generic findings one can, one needs
6 to consider the current situation. One needs to
7 consider the nature of the issues that are raised by
8 Omagh and one needs to also, I accept, consider the
9 JTAC threat assessment, and that, was what I was going
10 to come on to, effectively.

12:27

12:28

11 CHAIRPERSON: So we've reached a point I think where we
12 would recognise that anonymity could be lost in the
13 sort of fashion that was described in PW9 --

14 MR. SOUTHEY: Yep.

15 CHAIRMAN: -- where to grant anonymity would in effect
16 bring the proceedings into disrepute.

12:28

17 MR. SOUTHEY: That's obviously how the judge, the
18 learned judge analysed it, what I would submit is the
19 key point about that in one sense is how does that --
20 when one analyses how does that fit into the Article 2
21 consideration the primary reason it fits into is either
22 because, if I'm right where it fits in, because of what
23 already was known about the individual, PW9, there
24 would be no increase in risk, or because it wasn't a
25 reasonable step, adopting Mr. Henry's analysis, because
26 it wouldn't make any difference, effectively. And the
27 wider point, that's why I'm keen to, in one sense avoid
28 arrowing this down simply to cases where anonymity has
29 been lost. The wider point, in my submission, is what

12:28

1 that demonstrates is that ultimately there needs to be
2 a consideration, at the very least, of whether
3 anonymity will have any impact, and one of the most
4 obvious circumstances in which it might be concluded
5 anonymity will have no impact is where anonymity has
6 been lost, it is possible to conceive of other
7 circumstances. That's why I keep referring to the
8 person who is in Australia, basically. Anonymity in
9 those circumstances would, we would submit, potentially
10 make no difference because the person's location,
11 effectively, had addressed their risk.
12

13 THE INQUIRY ADJOURNED BRIEFLY AND RESUMED AS FOLLOWS:
14

15 MR. GREANEY: Sorry, the technical issue has been
16 resolved. Our options now are to sit on for just a
17 short period of time and then take the ordinary lunch
18 or to sit on for what ought to be no more than 45
19 minutes to complete the submissions, our preference is
20 the second of those of courses and stenographer has
21 been good enough to indicate that she's comfortable
22 with that approach.

12:53

23 CHAIRMAN: All right, are you happy with that
24 Mr. Southey? Thank you very much.

25 MR. SOUTHEY: Before I go on to what I was about to do
26 which was JTAC threat assessment and the questions in
27 relation to that, can I just indicate, because, well
28 Mr. Henry partly and also my instructing solicitor have
29 drawn my attention to two rulings that may assist in

12:53

12:54

1 relation to other examples in relation to anonymity.
2 The first that Mr. Henry located is [2024] NI
3 Coroner 2, that is the ruling of Mr. Justice Huddleston
4 regarding PW35. I think as we all understood, it is
5 primarily a case of anonymity having been lost. The 12:54
6 one complication that I think probably you ought to be
7 aware of is that although, effectively, anonymity had
8 been lost the witness then argued that they should be
9 granted anonymity because of the impact on their health
10 and that argument was rejected, so there was a sort of 12:55
11 loss of anonymity but then a follow up from the
12 witness.

13
14 The other that my instructing solicitor drew attention
15 to is [2025] NI Coroner 5, which is a ruling of his 12:55
16 Honour Judge Gilpin in the inquest into the death of
17 Patrick Crawford. That is a case where anonymity was
18 reviewed, having initially been granted towards the end
19 of the inquest because the witnesses had died. And in
20 fact anonymity was maintained because nobody sought the 12:55
21 lifting of anonymity but it possibly is an indication
22 of the sort of circumstance, again, where anonymity in
23 principle may be an issue because if someone is dead,
24 depending on what, for example, their family situation
25 is, it might be said that anonymity would make no 12:56
26 difference because unfortunately they are no longer a
27 potential target.

28
29 And certainly the Coroner seemed to have regarded it as

1 a potential change of circumstances but then didn't
2 actually lift anonymity because nobody was seeking
3 that. But neither of those, I suppose, are direct
4 answers to your question but they are worth clarifying,
5 I think, given the question asked.

12:56

6 CHAIRMAN: well that's helpful, thank you Mr. Southey.

7 MR. SOUTHEY: Can I then turn to JTAC assessment? A
8 couple of things just that I would like to say to put
9 it in context and put in context my sort of response to
10 the questions that were asked. Two things first that
11 should be noted about it, firstly, if one looks at the
12 first page of it, page 144, that is where there is the
13 reference to the downward trajectory in relation to
14 threat and that is where the reference is found also to
15 the peak threat being 2010. And I just draw attention
16 to that because my learned friend, Mr. Henry, drew
17 attention to the tragic killings of Constable Carroll
18 and Constable Kerr. They, of course, occurred during
19 that peak and, to some extent, in our submission, as a
20 result are of perhaps less significance than they might
21 be because fortunately things have improved since then
22 and that's also demonstrated by, as I already indicated
23 the threat level now is substantial which is a
24 reduction.

12:57

12:57

12:57

25
26 More importantly though, Question 2, if my notes are
27 correct, focuses, to some extent, on the last paragraph
28 and, in particular, the last sentence of the last
29 paragraph which was the statement that there is a

12:58

1 realistic possibility that NI RT threat will increase.
2 That sentence should be read, though, with what follows
3 which is the reference to "any increase in the level of
4 threat being dependent on the receipt and nature on
5 subsequent intelligence." And that's an important 12:58
6 starting point, in our submission, because it does, in
7 our submission, demonstrate two things; one, a
8 recognition that there isn't necessarily going to be an
9 increase in any particular case and whether or not
10 there's an increase may depend on future intelligence. 12:59
11 And, secondly, it reflects, in one sense, highlights
12 the fact that the language of realistic possibility in
13 our submission doesn't necessarily reflect the
14 Article 2 test. It is, we would submit, potentially
15 of -- there is a potential material difference in the 12:59
16 sense that real risk, essentially is a test which is
17 both recognising the fact that there is inevitably
18 uncertainty about whether there will be an attack or a
19 threat to life but at the same time, real risk does
20 suggest that there needs to be a degree of risk that is 13:00
21 beyond that, effectively, that is inherent in every day
22 life where we all run risks all the time but in one
23 sense just have to accept that, that's part of human
24 life. And we submit that one needs to be cautious
25 about applying language such as that, that's found in 13:00
26 the last paragraph, "real possibility" particularly in
27 light of what follows, the second sentence.
28
29 That, in our submission, links into Question 3 and

1 Question 3, in part, focuses on how one should read
2 JTAC. And in our submission with one important
3 qualification, and that is the qualification that where
4 JTAC uses language, as it does at the top of page 145
5 of substantial, it is clear it is using a formal 13:01
6 gradation system to identify a level of risk. In our
7 submission, it should be read in a common-sense way
8 recognising that it isn't for example, as far as we're
9 aware by lawyers who understand the Article 2 test, it
10 is written by security professionals who are expressing 13:01
11 themselves in a common-sense way. And that's important
12 because, obviously, the role, in our submission, of the
13 Inquiry is to convert what is said, essentially -- or
14 to apply what is said in the context of the Article 2
15 test. And that test, what I've just said links into a 13:01
16 submission that my learned friend, Mr. Henry, made this
17 morning about the protective or the precautionary
18 approach.

19
20 My learned friend said in relation to that, one of the 13:02
21 reasons why the precautionary approach applies, and I'm
22 going to come on to Question 4 in a moment, but one of
23 the reasons why it applies is that there is inherent
24 uncertainty. And we accept that there is a degree of
25 uncertainty but we submit that that uncertainty is 13:02
26 reflected in case law like Begum that deals with how
27 risk is assessed. That case law makes it clear that
28 risk is not the sort of fact finding that perhaps
29 judges spend most of their time doing when they are

1 considering even the civil standard of proof or
2 criminal standard of proof. Risk assessment involves
3 taking account of a number of different factors and
4 reaching a conclusion, not applying balance of
5 probabilities, but still reaching a solid conclusion 13:03
6 about risk. And, in our submission, the real and
7 immediate risk test shouldn't be in any sense watered
8 down by reference to the precautionary approach or
9 whatever.

10
11 ultimately the question for the Inquiry based on the 13:03
12 JTAC approach, in our submission, has to be is there a
13 real and immediate risk associated, in particular, with
14 giving evidence to the Inquiry.

15
16 I've just touched on precautionary approach and 13:03
17 Question 4. Can I then deal in detail with Question 4.
18 Our submission in relation to precautionary approach is
19 that the precautionary approach applies to the second
20 element of the test, not the first element of the test. 13:04
21 And the reason we submit that, in our submission, is
22 two-fold, one I have already touched upon which is that
23 the Article 2 engagement test, if I can put it that
24 way, I thought the first element of the test is clear,
25 well established and doesn't need qualification. It is 13:04
26 flexible enough to take account of the uncertainty,
27 that's why it talks about risk, not, for example,
28 requiring something proven to the balance of
29 probabilities. And it's the second stage at which the

1 precautionary approach comes into effect. That we
2 submit is consistent with Jordan. If one goes to the
3 authorities at 1288, Mr. Justice Stephens (as he then
4 was), summarises what is meant by the precautionary
5 approach, paragraph 118, and, in particular, says 13:05
6 that -- or describes how it effectively comes into play
7 in carrying out a balancing exercise. And we submit
8 that balancing exercise, if one thinks back to what I
9 have already said about Osman, the only stage at which
10 there's a balancing exercise is at the second stage, 13:06
11 it's at the second stage the State has to take
12 proportionate steps. It can't necessarily take every
13 step but it has to assess what is a proportionate step.
14 And in that context it's relatively easy to see how a
15 precautionary approach fits in. At that stage when 13:07
16 looking at whether a step is reasonable, it becomes, in
17 our submission, easy to see why it may be necessary to
18 take account of uncertainty essentially about what will
19 work and what won't work.

20
21 Now, the note from the Inquiry highlighted one of the
22 Doherty judgments, and it's the May 2023 one which is
23 at page, relevant passage is at page 1824 of the
24 authorities. And it was particularly para 7 to 9 if I
25 remember rightly, were highlighted. In that 13:08
26 judgment -- that's, I should say, [2023] NI Coroner 5,
27 in that judgment Mr. Justice Huddleston at para 7 noted
28 the real and immediate test -- noted that the issue was
29 whether there was an immediate risk that wasn't

1 fanciful.

2
3 He then at para 8 said:

4
5 "The coroner is also entitled to take a 'precautionary 13:08
6 approach'..."

7
8 So he seemed to regard that as something that was
9 supplementary to the real and immediate risk test, it
10 was not something that was sort of the application of 13:08
11 it, as we read that.

12
13 He then, I accept, indicates that applying that, it's
14 relevant to take account of even a low increase in
15 risk. We submit, if we're right, that in fact that 13:09
16 increase in risk needs to be considered primarily at
17 para 7 where you're looking at whether there's a real
18 and immediate risk, for the reasons I already gave.
19 But, in any event, in one sense what one sees here is
20 precautionary approach potentially feeding into the 13:09
21 consideration, as I say, after the consideration of
22 real and immediate risk.

23
24 He then applies that at para 15 and appears to, we
25 would submit, apply the precautionary approach after, 13:10
26 and one sees that in particular from the way in which
27 he approaches anonymity in paragraph (i) within
28 para 15, he appears to approach that as, essentially,
29 being something he considered after the engagement of

1 Article 2 when he's considering whether or not
2 anonymity is a reasonable step.

3
4 So we would submit, at the very least, Doherty is not
5 entirely clear about where, within the Article 2 13:10
6 analysis the precautionary approach applies. In those
7 circumstances, one should follow the approach
8 essentially of Mr. Justice Stephens because it fits, in
9 our submission, conceptually within the sort of key
10 authorities such as Osman that set out the proper 13:11
11 approach to Article 2.

12
13 So overall what we submit in relation to Question 4 is
14 that the precautionary approach only feeds into the
15 second element of the two analyses, it's about the 13:11
16 State being in a position, effectively, if there is a
17 real and immediate risk to guard itself as able to take
18 precautionary approaches, steps, because such steps are
19 reasonable because of the uncertainty essentially about
20 the way in which risk will manifest itself. 13:11

21
22 That, I hope, deals with the questions. Overall, as I
23 say, what my answers probably demonstrate is that I
24 don't, as I understand it, see a huge amount of
25 difference between the parties. There is general 13:12
26 agreement that one needs to consider the individual
27 circumstances. My learned friend helpfully I think,
28 clarified that the PSNI position is, one shouldn't
29 close down the circumstances in which anonymity may be

1 inappropriate, although loss of anonymity is probably
2 the most obvious example. It would be a mistake to say
3 never say never about other circumstances in which
4 anonymity may need to be lost. None of that means one
5 can't make generic findings as a starting point. We 13:12
6 say that there needs to be a little bit of care applied
7 when applying the JTAC ruling, part for the reasons I
8 indicated which are the language doesn't necessarily
9 mirror Article 2, and not only does it not necessarily
10 mirror Article 2 but it's not written necessarily by 13:13
11 lawyers who understand the technical meaning of the
12 Article 2 test. And any generic findings need to take
13 account of the fact that there have been improvements,
14 significant improvements in the security situation in
15 Omagh. And the point I made before, this isn't, unlike 13:13
16 some inquests, a situation where the security forces
17 are, to use for example, the language of Ballymurphy,
18 being accused of being involved in a massacre. That
19 need for individual consideration does mean, in our
20 submission, that we would emphasise something that we 13:13
21 have emphasised all the way through and I repeated
22 earlier this morning, which is that there is a need for
23 candour, there is a need for public authorities who are
24 seeking anonymity to be open about the extent to which
25 an individual's past is known and to be open about any 13:13
26 other circumstances that may mean that in the
27 particular circumstances of the case risk is not what
28 it might generally be said to be.
29

1 I think that covers everything, Sir.

2 CHAIRMAN: Thank you, Mr. Southey.

3 MR. GREANEY: Sir, I indicated at the beginning that
4 Mr. Mansfield may wish to make a short submission at
5 this stage. He wasn't certain he would want to do so, 13:14
6 so may I just check whether he does want to?

7 CHAIRMAN: Thank you.

8
9 SUBMISSION BY MR. MANSFIELD:

10 13:14
11 MR. MANSFIELD: I wonder if I may, just to add a little
12 bit, we have submitted a written submission which
13 you've seen supporting the families and we have left
14 much of the detail to others to, as it were, submit.
15 However, there is one point I would just like to take 13:14
16 up, something Mr. Southey has said linked to what
17 Mr. Henry has said today. And it is the question of
18 accountability. Now, one has to pause and remember
19 that these submissions should not be seen in isolation
20 and I think you're only too aware, perhaps acutely 13:15
21 aware of what's about to come down the track which is
22 in fact another set of not unrelated submissions
23 concerned with closed material. And there are going to
24 be overlapping factors. And the reason I add this note
25 at this point going back to what Mr. Southey said today 13:15
26 about accountability, is that the family I represent
27 are concerned, in the longer run, that we may have a
28 situation in which the families and the public are not
29 made aware, for reasons to do with the Restriction

1 orders, not only of the identity, that's part of the
2 situation, but, more importantly, of the substance of
3 actions that may have been taken by certain
4 individuals. And in the context of this Inquiry, given
5 the gravity of the original offence and also the 13:16
6 repercussions from that, the need for accountability
7 and truth at the same time, that is one of the
8 objectives we say only obvious for the purpose of this
9 Inquiry. And, of course, the section that has been
10 referred to already and will be referred to again when 13:16
11 you get closed material, that you have a discretion and
12 it's where the chairman considers "an order to be
13 conducive to the Inquiry fulfilling its Terms of
14 Reference."

15 13:16
16 I just want to expand on that particular phrase because
17 it's obviously interpreted normally as relating to the
18 need for a Restriction Order in order to fulfil the
19 objectives. We are saying there is another aspect to
20 this and that is satisfying the obligations that you 13:17
21 have and the discretion you have. So, for example, the
22 position adumbrated by Mr. Southey this morning whereby
23 anonymity might be lost, and it might be lost in the
24 context of accountability which is linked to the
25 substance of the narrative and I'm going to put it 13:17
26 shortly, one of the main narratives here is
27 preventability, it is perhaps the core issue, and
28 linked to that and linked to preventability are,
29 undoubtedly, issues concerned with - and we've put it

1 in a later submissions which you'll be reading later -
2 but we're concerned that preventability hinges, in
3 large measure, upon one particular factor, and that is
4 intelligence and what was known and what wasn't known.
5 There's been a lot of publicity about it in any event, 13:18
6 so that issue, that sort of dimension mentioned in the
7 context of anonymity also affects what may come in
8 relation to the closed material.

9
10 So what the Rush family, I represent, are concerned 13:18
11 about here is that we are hoping that you won't be, as
12 it were, compelled to find yourself in a cul-de-sac
13 whereby the people responsible for whatever inactions
14 or actions have been taken that bear upon
15 preventability and, for example, intelligence, are not 13:18
16 made known at any stage but obviously worse, and I'll
17 deal with it when we come to closed material, but the
18 actual substance of what may or may not have gone wrong
19 is not made public. And so we say that there is this
20 other thread of the obligations under the Act of, in 13:19
21 other words enabling you to essentially fulfil those
22 and do things that are, and actions that are conducive
23 to the Terms of Reference which is how that section is
24 worded.

25 13:19
26 So we would say, at this stage, even though I'm
27 preempting the next stage, I would ask that you bear in
28 mind what is just over the horizon because it has a
29 bearing itself on identity and narrative. That's not

1 to say undermine every single application for that
2 reason but there will be some in that narrative that
3 require a public accountability. Otherwise one would
4 look back and wonder what has been the purpose of the
5 whole exercise if those matters are not canvassed and 13:20
6 addressed in the spirit of transparency which you've
7 mentioned yourself. Thank you for allowing me that
8 time.

9 CHAIRPERSON: Thank you, Mr. Mansfield.

10 MR. GREANEY: We are very grateful to Mr. Mansfield for 13:20
11 those submissions and we know that he and everyone
12 listening will bear in mind that you, Sir, have, on a
13 number of occasions, made plain that you will have the
14 importance of the principle of open justice at the
15 forefront of your mind throughout any decision-making 13:20
16 that you have to engage in.

17
18 Sir, the Inquiry legal team is grateful for the
19 submissions that we have received and that therefore,
20 you have received both in writing and orally on the 13:20
21 issue of anonymity. And we hope and believe that they
22 will give you the assistance that you have sought in
23 relation to that issue. For our own part we don't
24 propose to say any more about anonymity today. But
25 instead we will simply indicate that we will meet again 13:21
26 on the 7th of September for the closed material
27 Restriction Order hearing, the CMRO hearing to which
28 Mr. Mansfield has just made reference. And so we
29 believe that concludes the proceedings for today,

1 subject of course to anything further you wish to deal
2 with.

3 CHAIRMAN: Thank you very, much Mr. Greaney.
4

5 THE INQUIRY WAS THEN ADJOURNED UNTIL MONDAY, 7TH
6 SEPTEMBER 2026

13:22

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