

Report of the Bloody Sunday Inquiry – Volume X



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Return to an Address of the Honourable the House of Commons
dated 15 June 2010 for the

Report of the Bloody Sunday Inquiry

The Rt Hon The Lord Saville of Newdigate (Chairman)
The Hon William Hoyt OC
The Hon John Toohey AC

Volume X

Appendix 1: Matters Relating
to the Inquiry

Appendix 2: Opening
Statement, Principal Rulings
of the Tribunal and the
Decisions of Various Courts

Bibliography

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Bibliography

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Appendix 1: Matters Relating to the Inquiry

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A1.1: The conduct of the Inquiry

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The background to the Inquiry

A1.1.1 On 31st January 1972 the then Home Secretary announced that a public inquiry would be held into the events of the preceding day, which has become known as “Bloody Sunday”. Lord Widgery, the Lord Chief Justice of England, conducted the inquiry and his report was published on 19th April 1972.¹ Many people, including those whose relatives had died and those who were wounded on that day, rejected his conclusions. Over the years, some of these people campaigned, with others, for a new public inquiry. New material relating to the events of Bloody Sunday came to light. This material included eyewitness accounts (made available to Lord Widgery but not, during the course of his inquiry, made public) and the results of media investigations, including a newspaper report and a Channel 4 television interview, which featured a new and disturbing account from a former member of 1 PARA about the actions of the Army. That soldier became known to this Inquiry as Private 027, which was the cipher allocated to him by the Widgery Inquiry. New interpretations of ballistics evidence and new medical evidence also became available.

¹ Widgery Report, *Report of the Tribunal appointed to inquire into the events on Sunday, 30 January 1972, which led to loss of life in connection with the procession in Londonderry on that day*, HL101, HC220, London: HMSO, 1972.

A1.1.2 In 1997 Professor Dermot Walsh wrote a report entitled “The Bloody Sunday Tribunal of Inquiry. A Resounding Defeat for Truth, Justice and the Rule of Law”, in which he analysed the statements made by soldiers to the Royal Military Police (RMP) and to the Treasury Solicitor following the events of Bloody Sunday. These statements were not made available to counsel for the next of kin at the Widgery Inquiry but were released for public inspection in the summer of 1996. Professor Walsh concluded that the statements contained substantial and material inconsistencies, discrepancies and alterations.

A1.1.3 In 1997 the Irish Government called for a new public inquiry and, in support of that call, submitted a dossier to the United Kingdom Government. The dossier included an analysis of the new material and a consideration both of Professor Walsh’s report and of the

critique by Professor Samuel Dash of Lord Widgery's findings, published in June 1972 by The Defence and Education Fund of the International League for the Rights of Man, in association with the National Council for Civil Liberties. The Irish Government argued that Lord Widgery's findings could not be supported.

A1.1.4 The United Kingdom Government considered that the weight of material available at this point was such as to require a re-examination of events. Accordingly, the Prime Minister, The Rt Hon Tony Blair MP, announced on 29th January 1998 the setting up of an inquiry under the Tribunals of Inquiry (Evidence) Act 1921. This Act was repealed and replaced by the Inquiries Act 2005, but by virtue of section 44(5) of that Act the repeal did not affect powers conferred or duties imposed on the Tribunal under earlier legislation.

The Tribunal

A1.1.5 There were three members of the Tribunal. It was chaired by The Rt Hon the Lord Saville of Newdigate. The Hon William Hoyt OC (formerly Chief Justice of New Brunswick, Canada) and The Rt Hon Sir Edward Somers (a former member of the Court of Appeal of New Zealand) were appointed as members of the Tribunal in February 1998. Sir Edward Somers resigned in June 2000 for health reasons and later died. He was replaced in September 2000 by The Hon John Toohey AC (a former Justice of the High Court of Australia). The Hon William Esson, then a serving member of the Court of Appeal of British Columbia, Canada, was appointed a reserve member of the Tribunal. He resigned from the Inquiry on health grounds in August 2001.

Counsel to the Inquiry

A1.1.6 The Tribunal approved Lord Saville's appointment of Christopher Clarke QC (now The Hon Mr Justice Christopher Clarke) as Counsel to the Inquiry. Alan Roxburgh and, later, Jacob Grierson were appointed as Junior Counsel. On Jacob Grierson's resignation in June 2000, Cathryn McGahey and Bilal Rawat joined the Inquiry as Junior Counsel.

Solicitors and Secretaries to the Inquiry

A1.1.7 Philip Ridd, then a senior legal adviser to the Inland Revenue, was appointed as the first Solicitor to the Inquiry. He was succeeded by John Tate who appointed Gordon Dickinson as his deputy. Gordon Dickinson subsequently became Solicitor to the Inquiry.

A1.1.8 Ann Stephenson, a senior administrator from the Department of Health, was the first Secretary to the Inquiry. She was succeeded by Adrian Shaw, then by Christine Pulford and, finally, by Elizabeth Johnson.

The interested parties

- A1.1.9** The Tribunal granted interested party status to most of those wounded on Bloody Sunday, to the families of the deceased and to soldiers who were present on the day or had relevant evidence to give about it. Those with interested party status were entitled to be legally represented throughout the Inquiry's hearings.
- A1.1.10** A more limited form of interested party status was granted to former members of the Executive Committee of the Northern Ireland Civil Rights Association (NICRA), who organised the march on 30th January 1972, members of the Royal Ulster Constabulary (RUC), now the Police Service of Northern Ireland (PSNI), certain former republican paramilitaries and to a person wounded on Bloody Sunday, who elected to participate in the Inquiry at a late stage. Those with limited party status were entitled to be represented during those parts of the hearings that were directly relevant to them.
- A1.1.11** Representatives of the Irish Government and of British Irish Rights Watch were invited to be present as observers throughout the hearings. Representatives of the Ministry of Defence (MoD) attended when arguments or evidence relevant to this department of state were heard.
- A1.1.12** The Tribunal decided that those with interested party status and limited party status should be able, through their legal representatives, to question witnesses. The Tribunal members recognised from an early stage that if such questioning were not permitted, the families of those who had died, and the wounded, would have no confidence in the Inquiry; several of them would almost certainly have declined to co-operate with it. Many soldiers faced allegations of serious wrongdoing, including murder; it was clearly right that they should be legally represented throughout the proceedings. The Tribunal members were aware that in some other inquiries it had been the practice for Counsel to the Inquiry to conduct all the questioning, in some instances being provided with questions by interested parties. For the present Inquiry, this was impracticable, given the controversial nature of the events being investigated. It would have been wholly unfair and unworkable for just one barrister to question, say, a soldier accused of firing a fatal shot, attempting to give him an opportunity to tell his side of the story, and then (on behalf of his alleged victim) suggesting that his account was untrue.

A1.1.13 The Tribunal is in no doubt that its decisions to grant interested party status and to permit questioning on behalf of parties were correct. It was essential that all parties had confidence in the Inquiry and that they knew that they were able to explore fully the events of 30th January 1972. The parties made substantial efforts to avoid duplication of questions; although seven separate teams of solicitors and counsel represented the families of the deceased and wounded, and four legal teams represented the soldiers, it was common for only two or three counsel on behalf of the interested parties to question a witness. It was not possible to limit legal representation to one team for the soldiers and another team for the families, because of conflicts of interest and the like between the individuals concerned.

A1.1.14 Further details of the representation of the various parties are contained in part 2 of this appendix.

Representation of witnesses

A1.1.15 Certain witnesses who had particularly controversial evidence to give were also permitted to be represented while they gave evidence and, in some cases, while evidence was given that related to them. Their legal representatives were, with the permission of the Tribunal, able to ask questions, both of their own clients and of those witnesses who gave evidence relating to their clients.

The Attorney General's undertaking

A1.1.16 The Tribunals of Inquiry (Evidence) Act 1921 gave witnesses before a public inquiry the right to refuse to answer questions on the basis that they may incriminate themselves. The Tribunal took the view that its search for the truth would be hampered considerably were witnesses to this Inquiry to exercise that right. In order to deal with this potential difficulty, the Tribunal obtained from the Attorney General on 23rd February 1999 an undertaking that no evidence given by a witness before this Inquiry would be used against that witness in any criminal proceedings. In March 2002 the undertaking was clarified to confirm that it extended to evidence relating not just to the events of 30th January 1972 itself, but to all evidence relevant to the events of that day. The giving of the undertaking meant that the risk of self-incrimination could not arise and, therefore, that no witness would be entitled to rely on the privilege against self-incrimination as a reason for refusing to answer a question.

The Inquiry's hearings

- A1.1.17** The Inquiry opened with a formal hearing on 3rd April 1998. In his opening statement the Chairman emphasised that the purpose of the Inquiry was to establish what had happened on Bloody Sunday; the Inquiry would not be sitting as a court of appeal from the Widgery Inquiry nor would it be an investigation into the way in which that earlier inquiry had been conducted. He invited anyone who had relevant material or evidence to give to contact the Secretary to the Inquiry.
- A1.1.18** The Chairman made it clear that the Inquiry was to be inquisitorial, not adversarial: the Tribunal's task was to find the truth, not to decide any issue in favour of one party or another. It was for the Inquiry, not the interested parties, to take the initiative in seeking relevant material and in identifying those witnesses who should be called.
- A1.1.19** He stressed that the Inquiry was to be as open as possible and that all those who provided information to the Inquiry could expect to see their information made public. The Tribunal adhered to this principle throughout the course of the Inquiry. All relevant material was made available to the parties and public, unless publication might endanger someone's safety or publication was not possible for reasons of public interest, such as a risk to national security.
- A1.1.20** The text of the opening statement can be found on the Inquiry's website at www.bloody-sunday-inquiry.org and in [Appendix 2](#).
- A1.1.21** Further preliminary hearings took place in 1998 and 1999. On 27th March 2000, Counsel to the Inquiry began to deliver an opening speech in which he summarised the principal issues that were expected to arise and gave an outline of the evidence that had, by that stage, been gathered and that related to those issues. The opening speech lasted for 40 sitting days.
- A1.1.22** The interested parties made brief opening statements in November 2000. On 28th November 2000 the first of the Inquiry's witnesses were called. Oral evidence was heard on a total of 367 days.
- A1.1.23** The Inquiry sat for 444 days between 20th July 1998 and 27th January 2005.

Counsel's reports

- A1.1.24** In 1998 and 1999 Counsel to the Inquiry produced three reports, which were distributed to the interested parties. The reports contained analyses of the evidence available at that time to the Inquiry and identified the central issues that, in their view, needed to be considered by the Tribunal.
- A1.1.25** The first report analysed the evidence given to the Widgery Inquiry and attempted to identify common ground and contentious issues.
- A1.1.26** The second report considered the statements made and the oral evidence given in 1972 by each of the 21 members of 1 PARA who said that he had fired live rounds on Bloody Sunday. Each soldier had made at least one statement to the RMP and one to the Treasury Solicitor and had given oral evidence to the Widgery Inquiry. The second report contained an analysis of the discrepancies (if any) in the accounts that each soldier had given in his various statements and oral evidence.
- A1.1.27** The third report compared the accounts given by all of the soldiers whose evidence was available to the Widgery Inquiry. The three reports can be viewed on the Inquiry's website.

Anonymity and screening

- A1.1.28** At an early stage an application was made to the Tribunal on behalf of soldiers and former soldiers that military witnesses other than senior officers should be granted anonymity. The basis of the application was that the safety of these witnesses and their families might be put at risk were the witnesses to be identified publicly. The Tribunal was not persuaded that total anonymity was necessary for all soldiers; initially it granted a limited form of anonymity only to those soldiers who had fired live rounds on 30th January 1972, ruling that they should be identified by their surnames alone. Following a judicial review of that ruling, and of a subsequent ruling in which the Tribunal ruled that no soldier should be granted even this limited form of anonymity, the Court of Appeal in London ordered the Tribunal to grant anonymity to all those soldiers who had fired on the day. The Court of Appeal ruled that, once it was accepted (as the Court accepted) that the soldiers had reasonable grounds for believing that their safety would be at risk were they to be named publicly, they should be named only if there were a compelling justification for identifying them. The Court found that no such justification existed. The Tribunal concluded that the Court of Appeal's reasoning must apply equally to those soldiers who

did not fire, whose need for anonymity was not considered by the Court of Appeal. The Tribunal therefore ordered that all soldiers alleged to have played a part on Bloody Sunday should be granted anonymity. In practice, the Inquiry granted anonymity to any soldier who gave evidence to the Inquiry, unless his name was clearly already in the public domain.

- A1.1.29** Anonymity was also granted to agents and employees of the Security Service and to paramilitary witnesses. All witnesses seeking anonymity, other than military witnesses, had to apply to the Tribunal for a grant of anonymity and justify the need for it.
- A1.1.30** A small number of witnesses applied successfully to be screened from public view while giving their evidence. Such witnesses could be seen by the Tribunal and by lawyers for the Inquiry and for the interested parties. These witnesses could not be seen by members of the public but their evidence could be heard by all those present in the hearing chamber. Some, but not all, of those witnesses were granted anonymity.
- A1.1.31** In 2001, a number of former RUC officers, who were not seeking anonymity, applied to be screened while giving oral evidence. Some of the families challenged by way of judicial review the Tribunal's decision to allow these officers to be screened. The High Court in Northern Ireland, and subsequently the Court of Appeal in Northern Ireland, upheld the Tribunal's decision.

Venue

- A1.1.32** The Tribunal initially decided that the majority of oral hearings should take place in Londonderry, this being the place in which the relevant events of 30th January 1972 had occurred. At an early stage it was contemplated that some evidence might be heard in London, if that were the most convenient place for such evidence to be taken.
- A1.1.33** The oral evidence of civilian and paramilitary witnesses, RUC officers and Northern Ireland-based politicians was heard in Londonderry. In 2001 an application was made on behalf of some of the soldiers for military evidence to be heard in Great Britain. The basis of the application was the submission that the soldiers' lives would be at risk were they to give evidence in Londonderry. In August 2001 the Tribunal rejected that application, taking the view that there was no such risk. Following a judicial review of the Tribunal's decision, the Court of Appeal in London ruled that the soldiers would be at risk in Londonderry and that they should not give their evidence there. The Tribunal decided that the military evidence should instead be heard in London. Subsequently, a number of

politicians and members of the security agencies who were based in Great Britain applied successfully to the Tribunal for a ruling that their evidence should also be heard in London.

- A1.1.34** The venue selected in Londonderry was the Guildhall, the city's principal civic building. The main chamber of the Guildhall was reorganised and considerably refurbished to accommodate the Inquiry.
- A1.1.35** In London, the Tribunal sat at Methodist Central Hall, Westminster. One of the building's main halls was refurbished and a hearing chamber, very similar to that in Londonderry, was created.
- A1.1.36** The Tribunal sat in Londonderry from 20th July 1998 until 19th September 2002 and from 29th October 2003 until 23rd November 2004.
- A1.1.37** The Tribunal sat at Central Hall in London from 25th September 2002 until 21st October 2003. A final witness, known as Witness X, was heard on 27th January 2005. By that time, the Inquiry's hearing chambers in Londonderry and London had been dismantled. The Tribunal sat in Court 36 of the Royal Courts of Justice in London. The witness gave evidence by video link from another location and his evidence was relayed by video and audio link to the Guildhall in Londonderry.

Evidence gathered by the Inquiry

- A1.1.38** In total, the Tribunal heard oral evidence from 922 witnesses and read the written accounts of a further 1,562 people. The Inquiry received 110 videotapes and 121 audio tapes. It received thousands of documents, the most important of which were placed in a core bundle and considered in evidence by the Tribunal. The material within the core bundle was divided into 33 categories and filled about 160 lever-arch files. Copies of the core bundle were supplied to the interested parties. The remaining material obtained by the Inquiry was determined to be of insufficient relevance for it to be considered by the Tribunal as part of the evidence placed before it. However, the vast majority of this material was distributed to the interested parties who were free to argue that any document within it was relevant and should be taken into account by the Tribunal. As a result, some additional material was added to the core bundle. A small quantity of material was the subject of successful applications by state agencies for non-disclosure to the parties or public on grounds of public interest immunity. Some of these documents

were made public in redacted form and added to the core bundle. Others could not be disclosed at all.

A1.1.39 The material obtained included written statements given by civilians shortly after Bloody Sunday to interviewers acting on behalf of NICRA. It also included tape recordings of interviews from that time. On the evening of Bloody Sunday, members of the Derry City branch of NICRA arranged for a visiting American film researcher, Kathleen Keville, to take statements from civilians who had witnessed the events of that afternoon. Ms Keville had an audio tape recorder with her; on the night of 30th January 1972 and over the following few days, she and others used the machine to record about 150 interviews. Solicitors representing NICRA before this Inquiry succeeded in tracing Ms Keville, who had returned to America. She had retained the original tape recordings and made them available to the Inquiry. Witnesses were therefore able to hear the accounts that they had given in 1972. Transcripts of these accounts were made available to the parties and some of the tapes were played during the course of the Inquiry's hearings.

Witnesses

- A1.1.40** The tracing and interviewing of witnesses was a lengthy and difficult process. The Inquiry had to seek to identify those, both members of the security forces and civilians, who had been present on Bloody Sunday and who it appeared might have useful evidence to give about the events of that day.
- A1.1.41** The Inquiry was assisted by the availability of records from the Widgery Inquiry (from which it could identify witnesses who had given evidence to that inquiry) and by the statements taken from civilians by NICRA shortly after Bloody Sunday. In Londonderry, appeals were made through the local media for witnesses to come forward. Solicitors representing the wounded and the families of those who had died on the day helped significantly, both in identifying potential witnesses and in encouraging them to co-operate with the Inquiry.
- A1.1.42** The PSNI (formerly the RUC) assisted the Inquiry in its efforts to trace police officers who had been in Londonderry on the day.
- A1.1.43** The MoD provided as much information as it could about soldiers who were, or were believed to have been, present in Londonderry on Bloody Sunday. In many cases, the soldiers concerned had left the Army and the MoD had lost contact with them. The Inquiry engaged tracing agents who were largely successful in locating witnesses, both civilian

and military, for whom the Inquiry had initially had no up-to-date contact details. Police forces within England and Wales also assisted in the tracing process.

- A1.1.44** The Inquiry sought evidence from others, particularly politicians, civil servants and agents or employees of the security services, who were not present on Bloody Sunday but might be expected to have valuable evidence to give in respect of it. These individuals were usually readily identifiable from the records maintained by the relevant government departments.
- A1.1.45** The Inquiry also needed evidence from those who were republican paramilitaries in 1972. The security services made available records that enabled the Inquiry to identify individuals believed to have been members of the Official IRA, Provisional IRA or Na Fianna Éireann in January 1972. Other republican paramilitaries came forward voluntarily. The Inquiry identified a total of 82 paramilitary witnesses, of whom 52 co-operated to the extent to which they were asked to do so. Fourteen could not be located and nine were unable to assist for medical or compelling personal reasons. Seven refused to co-operate. Of these, two lived outside the jurisdiction. Four were considered to have potential evidence of insufficient importance to justify the issue of witness summonses. The remaining potential witness, Martin Doherty (PIRA 9), was served with a witness summons and refused to comply with it. He was subsequently sentenced by the Belfast High Court to three months' imprisonment for contempt of the Tribunal.
- A1.1.46** The Inquiry traced, or attempted to trace, approximately 6,500 potential witnesses. Some, on being contacted, turned out to have no relevant evidence to give. It proved impossible to locate others. Many were confirmed as dead or too unwell to give evidence. However, statements were taken from nearly 2,000 people.
- A1.1.47** The evidence of those who could not be interviewed was not entirely lost in all cases since a proportion of them had made statements in the past to NICRA or to journalists and some had given evidence to the Widgery Inquiry. Records of the accounts of these witnesses remained available to the Tribunal and were taken into account by the Tribunal.

Statement-taking

- A1.1.48** The Inquiry, after inviting and considering tenders for the task, engaged Eversheds LLP, a firm of solicitors with offices throughout England and Wales, to take witness statements. Representatives from Eversheds worked in Londonderry and travelled throughout the

United Kingdom, taking the vast majority of the statements required by the Inquiry. Eversheds made in our view successful use of the cognitive interviewing technique, in which witnesses' recall was enhanced by encouraging them to recount several times their experiences of the day. In almost all cases, the witnesses remembered significantly more details as they went over the events for a second or third time.

- A1.1.49** As Solicitor and Deputy Solicitor to the Inquiry, John Tate and Gordon Dickinson, both senior civil servants, took responsibility for interviewing witnesses who lived abroad. They travelled to various countries including Australia, Canada, Germany, Hong Kong and Zimbabwe. Solicitors from Eversheds were sent to Kosovo to interview an Army officer serving there.
- A1.1.50** Although the majority of statements were obtained in the early years of the Inquiry, statement-taking continued, as more witnesses came forward or were identified, until 2004.

Oral and written evidence

- A1.1.51** Counsel to the Inquiry made the initial recommendations as to which witnesses should be called to give oral evidence. The Tribunal then reviewed those recommendations and made decisions as to those witnesses who should be called and those whose evidence should be read. A witness was called to give oral evidence if the evidence was or was likely to be controversial or if the Tribunal thought that through giving oral evidence the witness might be able to provide further assistance, beyond the information set out in the witness statement. The Tribunal read the written statements of those who were not called to give oral evidence and took those statements into account when it came to make its findings.
- A1.1.52** The parties were given lists of those whose evidence was to be read and were invited to identify from those lists any witnesses whom they wished to be called to give oral evidence. Where the Tribunal was persuaded that witnesses might be able to provide further assistance, the Tribunal acceded to the parties' requests for them to be called.

Expert evidence

- A1.1.53** The Tribunal determined at an early stage that it would commission its own reports from experts and would not generally accept reports obtained by interested parties. The Inquiry obtained expert evidence from two historians on the historical context of Bloody Sunday.

It also obtained expert assistance to enhance photographs and tape recordings. Attempts were made to determine whether a listener could identify and distinguish the sounds made by various types of weapons and nail bombs. The parties were invited to attend a demonstration at which weapons in use in 1972 were fired.

A1.1.54 A ballistics expert, a pathologist and an expert in firearms and explosives residue were engaged to analyse the pathology reports and scientific evidence collated in 1972 and to provide their own conclusions, as far as they were able to do so, upon this material. A report was also obtained from an expert in the construction of nail bombs. An expert from HM Nautical Almanac Office analysed a series of photographs taken on Bloody Sunday and, through examination of the shadows on the photographs, was able to provide a report on the sequence in which the photographs were taken.

A1.1.55 The Inquiry appointed a Peer Review Panel, consisting of three experts with a background in forensic science, to review the work of some of the Inquiry's experts. The report of the Peer Review Panel dated 24th May 2000 may be viewed on the Inquiry's website, www.bloody-sunday-inquiry.org.

Private 027

A1.1.56 The Tribunal also had to consider the taking of evidence from Private 027, the former member of 1 PARA whose "revelations" formed part of the case for a new Inquiry. It was apparent to the Tribunal from the outset that if Private 027 were either to give evidence voluntarily or be compelled to do so, his was likely to be evidence of the utmost importance. If he were to confirm the account attributed to him in the documents submitted to the Irish Government, his evidence would implicate a number of individuals in grave wrongdoing. If on the other hand he were to withdraw the earlier account or deny its authenticity, the allegations based upon that account might be exposed as false.

A1.1.57 Solicitors acting for Private 027 contacted the Inquiry in April 1998. They informed the Inquiry that their client was willing in principle to make a witness statement and give oral evidence, but was concerned about his personal security, and would not co-operate until arrangements acceptable to him had been made for his protection against any reprisals that might be attempted. The Inquiry, through his solicitors, invited Private 027 to make a formal application to the Tribunal for whatever special measures he considered necessary. However, he declined to do so, adopting the position that it was for the Inquiry to make suitable proposals to him and not vice versa.

- A1.1.58** Where a witness with relevant evidence to give refuses to co-operate save on his own terms, the Tribunal would normally be able to issue and serve a witness summons. However, the Inquiry did not know Private 027's whereabouts and he was not prepared to reveal them. His solicitors informed the Inquiry that they themselves did not know the address at which he was residing.
- A1.1.59** The Inquiry therefore made extensive efforts over a period of many months during 1999 to locate Private 027. The services of an experienced tracing agent were employed. Summonses were served on a number of utility companies and other organisations for the production of records that might have shown where he was to be found. After exhaustive searches it proved impossible to discover his current address. It appeared to the Inquiry that he had moved several times and that he had probably taken effective steps to put himself beyond reach of a summons.
- A1.1.60** In these exceptional circumstances, the Tribunal was obliged to consider whether an agreement should be reached with Private 027's solicitors to secure his voluntary co-operation or whether the Inquiry should proceed without his evidence. The Tribunal accepted that the fear of reprisals expressed by this witness was genuine and reasonable. After the most careful consideration, the Tribunal concluded that the proper fulfilment of its terms of reference required that every reasonable effort should be made to obtain his evidence, including, if necessary, arranging for the provision of appropriate measures for his personal protection. The Tribunal accordingly invited the Northern Ireland Office to consider whether it would be appropriate for public funds to be expended on the provision of measures to secure Private 027's personal safety. This culminated in an agreement made between the Northern Ireland Office and Private 027 on 6th July 2000 in which certain measures were put in place.¹
- ¹ [B1565.100-105](#). Parts of the agreement have been redacted for security reasons.
- A1.1.61** In order to save time Private 027 attended an interview with Eversheds, and a draft statement was prepared for his signature, before the agreement was concluded. It was therefore possible for him to sign the witness statement immediately after the agreement was finalised. The members of the Tribunal did not see the draft statement while the consultations were continuing.

A1.1.62 The Tribunal required that it should be a provision of the agreement that it would be free to make public all terms agreed with Private 027, save in so far as this would compromise his personal security. A memorandum setting out the position was sent to all interested parties by the Solicitor to the Inquiry in August 2000.¹

¹ [B1565.96-99](#)

Operation Apollo

A1.1.63 Immediately after Bloody Sunday, 29 of the rifles that had been used by members of 1 PARA on that day were submitted to the Department of Industrial and Forensic Science (DIFS) in Northern Ireland for ballistics testing. Twenty-eight of these were 7.62mm self-loading rifles (SLRs) and the 29th was probably a converted .303in sniper rifle. In September 1999 the Inquiry asked the MoD for any information that it could provide about whether the rifles still existed. The MoD succeeded in identifying five SLRs that were believed to have been among the 28 and that were still in its possession but which were subject to a destruction programme. Although an order forbidding the destruction of these rifles was issued by the MoD, two of the rifles were destroyed before they could be examined by the Inquiry.

A1.1.64 An investigation into the destruction of the rifles was undertaken jointly by the MoD Police and West Mercia Constabulary and was code-named Operation Apollo. The investigators concluded that the destruction had occurred as a result of negligence. No criminal proceedings were instituted as a result of this incident.

A1.1.65 The Operation Apollo team, as well as investigating the loss of two rifles, made enquiries to try to locate others. A total of 14 rifles were located, of which 13 were SLRs and one was a converted .303in sniper rifle.

A1.1.66 However, it transpired that a record was made in 1972 of only the last part of the serial number of each of the 28 SLRs submitted for examination. It was therefore impossible to say, even in respect of the 13 SLRs recovered, that these were definitely the ones in use on Bloody Sunday. The Operation Apollo team demonstrated that it was likely that the same final digits were allocated twice, once to each of the two companies that manufactured SLRs. The first part of the serial number, unavailable to the Inquiry in the case of the 28 SLRs, identified the manufacturer. The Operation Apollo team concluded that the .303in sniper rifle sent to DIFS in 1972 had a unique number. This rifle was located in Germany but no useful scientific evidence was obtained from it.

A1.1.67 In the event, the Inquiry's inability to trace and examine the 29 rifles turned out to cause no disadvantage to the Inquiry. The Inquiry's ballistics expert, Kevin O'Callaghan, concluded that the lack of ballistics evidence from 1972 (including the absence of most of the bullets known to have been fired), coupled with the likelihood that the rifles had been used, refurbished or re-barrelled over the years, would have made useful ballistics evidence impossible to obtain.

Claims by journalists for the protection of their sources

A1.1.68 Many journalists had, over the years, conducted investigations into the events of Bloody Sunday and had interviewed individuals who could provide information about that day. In some instances, an individual had spoken to a journalist on condition that the journalist would not reveal that person's name. When asked by the Inquiry to reveal the names of their sources, a number of journalists refused to do so, relying on the statutory protection afforded journalists under the Contempt of Court Act 1981.

A1.1.69 This statutory protection is subject to the proviso that the court may order disclosure if it is satisfied that it is necessary in the interests of justice. The Tribunal is given the power of the court to make such an order under the Tribunals of Inquiry (Evidence) Act 1921, and during the course of the Inquiry made a number of such orders, giving reasons for doing so.

A1.1.70 In each case of a refusal to identify sources the Tribunal asked the journalist to contact his source and to seek permission to reveal the source's name. The Inquiry also made efforts, where possible, to identify the source by other means. In many instances, the names of the sources were discovered without the journalists to whom the sources had spoken having to reveal the names.

A1.1.71 A journalist from the *Daily Telegraph*, Toby Harnden, wrote an article based on information provided to him by a soldier whose name Toby Harnden had promised to keep confidential. The Tribunal regarded the information as important and was initially unable to identify the soldier by any other means. On Toby Harnden's refusal to reveal the name of his source, the Tribunal, exercising its power under the Tribunals of Inquiry (Evidence) Act 1921, referred him to the High Court in Belfast for contempt. Later, the soldier (who was an existing Inquiry witness and who through his solicitor had previously

denied being the source) admitted having spoken to Toby Harnden. The proceedings against Toby Harnden were discontinued.

A1.1.72 The Tribunal ordered another two journalists to disclose the names of four soldiers who had spoken to the journalists and whom the Tribunal could not by other means identify. The journalists refused to do so. Their employer at the relevant time, Independent Television News (ITN), also refused to obey an order to produce to the Tribunal documents in ITN's possession that would identify these soldiers. The Inquiry subsequently succeeded in identifying two of the soldiers. The Tribunal did not pursue contempt proceedings against the journalists or ITN, taking the view that no useful purpose would be served by such action.

The Witness Liaison Team

A1.1.73 The Inquiry was conscious that many witnesses, for a variety of reasons, were likely to be nervous or anxious about giving oral evidence. Arrangements were made to make the experience of attendance before the Tribunal as comfortable as possible. Both the Guildhall in Londonderry and the Central Hall in London were equipped with witness waiting rooms, which were not accessible to the public. A member of the Inquiry's staff was responsible for meeting and looking after each witness. Each of the witness waiting rooms contained a replica of the computer screen used by witnesses while giving evidence. Each witness was shown how documents were displayed on the computer screen and was also shown how to mark documents on the screen while giving evidence, if this was needed.

A1.1.74 Members of the Inquiry's Witness Liaison Team were responsible, with Junior Counsel to the Inquiry, for timetabling the attendance of witnesses. Some witnesses gave evidence for several days; others for an hour or less. The Witness Liaison Team made travel arrangements, organised the payment of expenses and attempted to ensure that each witness suffered as little inconvenience as possible.

Accommodation for journalists

A1.1.75 A press centre was made available to journalists attending the Guildhall in Londonderry and the Central Hall in London. Each press centre was equipped with a closed-circuit television (CCTV) link, which enabled journalists to view and hear the proceedings in the chamber. The Inquiry's press officers were on hand to assist with queries; as each

witness began his or her oral evidence, the press officers distributed to journalists copies of any written statements made by that witness. Transcripts of the day's proceedings were made available to journalists at the end of each day.

Additional viewing rooms

- A1.1.76** The chamber within the Guildhall in Londonderry had two public galleries. A total of about 150 people could be accommodated within the galleries. Parts of the galleries were set aside for the use of “the families”, that is the wounded and relatives of those who had died on Bloody Sunday. The Inquiry could not predict with any certainty the numbers of members of the public who would wish to attend the Inquiry's hearings. It was inevitable that attendance would increase when high-profile witnesses gave evidence. The Inquiry was also conscious that family members might well wish not to attend the hearing chamber if distressing evidence was to be given, but might still wish to follow the proceedings from a more private room.
- A1.1.77** In order to accommodate additional members of the public in Londonderry, the Inquiry rented the Rialto cinema, a short distance from the Guildhall. A CCTV link allowed anyone in the Rialto to view and hear the proceedings then going on in the chamber. The Rialto was, in the event, little used, and eventually the Inquiry ceased to rent it.
- A1.1.78** A CCTV link was also established to the families' room within the Guildhall. This was a room below the hearing chamber to which only the families and their guests had access. The proceedings could also be viewed and heard through a CCTV link to the offices of the Bloody Sunday Trust, a group that had campaigned over the years for an inquiry, with which many family members were associated and whose premises were very near to the Guildhall.
- A1.1.79** In London, a public gallery that could accommodate 98 people was constructed at the back of the hearing chamber. A separate gallery was provided for the families. No additional public viewing space was provided or needed.

Closing submissions

- A1.1.80** At the conclusion of the evidence, the interested parties and those with limited party status were invited to make written submissions as to the findings that the Tribunal should make. The written submissions of each party were made available to all other parties. Each party was then invited to submit a written reply to the submissions made by the others.
- A1.1.81** After the exchange of submissions and replies, the Tribunal held brief oral hearings in which each party was entitled to make a short statement. The Tribunal took the opportunity to put questions to some of the interested parties.
- A1.1.82** Counsel to the Inquiry then made lengthy written submissions, analysing the interested parties' submissions and identifying the issues that Counsel believed that the Tribunal should consider. Finally, in the course of a two-day hearing, Counsel to the Inquiry made oral closing submissions.
- A1.1.83** The written submissions of the parties and Counsel to the Inquiry totalled 14,139 pages. They were presented in electronic as well as paper form. The electronic versions contained hypertext linking, so that the reader had only to click on the reference to a document or transcript in order to view that piece of evidence instantly on the screen.

Technology

- A1.1.84** The Inquiry made substantial use of information technology.
- A1.1.85** The material obtained by the Inquiry was supplied in electronic form to the interested parties. During the course of the hearings, witnesses were not usually asked to consult paper documents; each relevant document was instead displayed on a monitor in the witness box. Monitors in front of all Tribunal members and lawyers showed the same material. The system used was called TrialPro II.
- A1.1.86** The photograph below shows the hearing chamber in the Guildhall in Londonderry. Two large screens, suspended from the ceiling, can be seen at the top of the photograph. These screens faced the public galleries. One screen was used to display documents, giving members of the public the same view as that of the Tribunal members and lawyers. The second screen showed a video image of the person speaking in the chamber.

The cameras in the chamber switched automatically to film the current speaker, whether Tribunal member, lawyer or witness.



- A1.1.87** Similar screens, one showing the person speaking and another showing whatever document was being considered, were located in the Inquiry's offices in Londonderry, the press room, the families' room, the Bloody Sunday Trust building and (until March 2002) the Rialto cinema. When the Inquiry moved to London, the proceedings were relayed to all the screens in Londonderry.
- A1.1.88** Laptop computers were available to the Tribunal members and lawyers. The proceedings were recorded using the LiveNote system, in which a stenographer took down the words spoken and a transcript showing those words appeared on the laptop screens within seconds. It was possible for the Tribunal members and lawyers to annotate the transcript on the screen during the course of the proceedings.
- A1.1.89** A printed version of each day's proceedings was made available within two hours of the end of each sitting day. An electronic version was posted daily on the Inquiry's website. The Inquiry's proceedings were also recorded on audio tape. Those preparing the daily transcripts were able to refer to the day's tapes, ensuring that accurate transcripts were produced even of passages that the stenographer had found difficulty in recording.
- A1.1.90** One of the practical difficulties faced by the Inquiry was the fact that the area of Londonderry in which the shooting took place looked very different in 1998 from the way that it had looked in 1972. In particular, the Rossville Flats, the three blocks of which had dominated the area in 1972, had been demolished. In order to deal with this problem, the

Inquiry arranged for the creation of a virtual reality model of the relevant part of the city. This electronic model contained a photographic panorama of the Bogside as it was in the late 1990s. However, the user could switch to another version in which artists' impressions of the buildings that had been present in 1972 had been superimposed on the modern panorama. The virtual reality model was used to assist many witnesses. They could use it to identify particular locations and could also, using a stylus on the screen, mark "still" versions of the panorama with arrows or lines in order to pinpoint a particular place. The marked versions could then be preserved for future reference. When in use, the virtual reality images were displayed on the public screens.

- A1.1.91** The Tribunal considered that the use of information technology was of significant value to the Inquiry. It was undoubtedly far quicker for a witness, and all those present in the chamber, to be shown a document on a screen than for everyone present to be asked to reach for a paper bundle and find the relevant page. Research was made easier for lawyers, since the electronic transcripts could be searched for key words and phrases far more swiftly and accurately than paper transcripts.
- A1.1.92** The use of information technology enabled the public to have far greater access to the Inquiry's work than would otherwise have been possible. Members of the public were able to see on the public screens the documents that were being shown to witnesses; they would not have been able to do so had paper copies been used. The use of CCTV relays also meant that people could follow the proceedings without having to be present in the hearing chamber. For those without access to any of the places to which the proceedings were broadcast, the website provided, each evening, an update of the day's proceedings.
- A1.1.93** The members of the Tribunal made extensive use of information technology when preparing this report. Each used a desktop computer with two monitors, enabling him to view two documents at the same time with ease. In addition, each was provided with a laptop computer on which LiveNote and TrialPro II were stored. Since all relevant documents were available electronically, the members of the Tribunal were able to work outside the Inquiry's London office, a useful feature when two members of the Tribunal came from other jurisdictions.
- A1.1.94** Some of the information technology systems used by this Inquiry were subsequently used in the Shipman Inquiry, the inquest into the Omagh bombings, the ongoing inquiries in Northern Ireland and the Bank of Credit and Commerce International litigation.

Cost and length of the Inquiry

The cost of legal representation

- A1.1.95** Legal representation added very substantially indeed to the cost of the Inquiry and was the major item of expense. The Tribunal, however, was and remains of the view that for this Inquiry, the legal representation provided for the interested parties and others was essential. In a public inquiry into the death and injury of people at the hands of state agencies, justice in a democratic society demands, in our view, that the families of those killed, and those injured, together with the agents of the State or others said to be directly or indirectly responsible, should be entitled to legal representation, so as to ensure that their rights and interests are fully protected.
- A1.1.96** The Tribunal made every effort to ensure that money was not needlessly expended. The levels of remuneration for the lawyers involved were kept in line with those normally allowed for matters of the present kind.

Other factors relating to the cost and length of the Inquiry

- A1.1.97** Despite the use of information technology, the Inquiry has been lengthy and costly. Many factors have contributed to this. The fact that the scope of the Inquiry could not in our view be limited to the few minutes during which people were killed and wounded on Bloody Sunday and our need to hear almost 1,000 witnesses and read the statements of another 1,500 were two of the factors, to which was added the vast amount of documentary and other material relevant to Bloody Sunday. Other factors included the separate representation of various interest groups where we were persuaded that this was required in the interests of justice; and the requirement to redact countless documents to ensure anonymity. In addition, the Tribunal had to deal with many public interest immunity applications and applications that the Tribunal should not order the disclosure of journalists' sources of information. There were various judicial reviews and some subsequent appeals. The length and cost of the Inquiry was further increased by moving the sittings from Londonderry to London and back to Londonderry, in consequence of an order by the Court of Appeal.

Archiving

A1.1.98 The object of archiving has been to ensure the preservation of the vital and valuable records of the Inquiry. Principal among these are the documentary evidence, witness statements, transcripts of the Inquiry hearings and Tribunal rulings. Records of enduring value will in due course be transferred to The National Archives to ensure long-term preservation and public access.

Acknowledgements

A1.1.99 The Tribunal is grateful for the assistance that it received from many quarters. We should record that members of the PSNI (formerly the RUC), the Security Service, the MoD and other state agencies did considerable work in searching their archives to identify and make available to the Inquiry material relating to the events of Bloody Sunday. We recognise that very considerable effort was required to locate this material, without which the Tribunal would not have been able to complete its task.

A1.1.100 The Tribunal could not have undertaken and completed its work without the commitment and assistance of our Counsel and our professional and administrative staff. We mention our Counsel again – Christopher Clarke QC (now The Hon Mr Justice Christopher Clarke), Alan Roxburgh, Cathryn McGahey and Bilal Rawat – and our historical and research consultant Matthew Hill. It is impossible properly to describe their dedication to the Inquiry, their grasp of the material and their continuing contributions. Throughout they acted scrupulously in not seeking to influence the Tribunal in reaching its decisions, while providing us with invaluable assistance in collating and summarising the evidence and materials for our consideration. We would also mention Jacob Grierson, who was one of our Counsel during the early part of the Inquiry. Similarly, the Inquiry was exceptionally well served by the solicitors Eversheds, led by Peter Jones. Eversheds performed their enormous task in both a professional and sensitive manner.

A1.1.101 It is, of course, invidious to select for special thanks a few individuals from among the many people engaged by the Inquiry over time. Nevertheless, the Tribunal members would like to record their gratitude to Heather Woodside, the Inquiry's LiveNote stenographer who, with assistance from Emma Watmore and Adrienne Martin, recorded every word of the proceedings on almost every one of our hundreds of sitting days. We would also like to acknowledge the work of the members of our Witness Liaison Team, Tony Frankson, Drew Hammond, Ian MacMillan and Rob Ells, who arranged the

attendance of over 900 witnesses and did their utmost to make the giving of evidence as convenient and comfortable an experience as it could be. We also wish to mention and thank our research assistant, Louisa Aderonmu, for her help over many years.

- A1.1.102** The technical staff who organised and operated the computer and sound systems ensured that we were able to make the very best use of the available technology. The companies involved included Fujitsu, Deloitte, Legal Technology, Graphic Data and Michael KIELTY Audio. One of the Inquiry's own staff, Mark Burdon, created and maintained a database that recorded the Inquiry's correspondence and its dealings with all its witnesses and without which the Inquiry would have struggled to cope. Many of those witnesses would not have been found without the substantial efforts made by our tracing agents, The Risk Advisory Group plc ("TRAG"), to locate them.
- A1.1.103** The Tribunal would like to express its thanks to Derek Kinnen of the Northern Ireland Centre for Learning Resources (now of Opsi Limited), who developed the virtual reality model for us, which proved to be of great assistance.
- A1.1.104** A number of members of our staff saw the Inquiry through to its completion, namely, Katrina Barr, Christopher Jack (until almost the end), Elizabeth Johnson, Marsha McDermott, Lorraine Murray, Bronwyn Tyson, Salmina De Vry, and finally, but far from least, Valerie Bath, the Chairman's personal secretary throughout the Inquiry, who took on the additional burden of acting as the secretary for the other members of the Tribunal. We would like to thank them all for their hard work and commitment to the Inquiry.
- A1.1.105** The proofreading and production of the report were done by COI, whose work was consistently of the highest standards.
- A1.1.106** We are grateful to all those who helped the smooth running of the Inquiry, both in Londonderry and in London, and to the people of Londonderry who welcomed the Inquiry to their city and lived with its presence in their midst for nearly six years.

A1.2: Representation before the Inquiry

Families

Family of Patrick Doherty

Counsel: Eilis McDermott QC

Philip Magee (until 14th September 2000)

Michael Topolski (until 28th June 2001)

Mary McHugh (from 9th February 2002)

Solicitors: Barr & Co

Family of Bernard McGuigan

Counsel: Michael Mansfield QC

John Coyle

Solicitors: Brendan Kearney & Co

Family of Jim Wray

Counsel: Lord Gifford QC

Barry MacDonald (until 26th September 2000)

Richard Harvey (from 5th October 2000)

Solicitors: McCartney & Casey

Family of William and Alexander Nash; Daniel Gillespie

Counsel: Lord Gifford QC
Barry MacDonald (until 26th September 2000)
Richard Harvey (from 5th October 2000)

Solicitors: McCartney & Casey

Families of Gerald Donaghey, Gerard McKinney and William McKinney; Joe Friel and Joe Mahon

Counsel: James Gallagher QC (until 2000)
Reginald Weir QC (until September 2000)
Seamus Treacy QC SC (from September 2000)
Fiona Doherty (from September 2000)

Solicitors: Madden & Finucane

Families of Michael McDaid and John Young; Patrick O'Donnell

Counsel: Arthur Harvey QC
Karen Quinlivan

Solicitors: Madden & Finucane

Families of Jackie Duddy and Michael Kelly; Patrick Campbell and Patrick McDaid

Counsel: Kevin Finnegan QC (until May 2001)
Barry MacDonald QC SC (from 2nd August 2001)
Patricia Smyth (until 20th June 2002)
Tom McCreanor (from 26th June 2002)

Solicitors: Madden & Finucane

Families of Hugh Gilmour and Kevin McElhinney; Margaret Deery and Alana Burke

Counsel: Terence McDonald QC (until October 2000)

Michael Lavery QC (from October 2000)

Brian McCartney

Solicitors: Madden & Finucane

Michael Bradley and Michael Bridge

Counsel: Declan Morgan QC

Brian Kennedy QC

Solicitors: Brendan Kearney & Co

John Johnston, Damien Donaghey and Daniel McGowan

Counsel: Eilis McDermott QC (until 2000)

Arthur Harvey QC

Philip Magee (until 14th September 2000)

Ciaran Harvey

Solicitors: Madden & Finucane

Michael Quinn (limited to Sector 4 only)

Counsel: Eoin McGonigal SC

Solicitors: McCann & McCann

Martin McGuinness (limited party status)

Advocates: Richard Ferguson QC

Dermot Gleeson SC

Peter Cush

Barra McGrory

Solicitors: PJ McGrory & Co

OIRA 1, 2, 4 and 5, Johnny White and Reg Tester (limited party status)

Counsel: Kevin O'Donovan

Gareth Purvis

Solicitors: Jones & Co

Members of the Executive Committee of the Northern Ireland Civil Rights Association (limited party status)

Counsel: Sir Louis Blom-Cooper QC

Paddy O'Hanlon

Solicitors: Francis Keenan

Treasury Solicitor Team 1 (Anthony Lawton)

Counsel: Edwin Glasgow QC

Edmund Lawson QC

David Lloyd Jones QC

Peter Clarke QC

David Bradley

Michael Bools

Nicholas Griffin

Thomas Quinton

Soldiers given ciphers by the Widgery Inquiry				
A	Z	028	123	159
AB	001	030/232	124	162
AC	003	032	126	164
AD	004	033	127	200/240
B	006	034	128	201
C	007	035	130	203
D	008	038	131	204
F	009	039	132	205
J	010	041	133	206
K	013	042	136	207
M	014	106	137	208
N	016	107	139	210
O	017	109	140	211
P	018	110	142	213
Q	019	112	145	217
R	020	113	146	221
S	021	115	147	221A
T	022	117	148	223
U	023	120	152	
V	025	121	154	
Y	026	122	156	

Soldiers given ciphers by this Inquiry				
INQ 2	INQ 370	INQ 765	INQ 1152	INQ 1834
INQ 5	INQ 371	INQ 767	INQ 1155	INQ 1853
INQ 7	INQ 372	INQ 768	INQ 1157	INQ 1869
INQ 10	INQ 375	INQ 772	INQ 1163	INQ 1872
INQ 12	INQ 382	INQ 773	INQ 1164	INQ 1873
INQ 13	INQ 391	INQ 778	INQ 1171	INQ 1874
INQ 14	INQ 398	INQ 782	INQ 1173	INQ 1877

Soldiers given ciphers by this Inquiry (continued)

INQ 15	INQ 402	INQ 785	INQ 1174	INQ 1883
INQ 17	INQ 404	INQ 796	INQ 1194	INQ 1888
INQ 19	INQ 405	INQ 802	INQ 1195	INQ 1891
INQ 20	INQ 406	INQ 806	INQ 1197	INQ 1900
INQ 22	INQ 418	INQ 807	INQ 1208	INQ 1901
INQ 24	INQ 420	INQ 812	INQ 1210	INQ 1903
INQ 25	INQ 422	INQ 815	INQ 1217	INQ 1905
INQ 54	INQ 423	INQ 819	INQ 1231	INQ 1908
INQ 58	INQ 428	INQ 832	INQ 1236	INQ 1917
INQ 61	INQ 429	INQ 834	INQ 1237	INQ 1918
INQ 63	INQ 437	INQ 836	INQ 1241	INQ 1919
INQ 66	INQ 441	INQ 840	INQ 1252	INQ 1923
INQ 67	INQ 444	INQ 841	INQ 1257	INQ 1924
INQ 78	INQ 452	INQ 849	INQ 1260	INQ 1935
INQ 81	INQ 455	INQ 852	INQ 1266	INQ 1939
INQ 95	INQ 457	INQ 876	INQ 1275	INQ 1940
INQ 113	INQ 468	INQ 881	INQ 1280	INQ 1951
INQ 118	INQ 473	INQ 883	INQ 1288	INQ 1954
INQ 119	INQ 486	INQ 887	INQ 1298	INQ 1955
INQ 122	INQ 487	INQ 889	INQ 1305	INQ 1957
INQ 123	INQ 494	INQ 891	INQ 1310	INQ 1958
INQ 127	INQ 512	INQ 896	INQ 1318	INQ 1982
INQ 131	INQ 521	INQ 897	INQ 1324	INQ 1984
INQ 133	INQ 522	INQ 904	INQ 1326	INQ 1986
INQ 139	INQ 528	INQ 907	INQ 1333	INQ 1990
INQ 145	INQ 532	INQ 912	INQ 1334	INQ 1997
INQ 146	INQ 535	INQ 914	INQ 1335	INQ 2000
INQ 151	INQ 538	INQ 915	INQ 1336	INQ 2001
INQ 152	INQ 551	INQ 917	INQ 1342	INQ 2002
INQ 153	INQ 554	INQ 921	INQ 1343	INQ 2032
INQ 155	INQ 555	INQ 933	INQ 1348	INQ 2033

Soldiers given ciphers by this Inquiry (continued)				
INQ 166	INQ 558	INQ 945	INQ 1350	INQ 2037
INQ 171	INQ 559	INQ 947	INQ 1413	INQ 2038
INQ 172	INQ 581	INQ 951	INQ 1521	INQ 2041
INQ 177	INQ 583	INQ 956	INQ 1527	INQ 2043
INQ 178	INQ 588	INQ 957	INQ 1538	INQ 2044
INQ 189	INQ 589	INQ 960	INQ 1540	INQ 2045
INQ 206	INQ 594	INQ 966	INQ 1544	INQ 2047
INQ 214	INQ 598	INQ 967	INQ 1548	INQ 2050
INQ 228	INQ 603	INQ 975	INQ 1560	INQ 2054
INQ 229	INQ 604	INQ 979	INQ 1570	INQ 2056
INQ 235	INQ 614	INQ 1010	INQ 1579	INQ 2057
INQ 245	INQ 627	INQ 1016	INQ 1581	INQ 2065
INQ 248	INQ 633	INQ 1027	INQ 1593	INQ 2067
INQ 251	INQ 635	INQ 1030	INQ 1603	INQ 2078
INQ 254	INQ 637	INQ 1032	INQ 1751	INQ 2079
INQ 255	INQ 639	INQ 1041	INQ 1758	INQ 2089
INQ 261	INQ 646	INQ 1043	INQ 1761	INQ 2105
INQ 262	INQ 657	INQ 1044	INQ 1764	INQ 2117
INQ 268	INQ 663	INQ 1045	INQ 1770	INQ 2121
INQ 275	INQ 665	INQ 1046	INQ 1779	INQ 2146
INQ 290	INQ 682	INQ 1056	INQ 1782	INQ 2148
INQ 292	INQ 691	INQ 1058	INQ 1784	INQ 2149
INQ 293	INQ 693	INQ 1059	INQ 1788	INQ 2160
INQ 295	INQ 707	INQ 1068	INQ 1790	INQ 2225
INQ 300	INQ 722	INQ 1077	INQ 1791	INQ 2236
INQ 301	INQ 723	INQ 1087	INQ 1799	INQ 2238
INQ 304	INQ 727	INQ 1093	INQ 1803	INQ 2241
INQ 321	INQ 736	INQ 1096	INQ 1805	INQ 2242
INQ 325	INQ 738	INQ 1101	INQ 1822	INQ 2245
INQ 350	INQ 740	INQ 1111	INQ 1823	INQ 2554
INQ 352	INQ 747	INQ 1112	INQ 1824	INQ 2565

Soldiers given ciphers by this Inquiry (continued)				
INQ 360	INQ 748	INQ 1124	INQ 1825	INQ 2584
INQ 362	INQ 753	INQ 1139	INQ 1826	INQ 2592
INQ 364	INQ 754	INQ 1141	INQ 1829	INQ 2597
INQ 366	INQ 763	INQ 1147	INQ 1832	

Named military clients

General Sir Peter de la Billière

General Sir Robert Ford

General Sir Mike Jackson

General Sir Frank Kitson

General Sir David Ramsbotham

General Sir Michael Rose

Major General Henry Dalzell-Payne

Major General Patrick MacLellan

Major General Michael Steele

Major General Marston Tickell

Major General Peter Welsh

Brigadier Maurice Tugwell

Colonel Edward Loden

Colonel Derek Wilford

Major Norman Nichols

Captain Conder

Civil servants

Peter Blakesley

Derek Stephen

David West

Treasury Solicitor Team 2 (Robert Aitken)

Counsel: Gerard Elias QC

Nicholas Moss

Huw Davies

Clients

Lieutenant Colonel Colin Overbury	Warrant Officer Class II Lewis
Corporal Brobson	134
138	150
218	227
229	INQ 167
INQ 179	INQ 351
INQ 374	INQ 471
INQ 491	INQ 552
INQ 587	INQ 631
INQ 659	INQ 709
INQ 783	INQ 838
INQ 977	INQ 1115
INQ 1224	INQ 1937

Three former civil servants:

Sir Arthur Hockaday

Anthony Stephens

Kelvin White

Treasury Solicitor Team 3 (Jacqueline Duff)

Counsel: Sir Allan Green QC

Ian Leist

Clients

Private H 015

INQ 486 INQ 1831

John Wood INQ 1847

INQ 1848 INQ 2064

INQ 2107

Treasury Solicitor Team 4 (Adam Chapman)

Counsel: Rosamund Horwood-Smart QC

Alexander Milne

Clients

Private L 005

129 135

David Longstaff INQ 954

INQ 1243 INQ 2025

Appendix 2: Opening Statement, Principal Rulings of the Tribunal and the Decisions of Various Courts

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A2.1: Opening Statement of the Tribunal (3rd April 1998)

This is an Inquiry into what happened on the streets of this city on Sunday 30th January 1972. On that day, through gunfire on those streets, 13 people died and a similar number were wounded. Whatever conflicting views are held about the events of that day, it has become known as “Bloody Sunday”, so it seems to us that this Inquiry should be called the “Bloody Sunday Inquiry”.

Today is the formal opening day of the Inquiry. We are here to introduce ourselves, to outline our task as we see it and to explain how we propose to set about that task.

My name is Mark Saville. I am an English Law Lord, one of the judges who sit in the House of Lords as the highest court of appeal in the United Kingdom. I am presiding as Chairman of the Inquiry. I have two colleagues sitting with me: Sir Edward Somers, a New Zealander who was formerly a judge of the Court of Appeal of New Zealand, and Mr Justice William Hoyt, a Canadian judge who is presently Chief Justice of the Province of New Brunswick.

The Secretary to the Inquiry is Ann Stephenson, a senior administrator in the Department of Health who has been seconded to us for the duration of the Inquiry. Ann Stephenson is in charge of the overall administration of the Inquiry.

The Solicitor to the Inquiry is Philip Ridd, a senior legal adviser to the Inland Revenue who has also been seconded to us for the duration of the Inquiry. His chief job is to co-ordinate the gathering and collating of the evidence to be put before us. Both Ann Stephenson and Philip Ridd will have assistants to help them carry out what undoubtedly will be very heavy tasks.

Christopher Clarke QC is Counsel to the Inquiry. Alan Roxburgh, another barrister, will work with him as his Junior. Their primary job is to assist the Inquiry by presenting the evidence to us and questioning the witnesses on our behalf.

The Tribunal, Counsel, the Inquiry Solicitor, and the Inquiry Secretary all have the same duty. That duty, and the object of the Inquiry, is to seek the truth about what happened on Bloody Sunday. We intend to carry out that duty with fairness, thoroughness and impartiality.

I was the person responsible for selecting Christopher Clarke QC, Philip Ridd and Ann Stephenson to help the Tribunal. So far as Christopher Clarke is concerned, I chose someone who is among the most senior and respected members of the English Bar. He in turn selected Alan Roxburgh as someone in whom he has from experience complete confidence. So far as the Inquiry Solicitor and

the Inquiry Secretary are concerned, I chose people who are also of proven ability. They are civil servants whose work has been entirely unrelated to any of the matters with which this Inquiry will be concerned. I am certain that they will be able to perform the duty that I have described.

I took the responsibility of appointing these people before my colleagues were appointed, in order to get the Inquiry under way as soon as possible. However, Sir Edward Somers and Mr Justice Hoyt have had the opportunity of considering the appointments that I have made and I am glad to tell you that, having met the other members of the team, they have both expressed complete satisfaction with those that I chose.

As to the Tribunal itself, I accepted the chairmanship at the invitation of the Lord Chancellor and was consulted by him over the appointment of my colleagues. I should make clear that in no shape, manner or form has the Government sought in any way to suggest how we should conduct the Inquiry or indicated what conclusions it would like us to reach. Apart from the Lord Chancellor, I have not in fact discussed any aspect of this Inquiry with any other member of the Government.

I believe that we are fortunate to have Sir Edward Somers and Mr Justice Hoyt as members of the Tribunal. They are people whose reputation for thoroughness, fairness and impartiality cannot be bettered. We should be very grateful indeed that they have agreed to come across the world to sit on this Inquiry.

The Inquiry is set up under the Tribunals of Inquiry (Evidence) Act 1921. Our terms of reference are to inquire into:

“the events of Sunday, 30th January 1972 which led to loss of life in connection with the procession in Londonderry on that day, taking account of any new information relevant to events on that day.”

There has already been one Inquiry into Bloody Sunday, conducted by Lord Widgery, who was then the Lord Chief Justice. This took place immediately after the events in question. The manner in which that Inquiry was conducted and the conclusions that it reached have been the subject of comment and criticism.

The present Inquiry is not an investigation into how Lord Widgery conducted his Inquiry. We are not sitting as a court of appeal from the Widgery Inquiry. It is very important for all concerned to bear this in mind, since otherwise there is a risk that we shall be diverted from our real task, which is not to enquire into what happened at the Widgery Inquiry, but what happened on Bloody Sunday. Having said this, however, the fact remains that we shall be looking into the same events as those Lord Widgery was asked to consider. We shall be looking at all relevant material that was available

at the time, whether or not it was considered or mentioned at the Widgery Inquiry, as well as any material that has subsequently come to light or which the present Inquiry may itself reveal.

Our task is to try to find out what took place in this city that Sunday afternoon. It seems to us that we cannot simply try to reconstruct events as they occurred on the streets that day, without paying proper regard to what led up to those events. Thus we shall be looking at the background to Bloody Sunday to the extent necessary to enable us to reach as informed a conclusion as possible.

We have already started collecting material and we expect that a lot more will become available in the immediate future. We shall undoubtedly need the help of all concerned to ensure that we look at everything that is relevant to our task. For this reason the Inquiry Secretary is writing to those we think may be able to assist us, but it is important that all who consider that they have useful information should contact the Secretary as soon as possible. This can be done by writing to the Bloody Sunday Inquiry, PO Box 18031 London, or by using the e-mail facilities of the Internet Web Site which, as we explain later in this statement, we have set up for the purpose of this Inquiry.

We should emphasise at this point that this is an Inquiry, not a trial. Trials are in the main conducted on an adversarial basis, i.e. where each party puts forward its case and seeks to answer the case put against it; where the tribunal acts as a sort of referee, requiring the parties to abide by the rules; and where, at the end of the day, the tribunal decides the case in favour of one side or the other on the basis of the material the parties have put before it.

An Inquiry like the present Inquiry is quite different. Here the Tribunal takes the initiative in trying to ascertain the truth. Unlike an adversarial contest, it is for the Tribunal to seek all the relevant material. Its task is not to decide the matter in favour of one party or side or another. Indeed, from the point of view of the Tribunal, there are no parties or sides. There will, of course, be those who have material evidence to give or who have a legitimate interest in challenging such evidence, but the Tribunal will not treat them as sides or parties in an adversarial contest, but rather as a means of seeking out the truth.

It follows from this that it is for the Tribunal to decide what material it should consider and what witnesses it should call to give evidence. It is also for the Tribunal to decide how to conduct the proceedings. We turn therefore to outline what we propose to do in relation to these matters. However, we should make clear that we want to adopt methods best suited to carrying out the Inquiry in the fairest, most thorough and impartial way possible, without, of course, incurring unnecessary delay or expense. Thus if people think that improvements can be made to these proposals, then they should make their views known in writing to the Inquiry Secretary. Again, this

should be done as soon as possible, so that the Tribunal has the opportunity to consider any such suggestions.

As we have said, we are already collecting material and repeat our request for those who believe they can help us to get in touch with the Inquiry Secretary without delay. We have also been considering the question of witnesses and request those who consider that they have material evidence to give (or who know of people they consider are likely to be able to give such evidence) also to contact the Inquiry Secretary as soon as possible. We should make clear at this point that we do not intend to apply the strict rules of evidence, though of course the weight that we are likely to give to any particular piece of evidence may well depend on how direct and first hand it is.

The statute under which this Inquiry is established gives the Tribunal the power to require persons to give evidence or to produce documents. We hope that it will not be necessary to invoke this power, but we shall do so if we conclude that our search for the truth requires it.

In this connection it would be foolish for us to ignore the fact that there are allegations that some of those concerned in the events of Bloody Sunday were guilty of very serious offences, including murder. Whether there is any substance in those allegations remains, of course, to be seen. All who give evidence to an Inquiry like this have the same rights and privileges as those who give evidence before an ordinary court, including the privilege against self-incrimination. We have considered whether to recommend to the Attorney-General at the outset that there should be an immunity from prosecution for all who give evidence to this Inquiry. The reason for doing this would be to encourage people to come forward and to speak frankly with no inhibitions. We have decided, however, not to make such a blanket recommendation at this time, but instead to look again at the question in the course of carrying out our investigations, when it may be possible to see more clearly whether the grant of immunity in any given case, or group of cases, is necessary for the purpose of carrying out the object of the Inquiry.

Some who may have material evidence to give to the Inquiry may have concerns about their personal security. Where we are satisfied that there are proper grounds for such concern, we shall make appropriate arrangements for their safety.

Where appropriate, the Inquiry Solicitor (or those assisting him) will seek to interview and to take statements from those concerned. In particular, we shall be seeking written statements from those we consider likely to be called to give oral evidence. In our view all those we wish to interview or from whom we wish to take statements should have, if they so wish, an independent lawyer present to advise them in their own interests. In appropriate cases we shall recommend that the cost of such legal assistance be met from public funds.

Apart from legal assistance during interviews and while statements are taken, there is the question of legal representation at the Inquiry. While remembering that this is an inquisitorial Inquiry and not an adversarial contest, and that those giving evidence will be called to do so by the Tribunal and questioned on behalf of the Tribunal by our Counsel, we fully appreciate that many of those concerned will have strong grounds for asking for legal representation. Indeed, as a matter of fairness, it seems to us that those against whom serious allegations are likely to be made must be given a proper opportunity to challenge what is said against them and to do so, if this is what they want, through lawyers representing their interests. However, we would not necessarily confine legal representation to those in that position, if we were satisfied that our search for the truth in a fair, thorough and impartial way dictated that others should also be legally represented.

In these circumstances we would invite all those who wish to be legally represented at the Inquiry to write to the Inquiry Solicitor requesting that they be given the right to legal representation, and setting out in full the reasons why they consider that their request should be granted. If those making such requests also consider that the cost of legal representation should be met from public funds, then in addition they should set out in writing the reasons why they take this view. The Tribunal will consider all such requests and may require further information before giving its ruling, which we intend to do publicly in writing.

Many people were caught up in Bloody Sunday. Many are likely to have material evidence to give. Some may feel that they should be legally represented at the hearings. At the same time, it seems to us that the opportunity must be taken for those with similar interests to join together for the purposes of legal representation. If their legitimate interests can be properly met by joint legal representation, there would simply be no point in having separate legal representation. We would therefore urge all those concerned who have similar interests to consider together how best to deal with this point. The Inquiry Solicitor will be ready and willing to discuss the matter with those concerned if that is thought to be of assistance. We should make clear that when deciding who should have legal representation and whether we should recommend that the cost of such representation should be met out of public funds, we shall take into account whether separate representation is really necessary.

It is important that we deal with the question of legal representation without delay. Thus we would urge all concerned to consider what we have said on this subject and to communicate with the Inquiry Solicitor as soon as possible.

It seems to us that we shall need some time to collect and collate what will clearly be a considerable amount of evidence. Apart from factual evidence, we may find it helpful to seek expert evidence in addition to that which we understand has already been obtained by others. Those concerned,

including in particular those against whom serious allegations are made, will need time to consider the relevant material that we have collected. Furthermore, it will be necessary for us to consider a number of preparatory matters, which may involve preliminary hearings, though we hope and expect to be able to deal with most matters in writing. We have concluded that it would not be fair or feasible to start the full hearings in this Inquiry until the autumn. This will give everyone a reasonable opportunity for proper preparation. We shall, of course, publish the exact dates for the hearings as far in advance as possible.

Our present intention is to begin those hearings in public in this city, indeed in this hall. We are presently minded to sit about four days a week, leaving at least a day (probably Friday) for assessing what has happened and for preparing what is to come. However, we propose to be flexible about our sitting hours and days, and will adapt these as best we may to make the hearings as convenient as possible for those taking part. For example, we would certainly consider some evening sittings, if this seemed to be a helpful thing to do.

We also expect that some hearings will take place in London, since this appears likely to be the most convenient course to take for some of those concerned.

The hearings in this city will start with an opening statement by our Counsel, who will set out in detail the material we have collected to date, identify the issues as we see them, and generally set the scene for the oral evidence, which will follow. During the course of the next few months we shall be considering in what order we should take the witnesses, and will of course liaise with all concerned in working out how best to organise this and similar matters.

As we have already indicated, those we invite to give evidence will already have been asked to provide written statements to the Tribunal. The Tribunal will read and consider such statements and the other material collected for the Inquiry (which will include, of course, statements previously made) before the full hearings start.

Before they are questioned by our Counsel, witnesses may wish to supplement orally what they have said in writing, for example if something has come to light after giving their written statements. However, we shall make every effort to advise witnesses in advance of all matters which they may wish to consider, so that they have an opportunity to set down in writing all that they want to say before they are questioned. We shall allow supplementary oral evidence before oral questioning if we are persuaded that this is required in the interests of fairness, thoroughness and impartiality.

If likewise persuaded, we shall also permit those who wish to do so to make short opening statements (we would expect through their lawyers) at the beginning of the hearing. Again, however, we should emphasise that this is an Inquiry, not an adversarial trial. It follows that any such

statements must be exclusively directed to assisting the Tribunal in performing its duty, rather than seeking to serve other interests. There would also be no point in repeating matters that are going to be covered by the opening statement of our Counsel. Thus we ask those who wish to make opening statements to inform us in advance, giving full written details of what they wish to say and their grounds for wishing to say it, so that we can decide whether or not (or to what extent) any such statements will assist in carrying out the object of the Inquiry.

After our Counsel has questioned the witness we shall permit further questioning by others, but once again only if we are persuaded that this is required in the interests of fairness, thoroughness and impartiality. The right to conduct further questioning is, of course, very likely to be granted to those facing serious allegations.

When we have concluded the oral hearings our Counsel will make a closing statement, drawing together all that we have heard and considered. Before that closing statement, and subject to the same considerations as those applying to opening statements, we shall permit other closing statements. We shall then form our conclusions and write our report.

In this statement we have emphasised the need for fairness, thoroughness and impartiality. Those requirements must not only be met throughout the Inquiry, but must also be seen to be met. This we shall endeavour to do.

The statute under which we are acting allows us to exclude the public or any portion of the public from any part of the proceedings, if we consider that it would be in the public interest for us to do so, but we shall need very strong grounds indeed to take that course, and in the event that we did, we would publish our reasons for doing so. We also intend to put all relevant material in the public domain as the Inquiry proceeds, unless again we are persuaded (for compelling reasons that we would publish) that it would be in the public interest to take a different course. It follows that those who wish to bring matters to the attention of the Tribunal must realise that we intend to make public anything of relevance that they tell us, including the source of such material, unless there are compelling public interest reasons not to do so.

To assist in the public nature of this Inquiry, we intend to take full advantage of Information Technology. We have set up our own dedicated Web Site on the Internet, where we propose to publish details of the relevant material collected and considered, together with daily transcripts of the proceedings as they get under way, of any preliminary rulings that we make and like matters. For example, the full text of this Statement will appear on that Site. The address of the Web Site is <http://www.bloody-sunday-inquiry.org.uk>.

We also intend to use real time transcription for the hearings. Real time transcription involves the recording on computers of what is said at the hearings, as it is said. The words spoken appear on monitors, virtually simultaneously. Those using the system can at the same time make private notes on their own screens. The computers sort and retrieve what is recorded, as required by each user. This greatly reduces the time needed to note up, analyse or keep abreast of the evidence as well as the need for multiple copies of bulky paper transcripts. Experience in long cases has demonstrated that real time transcription saves very considerable time and trouble for all concerned and is a substantial improvement on traditional methods of keeping a record.

When we have dealt with the question of legal representation, those legal representatives who [are] going to take part, but who are unfamiliar with the use of this technology, should get in touch with the Inquiry Secretary, who will be able to advise them on how to prepare to use it.

This opening statement is being televised. Since we intend to use our Internet Web Site to provide a ready means of following what is going on, the rest of the hearings will not be televised.

Later this morning the Tribunal will give a Press Conference, at which the media can put questions to us. After that we propose to go onto the streets where people were killed and wounded on Bloody Sunday. An officer from the City Engineer's Department has kindly agreed to accompany us, in order to point out the important places and the main changes that have taken place since 1972. This will not be an evidence gathering exercise, but rather a first step in being able more clearly to understand the evidence of what took place on Bloody Sunday. We expect that this will not be the last time we look at these streets for the purpose of this Inquiry.

We are enquiring into matters that have given rise to very strong emotions. Those emotions are wholly understandable, for whatever the circumstances, people were killed and wounded. There are also, undeniably, strong political views. Furthermore, the events with which we are concerned took place 26 years ago. We therefore have a very difficult task in trying to find the truth. We need the assistance of all concerned, particularly those who were there on that day. We ask them all to do their best to help us to seek the truth about what happened on Bloody Sunday.

A2.2: Ruling (24th July 1998): legal representation for the families of those who died and those who were injured; legal representation for ten soldiers; representation of the late Gerard Donaghy;* legal representation for Fulvio Grimaldi

On 20th and 21st July we held a preliminary hearing in this Inquiry in order to deal with a number of points that had arisen since the Tribunal made its Opening Statement at the beginning of April. On some of these points we wanted to hear the views of those interested in order to be properly informed before making rulings in the future. On other points we heard submissions on matters which call for a ruling now. In both cases, in accordance with what we said in our Opening Statement, it seemed to us that this was an exercise that should be carried out in public and this is what we have done.

The first matter discussed was the level of legal representation at the Inquiry for the families of those who died on Bloody Sunday and for those that were wounded, who had instructed the Belfast solicitors Madden & Finucane to act on their behalf. These comprise nearly all who lost family members or who were wounded on Bloody Sunday.

The Tribunal had expressed its provisional view that the interests of this group could be properly protected by engaging the services of one Leading Counsel and two juniors. This was not a view shared by this group, who requested that they be represented at the Inquiry by five Leading Counsel and five juniors.

From correspondence with Madden & Finucane, it appeared to the Tribunal that the principal reason for requesting this level of representation was to enable the families and the wounded to prepare and present a case to the tribunal in an adversarial fashion, that is to say as though they were engaged in a piece of ordinary litigation with opposing parties, in this case the soldiers, the Ministry of Defence and other departments of the Government.

The Tribunal could not and cannot accept that this is the correct basis on which to proceed. In his Royal Commission Report on Tribunals of Inquiry Lord Justice Salmon said:

* The correct spelling of this victim's name is "Gerald Donaghey". The spelling used here and throughout this appendix was to our knowledge the accepted spelling at the time, and thus reproduced faithfully here.

“28. Normally persons cannot be brought before a tribunal and questioned save in civil or criminal proceedings. Such proceedings are hedged around by long standing and effective safeguards to protect the individual. The inquisitorial procedure is alien to the concept of justice generally accepted in the United Kingdom. There are, however, exceptional cases in which such procedures must be used to preserve the purity and integrity of our public life without which a successful democracy is impossible. It is essential that on the very rare occasions when crises of public confidence occur, the evil, if it exists, shall be exposed so that it may be rooted out; or if it does not exist, the public shall be satisfied that in reality there is no substance in the prevalent rumours and suspicions by which they have been disturbed. We are satisfied that this would be difficult if not impossible without public investigation by an inquisitorial Tribunal possessing the powers conferred by the Act of 1921. Such a Tribunal is appointed by Parliament to inquire and report. The task of inquiring cannot be delegated by the Tribunal for it is the Tribunal which is appointed to inquire as well as to report. The public reposes its confidence not in some other body or person but in the Tribunal to make and direct all the necessary searching investigations and to produce the witnesses in order to arrive at the truth. It is only thus that public confidence can be fully restored.”

Similar views were expressed by Professor Walsh in his paper entitled *The Bloody Sunday Tribunal of Inquiry: A Resounding Defeat for Truth, Justice and the Rule of Law*.

Whether or not Professor Walsh’s criticisms of the Widgery Inquiry are justified is not a matter with which we are presently concerned, but we believe that the views he expressed on the proper nature and function of an Inquiry like the present Inquiry are an accurate statement of the legal position. Professor Walsh said this:

“Under our adversarial system of justice when the High Court is hearing a case between two opposing parties, it does not play an active role in adducing evidence to determine the factual truth of a matter in dispute between the parties. Its primary role is to make a final determination on the basis of the evidence presented to it by the opposing parties. In discharging this role it relies on the parties to present all the relevant evidence and to subject the evidence of their opponents to searching scrutiny. The High Court itself will not pursue this task. Its input is largely confined to ensuring that the parties respect the rules of procedure in adducing the evidence and in scrutinising each other’s evidence. At the end of the day the primary function of the High Court is to decide in favour of one side or the other in accordance with the rules of the game. It is not concerned first and foremost with establishing the truth. It may be, of course, that the adversarial procedure and the attendant rules applied by the Court are best suited to producing a final determination which accords with the truth in any case. That, however, is not necessarily the same thing as saying that the High Court is actively engaged in a search for the truth.

The Tribunal of Inquiry by contrast is set up specifically to find the truth. It is expected to take a positive and primary role in searching out the truth as best it can. Certainly, it will seek the assistance of any interested party who has evidence to give or who has an interest in challenging the evidence offered by another party. It must be emphasised, however, that it is the Tribunal, and not the parties, which decides what witnesses will be called to give evidence. Indeed, strictly speaking there are no parties, no plaintiff and defendant, no prosecutor and accused, only an inquiry after the truth. It is the Tribunal which directs that inquiry. All the witnesses are the Tribunal's witnesses, not the witnesses of the parties who wish them to be called. Whether any individual witness will be called is a matter for the Tribunal. Moreover, the Tribunal can be expected to act on its own initiative to seek out witnesses who may be able to assist in the quest for the truth. Ultimately, the task facing the Tribunal is to establish the truth, not to make a determination in favour of one party engaged in an adversarial contest with another."

In our Opening Statement we expressed similar views.

In these circumstances we thought it right at the outset of this preliminary hearing to raise this point with Mr Treacy, Counsel appearing on behalf of the group of families and the wounded seeking representation at the Inquiry. Mr Treacy immediately made clear on behalf of his clients that he accepted that the proper approach to an Inquiry of the present kind was as we have stated and that his application for the level of legal representation sought was not based on treating the Inquiry as an adversarial contest, but was founded on quite different grounds.

The provisional view expressed by the Tribunal was itself based on an objective assessment of the amount of work that Counsel would have to do in order to be able properly to protect the interests of the families and the wounded at the Inquiry, bearing in mind that it was the responsibility of the Tribunal to collect, analyse and present all the relevant material, as well as to carry the main burden of cross-examination at the oral hearings; and also bearing in mind that we would give all concerned a reasonable period to consider the material collected before those hearings began. However, Mr Treacy persuaded us that there were other factors to take into account, and having considered these we have concluded that the interests of justice do justify the level of counsel representation sought by the families and the wounded. Our reasons for doing so are as follows.

In the first place, Mr Treacy drew our attention to the fact that at the Widgery Inquiry the level of representation for the families and the wounded was about the same as that provisionally suggested by the present tribunal. He submitted, and we accept, that his clients genuinely believe that this level of representation put them at a grave disadvantage at that Inquiry and that similarly to limit

their representation at the present Inquiry would only repeat what they consider was an injustice done to them; leading them to view the present Inquiry with distrust.

Having listened to Mr Treacy it seems to us that whether or not these beliefs are objectively justifiable is really neither here nor there. The important fact is that they undoubtedly exist. Thus, although we remain of the view that because of the very different way we propose to conduct this Inquiry the families and the wounded would not in fact be disadvantaged by the level of legal representation we suggested, it seems to us that in order that justice should not only be done but manifestly be seen to be done, the point made by Mr Treacy is a good one.

In the second place, there is another consideration, which supports Mr Treacy's submission. Although the families and the wounded have made common cause, although from a lawyer's point of view their interests seem identical or virtually identical, and although from our present state of knowledge there seems to be no conflict or potential conflict of interest that would call for separate representation, we accept that their situation cannot simply be viewed from a narrow legalistic point of view. Looked at from a rather wider and perhaps more human perspective, the fact of the matter is that each family and each of the wounded has a private and personal interest, which must be borne in mind, notwithstanding it leads them to make common cause with each other. That private and personal interest could be properly served if, instead of a single team of Counsel acting for all the families and the wounded, the representation was divided as Mr Treacy suggested, so that comparatively small groups of the families and the wounded had their own leading and junior counsel responsible for their representation at the Inquiry. Once again it seems to us that this would help to enable justice to be seen to be done.

Mr Treacy readily accepted that the Tribunal could not allow this level of representation to lead to repetitive cross-examination by successive counsel. That would serve no useful purpose and would simply waste time and money. The same applies, of course, to submissions. Furthermore, although we shall recommend that the reasonable costs of engaging the services of five leading counsel and five juniors be met from public funds, we have an obvious duty to ensure that such costs are indeed reasonable. Of course, all counsel will have to acquaint themselves with the general picture, as well as the particular circumstances of the families and the wounded for whom they have a special responsibility, but we consider that much can and should be done to avoid duplication of effort among them. We suggest that it would be a good idea to keep in close contact with the Solicitor to the Inquiry, so as to seek to avoid the risk of incurring expenditure, which might be regarded as not reasonably necessary.

The Tribunal would be assisted by being informed as soon as possible of the names of the counsel involved and of details of the division of their responsibilities among the families and the wounded.

Before leaving this question we should mention a further submission put forward by Mr Treacy, which was to the effect that each of the families and each of the wounded was entitled as a matter of legal right to separate representation at the Inquiry; so there could be no valid objection to the lesser amount of representation sought.

We were not persuaded by this submission.

The object of providing legal representation is to ensure that as a matter of justice and fairness the interests of the persons concerned are properly protected at an Inquiry. It follows in the present case that each of the families and each of the wounded would be entitled to separate representation if it could be shown that such separate representation was required in order to ensure that their respective interests were properly protected. If their interests could be properly protected by, for example, some form of joint legal representation, then the basis for separate legal representation simply disappears, for neither justice nor fairness would require it.

For this reason it seems to us that the families and the wounded cannot found their claim to the level of representation that they seek simply on the basis that they have a basic right (whether or not justice and fairness require it) to separate representation, which they have chosen to waive in favour of what they describe as the minimum needed. What they can do, of course, is to seek to demonstrate that justice and fairness require either separate legal representation or, which is in fact what they have chosen to do (and indeed have succeeded in doing), require a higher level of joint representation than that suggested by the Tribunal. By taking this course the families and the wounded have, as it seems to us, correctly acknowledged that separate representation for each is not in fact required for this Inquiry to be just and fair.

It is convenient at this point to consider another matter on which we heard submissions from Mr Treacy, which relates to the scope of the work to be undertaken by those representing his clients, in particular their solicitors.

The Tribunal, of course, cannot prohibit any interested party from taking any steps it wishes to prepare for the Inquiry, but must once again make clear that it regards itself as under a duty to be responsible for collecting, collating analysing and presenting *all* relevant material. The Tribunal is preparing to engage experts and is seeking to interview everyone who might be expected to have something material to contribute. It is doing so in an entirely open and non-partisan way, so that the world can see how it is conducting itself and so that all who have a direct interest in the Inquiry will have a reasonable opportunity to consider and assess all the material evidence, as well as making suggestions for further or better investigations. In the nature of things, the Tribunal cannot simply accept evidence (whether factual or expert) prepared and presented by or on behalf of the families

and the wounded, any more than it can from those with opposing views, for such evidence is, inevitably, going to be carefully selected and presented so as best to support the contentions of those who proffer it. The Tribunal, unlike the families and the wounded (or indeed those with opposing views), does not start with any beliefs at all. Those held by the families and the wounded are clearly genuinely held and may prove to be justified, but the Tribunal alone is in a position to collect, collate, analyse and present all the available evidence, with no pre-conceived views at all, and with only its desire to seek the truth. That indeed is the duty of the Tribunal.

It follows from this that although it is open to Mr Treacy's clients to continue their investigations, we would find great difficulty in recommending the payment out of public funds for work done by their advisers which it is the responsibility of the Tribunal to undertake. This does not mean, as Mr Treacy suggested, that the families and the wounded would be reduced to playing a passive role in the Inquiry. As we said in the Opening Statement, we need the active and continuing help of all concerned to help us to find the truth about Bloody Sunday. Counsel to the Inquiry, reporting our progress to date at the outset of this preliminary hearing, gave a number of specific instances in which we need this help.

Mr Treacy's clients are clearly in possession of highly relevant material which the Tribunal has repeatedly asked them to produce, but which to date they have chosen to withhold. As we observed during the hearing, the impression has been given that this has been done so that this material can be used as a sort of bargaining chip in discussions with the Tribunal about how matters should proceed. The subject matter of this Inquiry is far too important for relevant material to be kept from the Tribunal and used for this purpose. As already indicated in correspondence with Madden & Finucane (in particular in our Solicitor's letter of 15th May 1998), the Tribunal will recommend the payment out of public funds of the reasonable costs (incurred or to be incurred) of assisting the Tribunal in the task of identifying and locating those who may be able to help the Inquiry, as well as in the other respects set out in that letter.

In this connection there are a number of specific matters on which we should state our views.

Mr Treacy suggested that solicitors instructed by his clients should be reimbursed from public funds for continuing to take what he described as provisional statements from those who might be able to help the Inquiry. We disagree. The costs of helping to identify and locate potential witnesses is one thing, but once this has been done, the task of interviewing those witnesses and taking statements from them, provisional or otherwise, is the responsibility of the Tribunal. Of course, as we said in the Opening Statement, any person the Tribunal seeks to interview has the right to have a legal adviser present in order to protect that person's interests, and it is up to that person to decide who should fulfil this role if that right is to be exercised.

It also appears that at one stage at least, it was contemplated that the families and the wounded would employ five firms of solicitors, three in Derry collating the existing statements from civilians and taking statements from new witnesses, one in Dublin dealing with the political and historical context within which Bloody Sunday occurred, and Madden & Finucane to co-ordinate the legal team and the preparation for the Inquiry.

We readily acknowledge that it will probably be necessary for more than one firm of solicitors to be engaged to provide the sort of assistance that the Tribunal has indicated that it requires. Collating existing statements and taking new statements, however, is the responsibility of the Tribunal, at least at this stage of the Inquiry. As to the political and historical context, the Tribunal considers, as its Counsel indicated at the beginning of this preliminary hearing, that this should best be approached, at this stage at least, by seeking the views of experts in this field to advise the Tribunal. The selection of such experts we already have in hand, and though of course we are willing to consider any suggestions in this and all other areas in which expertise may be required, we hope all will readily accept that it must be the duty of the Tribunal to satisfy itself that it is getting unbiased and impartial advice.

With regard to experts generally, Mr Treacy suggested that his clients would be put at an unfair advantage if they could not be assisted from public funds to obtain expert assistance at this stage of the Inquiry. Again we must disagree. It is the intention of the Tribunal to engage its own experts in all areas that require expert assistance. It proposes to identify those it is minded to engage and to publish its proposed instructions to those who are to be selected, giving all concerned an opportunity to suggest changes or additions to those instructions. At the earliest opportunity the reports of the experts will be published and the interested parties will be asked to consider them and to say whether or not they agree with the opinions expressed. It may well be that at this stage the families and the wounded may require expert assistance, to help them to understand the reports and to form a view as to whether or not they agree with them, as well as helping them to decide whether or not to request the Tribunal to obtain further expert assistance. Mr Treacy suggested that his clients could be put under a disadvantage if at the oral hearings counsel for other interested parties sought to undermine expert evidence which his clients had previously accepted, since they, without their own experts, would be able to do little or nothing about it. However, as we pointed out during the hearing, this will not happen under the procedures that the Tribunal intends to adopt, for any challenge to any expert report provided to the Tribunal will have to be made long in advance of the oral hearings; and if one is made, the Tribunal will make sure that no interested group will be unfairly disadvantaged.

There is one final point we should make on the subject of experts. This matter was discussed at length on the first day of the preliminary hearing. On the second day of the hearing, Mr Treacy

revealed to the Tribunal for the first time that his clients had already retained experts to prepare a computerised reconstruction of relevant areas of the city. He also told us that his clients' solicitors had been, as he put it, talking to a number of other experts practising in such fields as the pathology of wounds and firearms. What we have already said about expert evidence must apply. We would ask the families and the wounded to consider what their reaction would be if it was suggested that the Tribunal could and should make use of expert evidence prepared on behalf of, for example, the soldiers, where the Tribunal had neither been informed that this was being done nor asked to sanction this course of action, nor been made privy to the conversations with or instructions given to those experts. We would draw the attention of all concerned to what we said in paragraph 23.5 of the Matters to be Addressed at the Preliminary Hearing.

We now turn to the question of the representation sought on behalf of ten of the soldiers by Mr Edwin Glasgow QC. We accept his submission that they should be represented at the Inquiry by one leading counsel and two juniors. We also accept his further suggestion that we should sanction in advance the representation by this team of any other soldiers who wish to be represented at the Inquiry by them and for whom they could properly act. At the preliminary hearing Mr Glasgow undertook forthwith to inform the Tribunal of the identity of any soldiers who come to be added to those he already represents.

We are very disappointed that to date very few of the soldiers present in Derry on Bloody Sunday have been identified, let alone located. We have, of course, the names of those who gave evidence to the Widgery Tribunal, but in most cases not their present whereabouts, and what is more we want to interview as many as possible of all the soldiers who were there on that day, or who may be able to give us information on the events of that day. Mr Burnett QC, who at our invitation appeared on behalf of the Ministry of Defence at the preliminary hearing, told us of the difficulties the Ministry had encountered in trying to trace these people, having agreed with the Tribunal in April that they would undertake this task. We take the view that the Tribunal itself must now take the initiative in tracing those concerned. We will instruct agents for this task. Mr Burnett told us that one of the problems in tracing at least some of the soldiers lay in the restrictions imposed by the Data Protection Act, and agreed with us that the way forward was probably for the Tribunal to issue subpoenas to the government departments concerned with such things as soldiers' pensions. We intend to take this course. We must record, however, our dissatisfaction with the fact that a considerable time passed before we were informed of the difficulties being encountered by the Ministry of Defence. Had they come to us earlier and explained their problems, the Tribunal might well have been able to take action itself before now and thereby saved valuable time.

There are two further questions concerning representation on which we heard submissions during the preliminary hearing. The first of these concerned the representation of one of the deceased, Gerard Donaghy.

Mr Donaghy was adopted when he was ten months old. His natural siblings, with whom he had no contact following his adoption, and his adoptive siblings, with whom he was very close, both seek to represent his interests before this Tribunal.

Mr Gallagher QC, for the natural siblings, submits that two factors warrant their separate representation of his interests. They point out that it has been alleged that he, alone of the deceased and wounded, was found with weapons on his person, namely, four nail bombs were found in his pockets while being taken to hospital. In turn, it is alleged on his behalf that the bombs were planted by either the police or Army. Thus, they argue, as Mr Donaghy has been singled out for having weapons in disputed circumstances, the task of representing him will be a heavy one requiring separate representation. The second factor is that, because he was killed in a location along with three others, a conflict of interest may arise between his interests and the interests of the three other deceased. The nature of the conflict was not disclosed.

Mr Treacy, for Mr Donaghy's adoptive siblings, submits that adoption legislation gives the adoptive siblings paramountcy, that Mr Donaghy's interests do not differ from those of the others that he represents, that he can foresee no conflict of interest between Mr Donaghy's interests and the others and, indeed, that if one arises, he and his instructing solicitors would cease their representation of Mr Donaghy's interests.

In our view, the claim of the adoptive siblings to represent his interests prevails. Until the death of his adoptive parents when he was about ten years old, he was raised by them in a family unit along with his adoptive siblings. After the parents' death, he was raised by those siblings. As we are disposed to grant increased representation to the families, any additional burden of representing Mr Donaghy's interests is accommodated. No conflict between his interests and those of the others who were shot at the same location was identified to us.

The natural siblings have not demonstrated to us that they ought to represent Mr Donaghy's interests nor that they should be permitted separate representation, along with the adoptive siblings, of his interests. For that reason, we are satisfied that Father Patrick Donaghy and Mary Donaghy, the adoptive siblings of Mr Gerard Donaghy, are solely entitled to represent his interests before this Tribunal.

The remaining matter relating to representation is the application made by Mr Treacy on behalf of Mr Fulvio Grimaldi for this gentleman to be separately legally represented at the Inquiry.

Mr Grimaldi was in the city on Bloody Sunday. He took many photographs and gave evidence to the Widgery Inquiry. At this Inquiry he was cross-examined. It was suggested to him that he was a liar and closely associated with illegal organisations. Mr Grimaldi at the end of his evidence produced a number of bullets which he said that he had collected and which he further said demonstrated that General Ford had lied about the number of shots the soldiers had fired. At a later stage of that hearing, and in the absence of Mr Grimaldi, an expert who said he had examined the bullets, expressed the view that their appearance was consistent with them having been fired into sand, that they showed signs of exposure to oxidation for a considerable time, that many appeared to have been gripped in a vice, probably in a deliberate attempt to distort them, and that it was most unlikely that any of the bullets had been fired on the streets of the city on 30th January 1972.

The Tribunal has yet to interview Mr Grimaldi. If he is willing to be interviewed he has, of course, the right to have a lawyer present to safeguard his own interests. Until this interview has taken place, and until any evidence he has to give can be assessed in the light of all the other material the Tribunal has gathered, it is quite impossible to know whether or not the interests of justice require that Mr Grimaldi be legally represented at the Inquiry. We accordingly refuse this application on the grounds that it is premature. If circumstances arise in the future that would justify the renewal of the application, we would of course reconsider the position.

There remain some matters, which do not call for an immediate ruling by us, but on which we wished to hear the views of those represented before us.

The first of these concerns the question of anonymity.

In the expectation that the question of anonymity would arise, we asked the interested parties for any general observations or submissions they might have as to the approach that we should adopt in relation to it. It will be recalled that, with the exception of five senior officers, the soldiers who gave evidence before the Widgery Inquiry were not required to disclose their names.

We have not yet been asked to make rulings on anonymity in respect of any individual witnesses or groups of witnesses who may give evidence to this Inquiry. However the Treasury Solicitor and Ministry of Defence have indicated that applications for anonymity are likely to be made in due course on behalf of soldiers or former soldiers who were serving in Londonderry on Bloody Sunday.

It should be remembered that there are various different forms of anonymity. Depending on the circumstances, it might be appropriate to allow a witness to give evidence without stating his or her name and address in public, or perhaps to give evidence from behind a screen in order to conceal his or her physical appearance. It might also be necessary to preserve the anonymity of individuals by substituting letters or numbers for names in witness statements and other documents.

Mr Treacy referred us to a number of authorities in this field, including *Scott v Scott* [1913] AC 417, *A-G v Leveller Magazine Ltd* [1979] AC 440 and *R v Murphy & Maguire* [1990] NI 306. He also annexed to his written submissions a copy of an article by Gilbert Marcus, "Secret Witnesses" (1990) PL 207. Mr Treacy argued that the granting of any form of anonymity was a very grave step that should only be taken if justified on compelling grounds.

In adversarial procedure, great importance is rightly attached to the principle of open justice. In particular, the courts require very strong grounds indeed before departing from the rule that a person charged with a criminal offence is entitled to know the identity of prosecution witnesses and to see them give their evidence. One of the reasons for this is to enable the opposing party to investigate and assess the credibility of those witnesses.

The position in relation to an Inquiry such as this one is, in our view, rather different. Nobody is being prosecuted before this Tribunal, nor is it our function to do justice between parties competing in an adversarial contest. Our task is to do justice by ascertaining, through an inquisitorial process, the truth about what happened on Bloody Sunday. The proper fulfilment of that task does not necessarily require that the identity of everyone who gives evidence to the Inquiry should be disclosed in public. The Tribunal will know the identity of all witnesses and, unlike a court, will itself take responsibility for investigating their credibility if there is reason to think that such an investigation is necessary.

Indeed we think that there are likely to be circumstances in which granting anonymity will positively help us in our search for the truth. Witnesses are unlikely to come forward and assist the Tribunal if they believe that by doing so they will put at risk their own safety or that of their families. Moreover it would be a mistake to suppose that the grant of anonymity would always operate to protect soldiers who are alleged to have been guilty of serious offences on Bloody Sunday. There may well be witnesses who wish to give evidence that is favourable to the interpretation of events for which the families and the wounded contend, but who will not co-operate with the Tribunal without assurances as to their anonymity. We are aware, for example, of certain television programmes in which people describing themselves as ex-soldiers present on Bloody Sunday have criticised the conduct of the Army on that day, but have done so anonymously, presumably for fear of reprisals by their former comrades.

Accordingly, we will be willing to grant an appropriate degree of anonymity in cases where in our view it is necessary in order to achieve our fundamental objective of finding the truth about Bloody Sunday. We will also be prepared to grant anonymity in cases where we are satisfied that those who seek it have genuine and reasonable fears as to the potential consequences of disclosure of their personal details, provided that the fundamental objective to which we have referred is not

prejudiced. As to the degree of anonymity that is appropriate, our current view is that restricting the disclosure of names and addresses ought to be sufficient in most, if not all, cases. We would regard the use of a screen as a wholly exceptional measure.

The obligation nevertheless remains firmly on those who seek anonymity of any kind to justify their claim. Applicants for anonymity must supply the Tribunal with a written explanation of the basis of their application, together with any material relied upon in support of it. Of course, unless and until the application is refused, the Tribunal will not reveal any information in its possession, disclosure of which might pre-empt its ruling. Otherwise, however, and subject to any claim for public interest immunity, we propose to circulate any written applications for anonymity to all interested parties and to invite their submissions before making a ruling.

It is obviously important that these applications should be determined sooner rather than later, especially in view of the problems that delay will cause in respect of the distribution of documents containing the names of potential applicants for anonymity. The fact that so far only a few of the soldiers have been traced presents the practical difficulty that their instructions cannot be obtained until they have been found. Rather than waiting for them to be located, we intend to ask the Ministry of Defence to put forward any application for anonymity on their behalf, together with such submissions and evidence as it considers appropriate in relation to any continuing security risk to which they may be exposed. The Solicitor to the Tribunal will shortly be writing to the Ministry of Defence in this connection, as well as to the Treasury Solicitor on behalf of the soldiers represented by Mr Glasgow. Meanwhile, in order to provide to interested parties as many as possible of the documents we have collected to date, we shall blank out the names etc of those who we consider may have a case for anonymity, in order not to pre-empt any future ruling and to minimise delay in the publication of documents.

The second matter which the Tribunal raised during the course of the preliminary hearing was the question whether the Tribunal should recommend to the Attorney General that he should provide an assurance that nothing said to the Tribunal by any person, either before or at the oral hearings, could or would be used in subsequent criminal proceedings against that person.

The object of doing this is to encourage people to come forward to assist the Inquiry in its search for the truth, without fear that what they say may afterwards be used against them. Without such an assurance, of course, any witness has the right to exercise the privilege against self-incrimination. However, the Tribunal is presently of the view that were such an assurance given, it would not be possible for witnesses to refuse to answer questions on the basis of the privilege against self-incrimination, for the simple reason that no question of incrimination could arise. Furthermore, in such circumstances, were the witness to continue to refuse to answer, it would on the face of it be

proper for the Tribunal to draw inferences from that refusal. The Tribunal would also draw attention to the provisions of the European Convention on Human Rights, expected shortly to be brought into force in this country, which contains provisions which might themselves prevent or restrict the use in subsequent criminal proceedings of statements made to the Inquiry.

It is considerations such as these that led us to observe to Mr Treacy that his description of the point under discussion as the question of “*partial immunity*” is in our view inaccurate and likely to be confusing, especially to non-lawyers. “*The status of evidence*” would be a better description.

This is a matter on which the Tribunal would like to hear the views of interested parties as soon as possible. We are bound to say that our present view is that we will be gravely hampered in seeking to find the truth without the assurance to which we have referred, while little if anything will be gained in the absence of such an assurance. The urgency lies in the fact that this is not a matter which can await the oral hearings, since we are already engaged in trying to interview potential witnesses and it seems to us that many may be reluctant to help or advised to rely on their privilege in the absence of an assurance. It is also important to remember that the assurance only applies to the individual giving the evidence and only protects that individual in respect of that evidence. All other facts found by the Tribunal would be unaffected by it and would remain to be taken into account in the event that those responsible conclude after the Inquiry that criminal proceedings should be taken.

Mr Treacy reasonably asked for time to consider this point and agreed that what he had to submit could be done in writing. The same, of course, applies to others who wish to express their views. As we made clear during the preliminary hearing, these submissions, and any ruling of the Tribunal, will be made public.

We should record at this point that we have received to date no application for immunity from prosecution, nor any claim to public interest immunity in relation to documents. Thus all that needs to be said in this connection is that we shall notify all interested parties should such questions arise in the future and give them an opportunity to make representations before we make any ruling.

There remains the question of legal professional privilege claimed by some of the soldiers in respect of certain documents in their possession. Again Mr Treacy asked for time to consider this claim and to put any submissions in writing. This is acceptable to the Tribunal on the same basis as we have indicated when discussing the topic of the status of evidence. Mr Treacy and his clients will doubtless have in mind that in many cases the claim to privilege relates to copies of documents in the possession of individuals, the originals of which (or further copies) have already been collected by the Tribunal and will be distributed to all concerned. There would seem to be little if any point in

debating intricate points of discovery when the documents in question are available from other sources.

Finally we should record that we found the oral preliminary hearing to be of great assistance in considering the various topics that were raised. However, there remains a great deal to be done on substantive matters. We hope that in the autumn we shall be able to produce and publish a preliminary analysis of the material collected, together with the identification of what appear at that stage to be key issues and such matters as a provisional list of those we consider should be called to give oral evidence. Thus, unless it is unavoidable, we would prefer to deal with other preliminary matters by way of written submissions, since it is very time consuming for all concerned to organise and conduct oral hearings.

The public can rest assured that the fact that matters are being conducted in writing rather than at an oral hearing does not affect at all what we said in our Opening Statement about the public nature of this Inquiry and we shall be continuing to utilise our Web Site (<http://www.bloody-sunday-inquiry.org.uk>) and other appropriate means to keep everyone informed of what is going on.

A2.3: Ruling (27th November 1998): the status of evidence (Attorney-General's Assurance); venue; experts; anonymity and privilege; progress report; Counsel's report

Over the course of the last few months, a number of matters have been the subject of submissions from interested parties. In addition there are other matters on which it is now also appropriate to make rulings and observations.

The status of evidence

Among the matters discussed at the preliminary hearing in July was the question whether the Tribunal should seek from the Attorney-General an assurance in the form of an undertaking that nothing said to the Tribunal by any person, either before or at the oral hearings, could or would be used in subsequent criminal proceedings against that person.

In its rulings and observations issued after that preliminary hearing, the Tribunal had this to say about seeking such an undertaking:

“The object of doing this is to encourage people to come forward to assist the Inquiry in its search for the truth, without fear that what they say may afterwards be used against them. Without such an assurance, of course, any witness has the right to exercise the privilege against self-incrimination. However, the Tribunal is presently of the view that were such an assurance given, it would not be possible for witnesses to refuse to answer questions on the basis of the privilege against self-incrimination, for the simple reason that no question of incrimination could arise. Furthermore, in such circumstances, were the witness to continue to refuse to answer, it would on the face of it be proper for the Tribunal to draw inferences from that refusal. The Tribunal would also draw attention to the provisions of the European Convention on Human Rights, expected shortly to be brought into force in this country, which contains provisions which might themselves prevent or restrict the use in subsequent criminal proceedings of statements made to the Inquiry.

It is considerations such as these that led us to observe to Mr Treacy [counsel acting for those represented by Messrs Madden & Finucane] that his description of the point under discussion as the question of “partial immunity” is in our view inaccurate and likely to be confusing, especially to non-lawyers. “The status of evidence” would be a better description.

This is a matter on which the Tribunal would like to hear the views of interested parties as soon as possible. We are bound to say that our present view is that we will be gravely hampered in seeking to find the truth without the assurance to which we have referred, while little if anything will be gained in the absence of such an assurance. The urgency lies in the fact that this is not a matter which can await the oral hearings, since we are already engaged in trying to interview potential witnesses and it seems to us that many may be reluctant to help or advised to rely on their privilege in the absence of an assurance. It is also important to remember that the assurance only applies to the individual giving the evidence and only protects that individual in respect of that evidence. All other facts found by the Tribunal would be unaffected by it and would remain to be taken into account in the event that those responsible conclude after the Inquiry that criminal proceedings should be taken.

Mr Treacy reasonably asked for time to consider this point and agreed that what he had to submit could be done in writing. The same, of course, applies to others who wish to express their views. As we made clear during the preliminary hearing, these submissions, and any ruling of the Tribunal, will be made public.”

We have now received and considered submissions on this topic. Those acting on behalf of certain soldiers have simply expressed their general support for seeking such an assurance, while those acting on behalf of the families and the wounded have put forward detailed reasons for not taking this course.

It may be helpful first to set out some general observations.

The object of the present Inquiry, as we made clear in the Opening Statement, is to try and find out the truth about what happened on Bloody Sunday. Unlike some other forms of Inquiry, we are not charged with investigating whether or not grounds exist for bringing criminal charges against any person or persons, though of course if we concluded that, for example, conduct which caused or contributed to the death or wounding of individuals was wrongful, we would not hesitate to say so.

Equally, we are well aware that some at least of the families of those who died and those who were wounded believe that the casualties resulted from criminal behaviour and that those responsible should not escape justice but should be prosecuted. However, the responsibility for deciding whether or not there are grounds for prosecutions and whether or not there should be prosecutions does not lie with us.

In these circumstances our primary duty must be to use all legitimate and proper means to try and get to the truth. It is in this context that we considered whether the existence of the privilege against self-incrimination, which is among the privileges and immunities given to witnesses by Section 1(3)

of the Tribunals of Inquiry (Evidence) Act 1921, was likely to hinder us in our task and if so, whether there were any legitimate and proper means we could employ to remove or reduce that hindrance.

The privilege against self incrimination is deeply rooted in the common law, arising in part at least from the revulsion felt by the methods employed by the Star Chamber: see, for example, Holdsworth's *History of English Law*, 3rd Ed (1944) Volume 9 at page 200 and Lord Griffiths in *Lam Chi-ming v The Queen* [1991] 2 AC 212 at page 222. It is, as Lord Wilberforce said in *Rank Film Distributors Ltd. v Video Information Centre* [1982] AC 380 at page 442 "a basic liberty of the subject". It is indeed a basic human right.

What is important to remember in the present context, is that this right is not confined to an entitlement to refuse to answer questions designed to elicit a direct confession or admission of criminal conduct, but necessarily extends very much further. That this is reflected in the European Convention on Human Rights was made clear in the judgment of the European Court of Human Rights in *Saunders v United Kingdom* [1996] EHRR 313, where the British Government had argued that the evidence which Mr Saunders had been forced to give to a Department of Trade and Industry Inquiry (under statutory provisions that in effect removed the privilege) and which was afterwards used at his criminal trial, was not self-incriminatory and that he had merely given exculpatory answers or answers which, if true, would serve to confirm his defence. The Court, having pointed out that in fact some of Mr Saunders' answers were directly self-incriminatory, went on to say this:

"In any event, bearing in mind the concept of fairness in Article 6, the right not to incriminate oneself cannot reasonably be confined to statements of admission of wrongdoing or to remarks which are directly incriminating. Testimony obtained under compulsion which appears on its face to be of a non-incriminating nature - such as exculpatory remarks or mere information on questions of fact - may later be deployed in criminal proceedings in support of the prosecution case, for example to contradict or cast doubt upon other statements of the accused or evidence given by him during the trial or to otherwise undermine his credibility. Where the credibility of an accused must be assessed by a jury, the use of such testimony may be especially harmful. It follows that what is of the essence in this context is the use to which evidence obtained under compulsion is made in the course of the criminal trial."

The Court in that case was of course dealing with the question whether there had been a violation of Article 6(1) of the Convention, which gives the right to a fair trial, and which will not become an integral part of our law until the Human Rights Act 1998 comes into force. However, we are firmly of the view that as a matter of common law, the ambit of the privilege against self-incrimination is at least as wide: see, for example, *Sociedade Nacional de Combustiveis de Angola UEE v Lundqvist*

[1991] 2 QB 310 and *Den Norske Bank ASA v Antonatos* [1998] Lloyd's Law Reports: Banking 253. On these authorities it seems that not only does a person possessing the privilege against self incrimination have the right not to give evidence (nor to produce documents) which could later be deployed against him in a criminal trial, but also that this right apparently extends to anything which could fairly be said to give rise to the risk or increased risk of prosecution.

In the context of the present Inquiry, where allegations of very serious criminal conduct are being made and pursued against soldiers and where indeed those making those allegations have, as we have pointed out, expressed their determination that those they believe have committed crimes should be prosecuted, it seemed to us that there was a real prospect that witnesses who can reasonably be expected to be in a position to assist the Tribunal in its search for the truth, would choose to exercise their human right not to incriminate themselves, and would thereby (given the width of the immunity) deprive the Inquiry of much valuable information in that search.

On this basis we considered whether there were any legitimate and proper means by which we could both protect the right of witnesses not to incriminate themselves and also put ourselves in the position of getting as much relevant information as possible.

In our view an undertaking from the Attorney-General (by which expression we include any other appropriate authority, such as the Director of Public Prosecutions) would achieve this objective. Bearing in mind the width of the immunity, an undertaking would have to be in the following form or one to the same effect, namely an undertaking in respect of any person who provides evidence to the Inquiry, that no evidence he or she may give before the Inquiry, whether orally or by written statement, nor any written statement made preparatory to giving evidence, nor any document produced by that person to the Inquiry, will be used to the prejudice of that person in or in connection with any criminal proceedings (actual or contemplated) against that person, except proceedings where that person is charged with having given false evidence in the course of this Inquiry or with having conspired with or procured others to do so.

In our view, if such an undertaking were provided, persons giving evidence to the Inquiry in any form could not refuse to answer or to produce documents on the basis of the privilege, for there would be no risk of self-incrimination: see, for example, *R v Boyes* (1861) 1 B & S 311 and *Re Genese* (1885) MBR 223. As we said in July, it also seems to us that in such circumstances, the Inquiry could properly draw inferences from a failure to answer questions or to produce documents, unless of course there were other good grounds (apart from the privilege against self-incrimination) to justify that failure.

We could not see any real disadvantages from taking this course. In the absence of an undertaking, those from whom the Tribunal wished to obtain information would be fully entitled to exercise their human right against self-incrimination. Indeed, it seems to us that it is part of the duty of a Tribunal like the present one itself to take care that those from whom it wishes to obtain information are made aware of their rights and so can make an informed choice as to whether or not to exercise them, which is why, in our Opening Statement, we made clear that those whom we wished to interview were entitled to have their own lawyer present to safeguard their interests. It follows from this that any suggestion that (without an undertaking) witnesses would or should provide from their own mouths evidence or other support for later criminal prosecutions against them simply cannot be sustained. If, apart from self-incriminatory material, there are grounds for prosecuting anyone which emerge from the Inquiry, then the existence of the undertaking should in our view make no difference.

We now turn to consider the detailed submissions made on behalf of the family of James Wray deceased.

The basic submission advanced for the Wray family is that it is wrong in principle to seek a “blanket” assurance from the Attorney-General covering all potential witnesses; and that if any assurance is to be sought at all, this should only be done if and when requested by a witness, and then only if that witness provides full reasons for that request, including an outline of the nature and content of the evidence to be given and an explanation as to why that evidence cannot be given without the assurance; if the Tribunal is satisfied there is a proper reason for doing so which outweighed the public interest in pursuing a prosecution; and if the parties represented at the Inquiry are given an opportunity to make submissions to the Tribunal on the desirability of seeking an assurance in the particular case.

A number of arguments are advanced in support of the proposition that seeking a “blanket” assurance would be wrong in principle.

The first of these is that since the Tribunals of Inquiry (Evidence) Act 1921 gives a tribunal established under that Act the same powers as the High Court possesses for securing the attendance of witnesses, their examination under oath and the production of documents; and witnesses the same immunities and privileges as they would enjoy in the High Court, it was clearly not the intention of Parliament to provide witnesses at tribunals with any additional immunity of the kind that would prevent the subsequent use against them of evidence given at the tribunal’s hearings.

This argument would seem logically to lead to the proposition that in no circumstances does a tribunal have a power to seek an assurance from the Attorney-General, but can only use the powers expressly given in the Act. However, those making the argument expressly accept (in our view correctly) that this is not the position and that a tribunal does have this power. The point that is made is that in these circumstances the discretion whether to make a recommendation must be exercised judicially in accordance with proper principles, in particular taking into account the scheme and intention of the Act.

Few would quarrel with the proposition that a tribunal, when exercising its powers or discretion on any matter, must do so judicially and in accordance with proper principles. However, it seems to us that this arises from the very nature of a tribunal of inquiry and general principles of justice, rather than from seeking to draw inferences (which can only be speculative) as to what Parliament did not intend. For example, the fact that Parliament said nothing about tribunals acting judicially and in accordance with proper principles could hardly mean that Parliament did not intend tribunals to act in this way.

The next submission relates to the fact that the Salmon Report (Cmnd 3121) considered that a witness's immunity should be extended so that neither his evidence before the Tribunal, nor his statement to the Treasury Solicitor (i.e. to the Solicitor to the Tribunal) nor any documents he is required to produce to the Tribunal should be used against him in any subsequent civil or criminal proceedings except in criminal proceedings in which he is charged with having giving false evidence before the Tribunal or conspired with or procured others to do so. In 1973 the then Government expressed the view that this proposal was acceptable, but considered that legislation was necessary to give effect to this recommendation. (See Cmnd 5313, paragraphs 36 and 51(g).) On this basis the submission is that "*the use of a device designed to achieve a result not contemplated or approved by Parliament in the Act or subsequent legislation should not be employed as a matter of course or in a blanket fashion but only in exceptional circumstances where the facts in a given situation warrant a departure from the normal rule*".

We understand from this submission that it is suggested that the "normal rule" should be to use the powers expressly given in the Act, rather than those which are not spelt out in the Act but which it is accepted a tribunal possesses.

We do not see why this should be so. The tribunal's task is to exercise those powers that it concludes will best assist in carrying out the particular inquiry entrusted to it by Parliament. In our view, there are no "normal rules" of the kind suggested, apart of course from the need to act judicially and in accordance with proper principles.

The next submission seeks to challenge the view expressed by the Tribunal in July that it would be gravely hampered in seeking to find the truth without the assurance, while little if anything would be gained in the absence of an assurance.

It is first submitted that it is premature to suggest that the Tribunal will be hampered in seeking the truth. The point is made that this Inquiry is unique in that it has been set up to inquire into an issue which has already been the subject of an inquiry by a tribunal established under the same Act. It is submitted that since the present Tribunal has at its disposal the evidence put before the previous inquiry (including in particular that of the soldiers) as well as a substantial body of additional evidence that has become available since publication of the Widgery Report, the availability of all this evidence may very well allow the Tribunal to find the truth without the proposed assurance being offered to any witnesses.

The Tribunal is indeed in possession of a considerable body of evidence. This discloses, to put it at its lowest, a fundamental difference of expressed views as to what actually happened on Bloody Sunday. In these circumstances (and bearing in mind the seriousness of the allegations that have been made) it seems to us to be vital to talk to as many as possible of those who were there on that day or concerned with the events that occurred, be they civilians, soldiers or others, notwithstanding they may have already given statements or indeed evidence to the previous inquiry. As we have said before, one of the purposes of an undertaking is to encourage these people to come forward, without fear that what they say may be held against them, to give us the help we undoubtedly need. Of course, many of these people will not need that encouragement, but equally it seems to us (as a matter of common sense) that many (particularly those against whom serious allegations have been made) will be reluctant to come forward or to speak fully and frankly. With an undertaking, people will not only be assured that what they say will not be held against them for the purpose of criminal proceedings, but will also have in mind that, so far as the Inquiry is concerned, their continued silence might well speak for itself.

This leads to the next submission, which is to the effect that such an assurance does not guarantee that the witness will in fact be frank and forthright giving his evidence, and that admissions of criminal or discreditable conduct are much more likely to be made, if at all, in cross-examination.

We entirely accept that the provision of an assurance is no guarantee that witnesses will come forward and give full and frank evidence. The question we have asked ourselves is whether, in the absence of an assurance, we are likely to be hampered in carrying out our task of trying to find out what happened on Bloody Sunday. We remain firmly of the view that this is the case. It seems to us, again as a matter of common sense, that to ask people to give evidence in circumstances where it is being asserted that those people have committed criminal offences, and where what they say

may subsequently be held against them in criminal proceedings, is in truth to encourage them not to come forward or, if they do, to exercise their undoubted right not to be compelled to incriminate themselves. Furthermore, the suggestion that any admissions are more likely to be made in cross-examination simply ignores the fact that, in the absence of an assurance, the witness can exercise the right against self-incrimination.

In paragraph 10 of their submissions, the Wray family says this:

“The fact that a witness who had been given an assurance could not refuse to answer further questions does not mean that he will answer them truthfully. Conversely, the fact that a witness who had not been given an assurance could refuse to answer further questions does not prevent the Tribunal from drawing obvious inferences.”

The first part of this submission is correct, but it is incomplete. Without the assurance the witness can exercise the privilege against self-incrimination. With the assurance we believe that the witness does not have the right to refuse to answer. If the witness seeks to lie at this point, then the opportunity exists, which it would not otherwise do, to seek to demonstrate by further questioning that he is not giving truthful answers.

The second part of this submission, if we understand it correctly, is in our view wrong. In our view we could not draw any inference from the justified refusal of a witness to answer on the grounds that the answer might incriminate him. The witness is exercising a legal right not to answer; and we cannot accept the proposition that nevertheless a court or tribunal could, in effect, treat the witness as not having exercised that right but instead made an admission. See *ex parte Symes* (1805) 11 Ves Jun 521 at 523 per Lord Eldon LC and *Sociedade Nacional de Combustiveis de Angola UEE v Lundqvist* [1991] 2 QB 310 at 319. Of course, where the privilege exists and is exercised, its consequence in the ordinary case will be that there will be nothing in evidence from the person concerned to rebut other evidence against him, but we are engaged in a search for the truth, which requires as much evidence as we can gather.

Conversely, where an assurance has been given, so that the evidence could not incriminate the witness, we believe that it would be permissible (other things being equal) for the Tribunal to draw inferences from a witness's refusal to answer, for that refusal could not be justified on the basis of the exercise of a legal right against self-incrimination.

The next submission is an assertion that a dishonest witness who has something to hide and is liable to prosecution on the basis of evidence other than his own testimony is highly unlikely in any

circumstances to make admissions which would strengthen the calls for his prosecution even if those admissions could not in themselves be used against him subsequently.

Again we would not necessarily quarrel with this submission, but again it is incomplete. The assumed dishonest witness will, of course, not hesitate to exercise his privilege against self-incrimination. With the assurance, we believe, as we have said, that the witness will have to answer questions, since his answers cannot incriminate him. If he then lies there is an opportunity to question him further to reveal the falsity of what he has said; if he remains silent, then inferences may be drawn from that fact. Without the assurance, neither of these things can be done.

It is then submitted that an assurance would not encourage a witness to make admissions implicating another person, since the assurance would not provide any protection for that other person.

To our minds this submission does not carry the matter any further. If there are good reasons for seeking an assurance, the fact that an assurance would not help in this instance is neither here nor there. Apart from this however, with an assurance a witness would have to answer (or risk inferences being drawn) in a case where his answer would implicate both himself and another. Without the assurance he could exercise his right.

The submission then continues by challenging the proposition that little if anything would be gained in the absence of an assurance. The hope is expressed that the Inquiry will not only establish the truth of the matter under investigation, but will provide sufficient evidence to pursue prosecutions for the serious offences that, according to the submission "*were undoubtedly committed on Bloody Sunday*". It is suggested that "*the provision of a blanket assurance of the kind contemplated may seriously hamper the pursuit of prosecutions since, by definition, none of the evidence given by the witnesses who receive such assurance will be available for use in any subsequent prosecution*".

On any view, the submission as stated is incorrect, for the assurance would only protect the individual giving the evidence from the subsequent use of that evidence against him.

The undertaking would have no effect on any subsequent prosecution of others. Apart from this, however, the submission seems to us to make the bold and to our minds unsustainable assumption that in the absence of an assurance, witnesses are likely to provide self-incriminatory evidence rather than exercising their human right to remain silent, for if the evidence they give is outside the wide ambit of the privilege against self-incrimination, then it will in truth be of little or no use in any subsequent prosecution against them.

In their next submission, the Wray family correctly point out that in the absence of an assurance, the Tribunal would have to be satisfied that any claim to privilege against self-incrimination was a proper

one and not a case where the danger (in the context this must mean of criminal prosecutions) was of an imaginary or insubstantial character. Again we agree, but in this Inquiry, where allegations of the most serious offences have been made and maintained for many years, where many (including the Wray family themselves) have made clear that they want those they believe to be guilty to be brought to justice, and where indeed through gunfire people died and were wounded, we do not believe that it can be seriously suggested that claims to privilege against self-incrimination are likely to be defeated on this ground.

The submission continues by pointing out that the privilege does not extend to evidence that would tend to incriminate others, so that in the absence of an assurance witnesses could be pressed to answer questions that might produce such evidence. Thus, it is said, evidence of value might be obtained which could be used in the subsequent prosecution of offenders other than the witness. All this is correct (as indeed we have pointed out when dealing with earlier submissions), but the providing of an assurance in no way prevents such evidence from being adduced. Indeed, as we have also pointed out above, it seems to us that with an assurance, witnesses may have to give evidence which, while tending to incriminate others would (but for the assurance) also incriminate the witness himself. Without the assurance the witness would be entitled to refuse to answer and so that evidence would be unavailable.

In paragraph 14 of their submissions the point is made that there has been no request from any witness for an assurance of the kind requested. This is not in the least surprising, since all witnesses enjoy the privilege against self-incrimination and so have no reason to make any such request. The point of the assurance is not to give witnesses additional rights, but to help the Tribunal to seek the truth.

In the same paragraph reference is made to a letter from the Treasury Solicitor to the Inquiry dated 4th August 1998 to the effect that they have no instructions from any of their clients that they will seek immunity. This latter point demonstrates the confusion that is likely to arise if the point under discussion is regarded as a kind of immunity, as we pointed out in July. The letter in question is referring to an immunity from prosecution. This is a different subject from that under discussion, which has nothing to do with immunity, but is concerned with the human right not to give self-incriminatory testimony.

There remains the suggestion that instead of seeking what has been described as a blanket assurance, an assurance should only be sought if and when requested by a witness, and then only if that witness provides full reasons for that request, including an outline of the nature and content of the evidence to be given and an explanation as to why that evidence cannot be given without the assurance; if the Tribunal is satisfied there is a proper reason for doing so which outweighed the

public interest in pursuing a prosecution; and if the parties represented at the Inquiry are given an opportunity to make submissions to the Tribunal on the desirability of seeking an assurance in the particular case.

In our view this suggestion is unacceptable for a number of reasons.

In the first place, as we have observed above, witnesses in general have no cause to seek such an assurance, protected as they are without it by the wide ambit of the privilege against self-incrimination.

In the second place, the suggestion is that the witness should in effect provide the very evidence in respect of which the assurance is sought. If the evidence would not tend to incriminate that witness, there would be no point in him asking for the assurance. If the evidence was self-incriminatory, then the witness has the right not to give it.

In the third place, if there was a witness who had self-incriminatory evidence that he wished to give but which he did not want to be used to incriminate him, then the so-called blanket assurance would cover this case, but the suggestion made would involve the witness having to take the risk of incriminating himself in an attempt to get the assurance, since his application might be refused. To our minds that would be tantamount to a breach of the human rights of that individual.

For these reasons we are unpersuaded by the submissions made on behalf of the Wray family that we should not adopt the course we suggested in July.

We now turn to the submissions made on behalf of the families of those who died and those of the wounded represented by Messrs Madden & Finucane.

In their letter dated 5th November 1998, which preceded their written submissions, this firm stated that they were anxious to know whether those representing the soldiers accepted the view we expressed in July that an assurance would preclude reliance on the privilege against self-incrimination.

We have not asked the representatives of the soldiers this question. It seems to us that this is a matter on which the Tribunal must now make up its own mind and proceed accordingly, having in July invited all concerned to make what submissions they wish on the subject, having considered those submissions, and giving, as we endeavour to do in this ruling, our reasons for our conclusions.

In their letter accompanying the submissions, Messrs Madden & Finucane expressed the view that before irrevocable assurances are given, the Tribunal would have wanted to ensure that the legal basis underpinning its provisional view was beyond meaningful challenge.

Interested parties can be assured that we have considered the legal position as carefully as we can. We have no doubt ourselves that the views that we have expressed are correct.

In the same letter we are asked to confirm that no witness has to date sought to exercise the privilege against self-incrimination. We are not aware of any such case, nor does this surprise us, since there is nothing to suggest that any of those we have interviewed to date run any real risk of prosecution. We have yet to start interviewing those some of whom may be (and on the contentions of those represented by Messrs Madden & Finucane are) in a different position.

As to the submissions themselves, in many places these seek to make the same points as made on behalf of the Wray family, and to which we would give the same answers. For example, in paragraph 4 the submission is that since damaging admissions are likely to be secured in cross-examination, an assurance may negate or make more difficult the bringing of successful criminal proceedings. Such a submission simply ignores the fact that without the assurance, the person concerned has the human right not to answer questions which may incriminate him; as well as ignoring the fact that an assurance will in no way impede criminal proceedings brought against another.

The submission continues by stating that servants and agents of the state who may have murdered innocent unarmed civilians should not be clothed by an assurance; with, as it is put, such "*special protection*".

In our view such submissions appear to demonstrate a failure to understand the purpose and effect of seeking an assurance.

The purpose of an assurance is to help the Tribunal to seek the truth while not infringing human rights, as we have explained above.

The effect of an assurance is that in its absence everyone (including servants and agents of a state) has the basic human right not to be compelled to give self-incriminatory evidence, however heinous the suspected crime may be. The assurance means that such persons are not justified in refusing to answer questions on the grounds that this human right would be infringed, for since there would be no risk that their answers could be used against them in criminal proceedings, their rights are not being infringed. The submission seems to proceed on the assumption that in the heat of cross-examination a witness (or his legal representatives) will overlook the fact that he has the

right not to make damaging admissions. This Inquiry is unlike a criminal trial, where if the defendant chooses to give evidence, he is treated by statute as having waived his privilege; and it may be that the apparent lack of understanding has arisen from overlooking this fact.

In our view reliance in the submissions on certain Articles of the European Convention on Human Rights and reliance on the authorities cited is equally misplaced. As we have said, this Inquiry is charged with the duty of trying to find out the truth about Bloody Sunday. It is not a Grand Jury, responsible for deciding whether grounds exist for prosecutions, nor does it have the power to recommend or to initiate any prosecutions for what happened on that day. Quite apart from this, however, we cannot accept that anything in the Convention or the authorities cited militates against seeking the suggested assurance, since this could only begin to have the effect suggested if indeed the assurance provided some "special protection". It does not. Instead it provides the Tribunal with a better means of performing its duty while protecting the human rights of those whose help it needs.

There remain the supplemental submissions made on behalf of the clients of Messrs Madden & Finucane and dated 13th November 1998. Our ruling is, as given above, that an assurance in the form set out above would preclude reliance on the privilege against self-incrimination, and that it is not appropriate for us to seek any form of confirmation of our views from those representing soldiers. We should point out that at present only a few soldiers are represented, so that even if we were now to seek confirmation, it would (if given) at best only bind those few. We should also point out that it is not within our power to prevent those who wish to do so from seeking to challenge our rulings elsewhere.

For these reasons, we are also unpersuaded by the submissions made on behalf of those represented by Messrs Madden & Finucane.

We should add this. The theme running through the submissions of those who oppose the seeking of an assurance from the Attorney-General seems to be that such an assurance would wrongfully prejudice the bringing of criminal proceedings against those the families and the wounded believe were criminally responsible for the deaths and injuries. We are not persuaded of this. Bearing in mind that it is our primary duty to seek the truth about what happened on Bloody Sunday, it seems to us that since we consider that an assurance would help us to perform that duty, we should seek that assurance. It is, however, for those responsible for deciding whether an undertaking should be given to consider whether in the public interest the Inquiry should proceed without what the Tribunal believes to be a valuable aid in the performance of its duty.

At a very late stage we received submissions from the British Irish Rights Watch and the Committee on the Administration of Justice in relation to (among other things) the question of the status of

evidence. These we have been able to consider, but for the reasons given in this ruling, we are unable to accept them. We should emphasise that in our view both these organisations are in error in describing the point at issue as one of “immunity” or “immunity from prosecution”. We are not recommending immunity from prosecution for anyone, nor do we accept that this will be the effect of an assurance. In our judgement it would be wrong and highly misleading to suggest the contrary.

In these circumstances we have decided that acting judicially and in accordance with proper principles we should seek an assurance from the Attorney-General in the terms of or to the same effect as the undertaking that we have set out above; and this is what we shall now do. We shall, of course, draw attention to what has been submitted to us, and to that end we shall enclose with our request copies of the submissions made to us and of this ruling.

Venue

The public hearings of the Inquiry will begin, as we intimated in the Opening Statement, in the Guildhall. However, as we also indicated in that Statement, some subsequent hearings may also take place in London. Those represented by McCartney & Casey have indicated that they would wish to make submissions opposing the hearing in London of evidence from the soldiers, while those representing certain soldiers have requested that any evidence from soldiers should be heard in London. We are prepared to consider further submissions on this question, provided (as we have already informed interested parties) they are sent to us by close of business on Thursday 3rd December 1998. We shall then distribute any further submissions to interested parties, giving them a further seven days in which to make any comments by way of response. We shall then consider the submissions and comments that we have received and make our ruling as soon as possible.

In this connection we should point out that if we were to decide to conduct any part of the public hearings in London, we would first have satisfied ourselves that proper facilities could and would be put in place to enable those hearings to be seen and heard as they happened on a suitably large video screen available to the public in the city where Bloody Sunday occurred. The legal representatives of interested parties would, of course, be expected to be physically present.

Experts

We have already retained a number of experts to assist us in our task. We trust that shortly we can issue their formal instructions, after having consulted interested parties.

Anonymity and privilege

We have received applications for anonymity and legal professional privilege. It is not possible yet to deal with those, since the process of receiving submissions and comments on submissions is not yet complete. We are anxious, however, to deal with these matters as soon as possible and have written to those concerned to ensure that this can be done. We shall, of course, make public in the ordinary way any rulings we make on these subjects.

Progress report

On 30 November we will publish a report of our progress since the hearing in July together with an outline timetable for the future. We are planning to start oral hearings on 27th September 1999.

Counsel's report

On 3 December we will also publish a report prepared by our Counsel of their researches on the material that they have been able to analyse to date. As that report itself makes clear, the views expressed are those of Counsel, and not the Tribunal, and are, themselves, preliminary and subject to change. The report does, however, set out the issues that our Counsel have identified as a result of the analysis that they have carried out to date. Insofar as it does so the interested parties (and any others concerned) should treat the report as notice from the Tribunal that such issues are likely to arise in the Inquiry and be considered by the Tribunal and prepare themselves accordingly.

A2.4: Ruling (17th December 1998): venue; anonymity for soldiers (overruled – items 43 and 44 below)

- 1 We are now able to give our rulings and observations on applications relating to the venue for oral hearings and on anonymity.

Venue

- 2 In our Opening Statement we stated our intention to begin the oral hearings of the Inquiry in the Guildhall. However, we also stated that we expected that some hearings would take place in London, since that appeared to be the most convenient course to take for some of those concerned.
- 3 The Treasury Solicitor, acting for some of the soldiers, has submitted that the oral evidence of his clients should be taken at hearings in London. This is opposed by those acting for the families of the deceased and for most of the wounded. We have also received submissions from the British Irish Rights Watch and the Committee on the Administration of Justice. They also oppose the application. The Treasury Solicitor has been given and has taken the opportunity to respond to this opposition and we have, of course, considered this response. We have also taken into account a submission from the Ministry of Defence related to the cost of taking the soldiers' evidence in the city where Bloody Sunday occurred. At a very late stage we received Supplemental Submissions from Messrs Madden & Finucane, but we did not find these of any assistance in reaching our conclusions on this matter.
- 4 From the point of view of personal convenience, it would doubtless be easier for many of the soldiers to give their oral evidence in London. In 1972 all or virtually all the soldiers involved were still in Northern Ireland, so that this question hardly arose. After a distance of 26 years only a handful of these individuals are still serving in the Army, and we recognise that a call to give evidence in Northern Ireland will require much more personal disruption than was the case in 1972.
- 5 In addition, it will be necessary to make appropriate security and accommodation arrangements. These arrangements may in themselves be more expensive than those for a hearing in London, but we are not persuaded that the overall costs of the Inquiry would be materially affected by holding hearings of soldiers' evidence in Northern Ireland.

- 6 In our view there is another major consideration to bear in mind.
- 7 This is the fact that we are investigating events which took place in a city a long way from London, events which led to people of that city being killed or wounded through the actions of soldiers who were there in an official capacity. Whatever the rights and wrongs of what occurred on Bloody Sunday, in our view the natural place to hold at least the bulk of the oral hearings is, in these circumstances, where the events in question occurred.
- 8 We have concluded on the information presently available to us that this factor, so far as the soldiers generally are concerned, outweighs personal convenience and the expenditure required to make appropriate security and accommodation arrangements.
- 9 In their submissions dated 9th December 1998, it seems to be suggested that the soldiers are already at a disadvantage because it will, in effect, be impossible for them to attend while those who are alleging that they committed murder are giving their oral evidence; so that to refuse to allow the soldiers to give evidence in London further tilts the balance of convenience unfairly against them. In addition, the point is made that the soldiers will not be able to follow the proceedings by video link and are unlikely to have access to daily transcripts, but at best will have to follow what is going on through the Internet.
- 10 We do not accept this submission. Those representing soldiers have accepted without challenge (and in our view correctly) that the civilians' evidence should be heard in the city where the events in question occurred. Hearing the evidence of the soldiers in London would not alter this state of affairs or its consequences. Furthermore, as we have repeatedly sought to explain, this is an inquisitorial inquiry and before oral hearings start all concerned will be given a proper opportunity to consider and prepare to deal with whatever allegations the Tribunal considers require an answer. This is not an adversarial proceeding and thus, for example, we shall not allow any interested party to keep oral (or indeed other evidence) in reserve in order to spring it by surprise in an adversarial fashion. Furthermore, we see no reason why those representing soldiers should not use to the full modern technology (not just the Internet) to keep those of their clients who wish it fully informed at all times of what is going on and to give advice to and receive instructions from those clients.
- 11 Accordingly, we are not persuaded that we should now rule that soldiers should give their oral evidence in London. On the contrary it seems to us that, as matters at present stand, and subject to changing circumstances and particular matters affecting individual soldiers, those who are called to give oral evidence should expect to give their evidence in the Guildhall. We shall not make a ruling to that effect now, since hearings involving soldiers are a long time ahead and meanwhile we want to keep the matter under review.

Changing circumstances and particular matters affecting individual soldiers may cause us to reconsider the matter.

- 12 All concerned have expressed a desire to see justice done. That is our desire as well. Justice can only be done and be seen to be done if the Inquiry is conducted in a calm and quiet manner, so that (among other things) all those who have relevant evidence to give have a proper and fair opportunity to be heard, without distraction or interference and without grounds for any concern save that they should speak the truth. We expect a hearing in the Guildhall to provide that opportunity. If for any reason our expectation turned out to be misplaced we would not hesitate to make other arrangements which (if justice required it) would include continuing our search for the truth elsewhere.

Anonymity

- 13 We now turn to the question of anonymity of witnesses. For convenience, we use the term “anonymity” not only in its strict sense, in which it denotes the withholding of a name, but also to cover any restriction on the disclosure of a witness’s address or other personal details, as well as concealment of his or her physical appearance.
- 14 In our rulings and observations published on 24th July 1998, we referred to the difference between inquisitorial and adversarial procedure and explained why it might be appropriate to grant a degree of anonymity to witnesses in certain circumstances. We summarised our approach in the following way:

“we will be willing to grant an appropriate degree of anonymity in cases where in our view it is necessary in order to achieve our fundamental objective of finding the truth about Bloody Sunday. We will also be prepared to grant anonymity in cases where we are satisfied that those who seek it have genuine and reasonable fears as to the potential consequences of disclosure of their personal details, provided that the fundamental objective to which we have referred is not prejudiced. As to the degree of anonymity that is appropriate, our current view is that restricting the disclosure of names and addresses ought to be sufficient in most, if not all, cases. We would regard the use of a screen as a wholly exceptional measure.

The obligation nevertheless remains firmly on those who seek anonymity of any kind to justify their claim. Applicants for anonymity must supply the Tribunal with a written explanation of the basis of their application, together with any material relied upon in support of it. Of course, unless and until the application is refused, the Tribunal will not

reveal any information in its possession, disclosure of which might pre-empt its ruling. Otherwise, however, and subject to any claim for public interest immunity, we propose to circulate any written applications for anonymity to all interested parties and to invite their submissions before making a ruling.

It is obviously important that these applications should be determined sooner rather than later, especially in view of the problems that delay will cause in respect of the distribution of documents containing the names of potential applicants for anonymity. The fact that so far only a few of the soldiers have been traced presents the practical difficulty that their instructions cannot be obtained until they have been found. Rather than waiting for them to be located, we intend to ask the Ministry of Defence to put forward any application for anonymity on their behalf, together with such submissions and evidence as it considers appropriate in relation to any continuing security risk to which they may be exposed.”

15

Since the publication of that ruling, we have received the following applications and submissions relating to anonymity:

- i. **Mr Anthony Lawton of the Treasury Solicitor’s Department** has applied on behalf of four senior officers for a direction that no information tending to disclose their addresses or telephone numbers should be disclosed. The officers concerned are Major General Ford, Brigadier MacLellan, Lt Col Wilford and Lt Col Steele. The names of these officers and the fact that they were involved in the events of Bloody Sunday have been public knowledge since 1972, and accordingly no question of restricting the disclosure of their names arises.

Mr Lawton has also applied on behalf of the other soldiers represented by him for a direction that no information tending to disclose their identities, occupations, addresses or telephone numbers should be disclosed to any person other than members of the Tribunal and its staff. At the time of the application the other soldiers represented by the Treasury Solicitor were the soldiers known during the Widgery Inquiry as O, U, V, 17, 112, 202 and 236. More recently, we have been notified by the Treasury Solicitor that he has instructions to act for two further soldiers. Pending our final decision on anonymity, we have allocated to one of these soldiers the code name INQ2. We deal with the case of the other below.

In his letter of 2nd September 1998, Mr Lawton stated that the principal basis for these applications was that his clients “*believe that they and their families would be at risk of being killed if their identities and whereabouts were revealed*”.

- ii. **The Ministry of Defence** has provided a submission on behalf of all soldiers who are potential witnesses but who are not currently represented before the Inquiry. The Ministry of Defence has asked us to withhold the names and addresses of these soldiers from disclosure beyond the members of the Tribunal until such time as the individual soldiers or their representatives can address us on their personal circumstances.

This application is founded on the risk to the physical safety of the soldiers that, in the Ministry of Defence's submission, will be created by disclosure of their names and addresses.

- iii. **The Home Office** has provided us with an assessment by the Security Service of the level of threat to the soldiers. The Ministry of Defence relies on this threat assessment in support of its application.

According to the threat assessment, military witnesses to the Inquiry will, if their names are revealed, face a "moderate" threat from dissident republican terrorists, which would be likely to increase in the event of an increase in the overall threat from such groups to targets in Great Britain. The existing "moderate" threat to those whose names are already public knowledge is not considered likely to increase solely as a result of their attendance before the Inquiry.

- iv. **Mr Treacy, counsel instructed by Madden & Finucane** on behalf of the majority of the next of kin and the injured, delivered submissions in response to the applications made by Mr Lawton and the Ministry of Defence. Mr Treacy's original position was that the applications for anonymity should be rejected in their entirety. In later submissions, however, Mr Treacy has said that his clients do not seek disclosure of the addresses or telephone numbers of military witnesses.

Mr Treacy submits that the withholding of the names of military witnesses would compromise the Tribunal's fundamental objectives and would diminish public confidence in the Inquiry.

- v. We have received submissions from Lord Gifford QC and Mr Macdonald, instructed by **McCartney & Casey** on behalf of the Wray family. They argue that the Tribunal should not accede to any request for non-disclosure of names, but they accept that the Tribunal should not disclose addresses or telephone numbers, unless this proves to be necessary in order to clarify a witness's identity.

Counsel for the Wray family argue that the granting of anonymity would hinder the Inquiry and undermine public confidence in it, and that the evidence put forward in support of the applications for anonymity does not demonstrate a level of risk sufficient to justify withholding soldiers' names.

- vi. Further submissions have been delivered to the Tribunal by **British Irish Rights Watch** and the **Committee on the Administration of Justice**. We understand that these are two independent organisations concerned with human rights issues in Northern Ireland. They are not represented before the Inquiry, but we are nonetheless grateful for the interest that they have shown on the issue of anonymity and we have taken their submissions into account.

British Irish Rights Watch submit that there would be no real risk to any of the soldiers if their names became known, and that in general anonymity ought not to be granted. However, they recognise the possibility that it might be justifiable to grant anonymity in individual cases for compelling reasons, such as where an applicant could show that he had received specific, recent threats relating to Bloody Sunday from a source capable of carrying them out. They accept that the interests of justice would not be frustrated by withholding the addresses and telephone numbers of witnesses concerned about their personal safety.

The Committee on the Administration of Justice also accepts that it might be necessary to grant anonymity in a small number of cases, but argues that this should be done only in exceptional circumstances where objective justification is demonstrated, and only to the extent absolutely necessary.

- vii. Copies of all of the applications and submissions referred to above have been distributed to the legal representatives of the interested parties. As a result, we have received submissions in reply from Mr Glasgow QC, Mr Lloyd Jones and Mr Bools, on behalf of Mr Lawton's clients, and from the Ministry of Defence.
- viii. We should record that a small number of soldiers have contacted the Inquiry directly and indicated that they wish to apply for anonymity. We have not yet invited submissions from the interested parties on these applications and, with one exception, we do not propose to deal with them in this ruling. The reason for taking this course is explained below.

In this ruling we are concerned only with the applications on behalf of soldiers or former soldiers to which we have referred above. If in due course any non-military witnesses make applications for anonymity, we will give them separate consideration.

- 17 One matter arising at the outset is Mr Glasgow's submission that, in relation to soldiers who gave evidence to the Widgery Tribunal, the issue with which we are concerned is not the granting of anonymity but its withdrawal. He does not contend that we are formally bound by any decision of the Widgery Tribunal. He submits nevertheless that there should be a presumption in favour of anonymity, because a number of the soldiers made statements and gave evidence before Lord Widgery "*after receiving assurance that anonymity would be preserved*".
- 18 We are not persuaded by this submission. We do not know by whom or in exactly what terms this assurance is supposed to have been given. It seems to us that we can assume no more than that the soldiers understood and expected that their names would not be divulged in the course of the proceedings before Lord Widgery. We are not aware of any reason to believe that an assurance was given that their names would never be disclosed by anyone. Accordingly, we treat these as fresh applications for the grant of anonymity and we start with no presumption that the existing de facto anonymity should be preserved.
- 19 As we have indicated, the applications for anonymity proceed upon the second of the two bases referred to in our July ruling, namely that the soldiers have genuine and reasonable fears as to the potential consequences of disclosure of their personal details. The particular concern identified is as to their own and their families' personal safety. We must therefore begin by considering whether or not it has been demonstrated that the soldiers' fears in that regard are genuine and reasonable.
- 20 The obvious difficulty that we face here is that at present only 13 soldiers are actually represented before the Inquiry. The Ministry of Defence has made general submissions in the interests of the remainder of the soldiers, but clearly has not been in a position to inform the Tribunal about the particular fears, or grounds for fear, of individuals.
- 21 Despite the apparently small number of soldiers who have obtained representation, the Tribunal is currently making substantial progress with the tracing exercise and we anticipate that very many more soldiers will acquire representation over the coming weeks. Some of them may prove to have specific personal circumstances bearing upon the question of anonymity in their cases. As we explain below, we intend to arrange matters in such a way that, provided that they act without undue further delay, they will have an opportunity to bring special circumstances of this kind to our attention before any step is taken which would prejudice their anonymity.

- 22 Even in the case of Mr Lawton's clients, no grounds relating to the specific circumstances of particular individuals have been advanced. Instead, Mr Lawton submits that "*the universal perception of the soldiers that they are at risk is manifestly reasonable*" and says that if the Tribunal is not prepared to grant his clients' application he will seek leave to make further submissions in camera. As to this last point, we would draw attention to our Opening Statement, in which we said that we would require very strong grounds indeed before agreeing to exclude the public from any part of the Tribunal's proceedings.
- 23 For the present, therefore, we can deal only with the general position as set out on behalf of Mr Lawton's clients, and in the Ministry of Defence's submissions, supported by the Security Service threat assessment. If these demonstrate that the disclosure of names and other details would give the soldiers objective reason to be fearful for their own or their families' safety, we might properly conclude that individual soldiers are in fact likely to have genuine and reasonable fears in that regard.
- 24 At this juncture we should make it clear that no one suggests that any of the families or the wounded would take part in, or support or condone, any unlawful reprisals against the soldiers. The only threat under consideration is that said to be presented by republican terrorist groups. As to this, British Irish Rights Watch say in their submissions that "*Republicans of all persuasions, including those dissidents who currently remain active, would respect the victims' views*". But we do not know how they can be sure that this is so.
- 25 The Security Service threat assessment acknowledges that the threat of terrorist attacks by the Provisional IRA (PIRA) is currently low, but argues that there is a continuing risk of attacks by republican dissidents, whose targets would not be significantly different from those formerly favoured by PIRA. It notes that republican terrorists have long regarded the military as a legitimate target, and it says that these groups retain the materiel and personnel to mount attacks in Great Britain. The Continuity IRA, the only republican terrorist group not currently on cease-fire, has not yet mounted attacks on the mainland, but the possibility of it doing so "*cannot be discounted*". PIRA has been observing a cease-fire since July 1997, but has so far maintained the capability of returning to violence should it decide to do so.
- 26 We are prepared to accept the general proposition that some terrorist groups remain capable of carrying out attacks both in Northern Ireland and in Great Britain, and that no one can be sure that future circumstances will not occur in which they choose to do so. However, it is another question whether, even if this were to happen, soldiers or former

soldiers who were involved in the events of Bloody Sunday would be likely to be selected as targets.

- 27 The author of the assessment refers to the “*importance of ‘Bloody Sunday’ in republican history*” as a reason for believing that there would be a real risk to military witnesses if anonymity is not granted. Counsel for the next of kin of James Wray take issue with this description, arguing that it is a misconception to think of Bloody Sunday as being of importance only to republicans. For our part, we do not suggest that the significance of Bloody Sunday was limited in that way. But we have to recognise that the actions of the Army on that day have always been a matter of exceptional controversy in many quarters, including among others the republican movement.
- 28 Nevertheless, there is virtually no material before us that demonstrates the extent, even prior to the paramilitary cease-fires, of any specific risk to former soldiers or their families arising from their previous involvement in controversial events in Northern Ireland. Mr Lawton’s application mentions that General Ford at one time received a written threat and that a letter bomb was intercepted by his bank. But we do not know when these incidents occurred, nor whether there was any evidence to link them directly to Bloody Sunday. The threat assessment refers to the interception in April 1998 of a vehicle-borne explosive device at Dun Laoghaire, and to the arrest in London on 10 July 1998 of three individuals, alleged to be members of a dissident republican group, who have since been charged with conspiracy to cause explosions. But, as counsel for the Wray family point out, there is nothing to show that the intention in either of these cases was to attack individual soldiers or ex-soldiers. In fact, they submit, there is no indication that individual soldiers have been targeted in recent years or that any soldier has ever been attacked specifically as a result of having given evidence in any proceedings. They say that many soldiers have in the past given evidence in controversial trials in Northern Ireland without anonymity. This has not been contradicted, although we know that there have also been trials in which anonymity has been allowed, subject where necessary to limited disclosure of the names to counsel for the opposing party.
- 29 In our view these submissions have real force. We acknowledge, as we have said, that exceptional controversy surrounds Bloody Sunday, so that the history of other incidents would not necessarily be a reliable guide in the circumstances of this case. We recognise also that patterns of terrorist activity change from time to time, and that future developments are never certain. Even so, we think it fair to say that the evidence of a continuing threat to soldiers who may be called as witnesses before this Inquiry is general as opposed to specific. Perhaps of necessity, it amounts to informed speculation

as to what could happen, instead of a more concrete prediction based upon specific past experience.

- 30 None of this is intended to suggest that the fears expressed by Mr Lawton's clients are not genuine, or that other soldiers not yet represented may not genuinely believe themselves to be at risk. On the contrary, it is easy to understand how the soldiers who have not hitherto been named are likely to feel generally apprehensive about the potential consequences if their anonymity were to be lost. Moreover, in the light of the threat assessment, we are not prepared to castigate that general fear as unreasonable. We accept that the capability retained by republican terrorists and the uncertainty of the future provide a degree of objective justification for the soldiers' fears. We consider, however, that the evidence of risk, viewed objectively, is limited and unspecific.
- 31 Having decided, albeit subject to these qualifications, that there is some rational basis for the soldiers to be fearful, we must consider, in accordance with the principles we set out in our ruling in July, what if any kind of anonymity would be appropriate in the circumstances. In addition, before granting anonymity of any kind, we must be satisfied that we can do so without prejudicing our fundamental objective of establishing the truth about what happened on Bloody Sunday. We propose to address this latter question first.
- 32 The submissions opposing the granting of anonymity put forward various grounds for the contention that anonymity, at least in the strict sense, would prejudice the fulfilment of the Inquiry's objectives. The main points that have been made are as follows.
- 33 It is said that if a witness is permitted to remain anonymous, he will feel insulated from effective criticism and will be more likely to give untruthful evidence. We agree that a witness who has been guilty of discreditable conduct is likely to feel more comfortable giving evidence anonymously than he would if his name were known. We accept that it is no part of our function to shield such witnesses from embarrassment or disgrace. But it does not seem to us obvious that the effect of this sense of reduced vulnerability would be to increase the temptation to commit perjury. There is a real possibility that it would, at least in some cases, have the opposite effect of encouraging greater candour. It would certainly be a serious mistake for any soldier to suppose that non-disclosure of his name would give him any protection in this regard. The Tribunal will have the names and addresses of all witnesses. Our counsel will cross-examine witnesses thoroughly in order to test their evidence. And granting anonymity for the purposes of this Inquiry would have no effect on any future criminal proceedings.

- 34 Then it is said that there may be witnesses who have made previous statements to others that are inconsistent with their evidence to this Inquiry. Anonymity might prevent those others from coming forward to tell the Tribunal what they know, because they might not appreciate its significance unless the witness in question is named publicly and they read about his evidence. In our view, the likelihood of this happening is slim and should be given only marginal weight in the present context. We would of course encourage anyone to whom an admission or self-incriminatory statement has been made in the past by someone involved in Bloody Sunday to come forward and contact the Tribunal. However, it seems to us improbable that the prospects of their doing so will be materially improved by publishing the names of the soldiers.
- 35 Another point that has been made is that a witness's name and address is the starting point for an investigation of his or her credibility. This is true, and as we said in our ruling in July, it is one of the main reasons why in adversarial proceedings the courts require particularly strong grounds before allowing anonymous testimony. Here, however, the force of the argument is diminished, because the Tribunal itself will take steps wherever appropriate to investigate the credibility of witnesses.
- 36 A related argument is based on the entitlement of those who are accused of wrongdoing to know the identity of those who make allegations against them. The relatives of the dead and the injured correctly point out that the soldiers have accused those who were killed and wounded on Bloody Sunday of having been carrying firearms or bombs. They submit that they are entitled to know the names of those who make these allegations. Although we give some weight to this factor, again we consider that it is offset to a significant extent by the inquisitorial nature of these proceedings, in which no one is being prosecuted and the Tribunal itself has responsibility for investigating allegations and the credibility of those who make them.
- 37 It is clear that the families of the deceased and the injured would like to see prosecutions brought against soldiers who in their view were guilty of serious offences on Bloody Sunday. If that were to happen, the names of the defendants would in the ordinary way become public. The position would not be affected by any grant of anonymity for the purposes of this Inquiry, because the prosecuting authorities would still be able to ascertain the true identity of the soldiers concerned.
- 38 It has also been submitted that to use letters or numbers instead of names would give rise to difficulties in analysing and cross-referencing the evidence and that there would be a material risk of mistakes in the redaction of documents. But we think that the need to

use letters or numbers would be at most an administrative inconvenience. We are not persuaded that it would in itself interfere with the work of the Tribunal.

- 39 None of the factors to which we have so far referred is, in our view, sufficient to demonstrate that the granting of anonymity would prejudice the fundamental objective of the Inquiry. We attach considerably greater weight, however, to another factor, which appears in the submissions only in the form of an argument that to grant anonymity would diminish public confidence in the Inquiry by creating the impression that the true facts are being concealed.
- 40 We see the point of substance as being not the maintenance of public confidence as such, but rather the proper fulfilment of our public duty to ascertain what happened on Bloody Sunday. An intrinsic part of that task is the investigation of the actions of individual soldiers on the day, which in our view encompasses not only what they did, but also who they were. We do not think that this makes it axiomatic that the name of every soldier involved should be disclosed, no matter what his individual circumstances might be. Even a code letter or number provides a degree of identification, in the sense that it distinguishes the witness concerned from all others involved. To restrict the disclosure of the actual names of a few soldiers, for sound reasons, would not in our view substantially impair our investigation of the facts. But we are satisfied that, if anonymity in the strict sense were to be allowed on a widespread or blanket basis, that would represent a material derogation from the Tribunal's public investigative function.
- 41 The same does not apply to addresses or other personal details such as occupations or telephone numbers. Unlike names, these form no part of the facts under investigation, and we do not think that we would prejudice our objectives by restricting the disclosure of this information in appropriate cases. The concealment of a witness's appearance raises different issues, but we do not consider that further in this ruling because there has been no application for permission to use a screen. It will be recalled that we stated in our ruling in July that we would allow this only in exceptional circumstances.
- 42 We turn now to consider whether any, and if so what, degree of anonymity is appropriate, having regard to our views as to the nature and extent of the risk, and our rejection of widespread or blanket anonymity, in the strict sense, as being incompatible with the Tribunal's fundamental objectives. We have previously made clear that, because anonymity represents a departure from the principle of open justice, it will only be appropriate if and to the extent that a clear justification is demonstrated.

- 43 As will be apparent from what we have said, there is a measure of consensus that there is no need for the addresses or other personal details of the soldiers, apart from their names, to be disclosed. This is a matter on which we must form our own view, but we are in fact satisfied that it is appropriate to allow military witnesses to withhold these details if they are fearful that by revealing them they will expose themselves or their families to the risk of attack. In particular, we bear in mind that the current addresses, telephone numbers and occupations of witnesses are of no relevance to the events of Bloody Sunday.
- 44 The application for names to be withheld creates for us a much more acute dilemma. For the reasons we have given, we have reached the view that it would be wrong in principle to give a general dispensation allowing all military witnesses to give evidence without revealing their names. Moreover we believe that this would, in the majority of cases, be going further than is justifiable or appropriate in circumstances where there is no concrete evidence of a specific threat. It seems to us that in the generality of cases the witnesses concerned will be sufficiently protected by the non-disclosure of their other personal details.
- 45 We have anxiously considered whether there are, or may be, any particular cases in which anonymity in the strict sense should be granted. One category, which might arguably qualify for different treatment, consists of all soldiers who fired live rounds on Bloody Sunday. Since those soldiers alone must, between them, be directly responsible for killing and wounding all those who were killed or wounded by Army gunfire on that day, we think that they would have more compelling and substantial grounds than others for believing themselves to be at risk.
- 46 At the same time, it has to be recognised that these are the very soldiers whose conduct lies at the centre of this Inquiry. To allow this group to remain entirely anonymous would be a step that we would find difficult to reconcile with our public duty to determine what happened on Bloody Sunday.
- 47 The conclusion we have reached is that, subject to what we say below about special factors relating to individuals, it would be justifiable to permit those in this category only a limited form of additional anonymity, under which their surnames will be disclosed but their forenames will not. It seems to us that this is the best available solution to a difficult problem, because it will create a significant extra element of assurance for these individuals as regards their personal security, without having any material adverse effect on the fulfilment of our task. As to the former point, if the surname is even moderately

common, it will be extremely difficult to locate an individual on the basis of that name alone. As to the latter point, we do not think that the forenames of those involved represent a critical element of the facts that we are required to determine. In addition, we believe that by disclosing the surnames of these soldiers, we will avoid giving them or others the false impression that they are immune from any effective public scrutiny, or from criticism should it prove to be justified. It will of course be open to any soldier to waive the anonymity granted to him if he so desires.

- 48 A separate issue is the possibility of special factors in individual cases. We have in mind here that particular soldiers, whether or not currently represented, may be able to advance special reasons which demonstrate that they are at greater risk than others and that the level of anonymity that they would receive under the principles outlined above would be inadequate. For example, a witness currently living in Northern Ireland might persuade us that he should be allowed to give evidence anonymously. Or a witness with a particularly unusual surname might persuade us that he should not have to disclose it because it will make his whereabouts readily discoverable. We would stress that these are only examples, and that everything will depend on the circumstances of the individual cases. But we think it right to give those to whom special considerations may apply the opportunity to put them forward. It must be understood, however, that we will entertain these applications only on the basis that they are justified by the special personal circumstances of the applicant. We do not propose to alter our basic approach to the issue of anonymity.
- 49 We referred earlier in this ruling to the requests for anonymity received directly from a small number of soldiers. With one exception, these requests raise no issues of general principle. We propose now to notify these soldiers of this ruling. If there are grounds for them to argue that special factors apply in their cases, they will have the opportunity to do so in the same way as others. If the soldiers concerned agree that no special factors apply to them, there will be no need to consider their individual applications any further.
- 50 No risk exists to the personal safety of soldiers who have died since Bloody Sunday, and the prospect that the surviving relatives of a deceased soldier would be sought out and attacked by way of revenge for Bloody Sunday seems to us somewhat remote. However, we think it only fair that, before we release the names of any soldiers who have died, we should try to contact their next of kin and give them an opportunity to make a special reason application if so advised. We propose to do this as soon as possible, although it will inevitably take some time to establish with certainty which soldiers have died and to locate their next of kin.

- 51 We should also say that the Home Office has offered to provide threat assessments for individuals in any case in which that would be helpful to the Tribunal. We will take up this offer in dealing with any applications based on special factors if we consider that an individual threat assessment would assist us.
- 52 Where anonymity of any kind is granted, our intention is to prevent the name or other relevant details from reaching the public domain, rather than to restrict the dissemination of information that has already become public. If it becomes clear to us that the name or other details of any of the soldiers who have been granted anonymity are in fact public knowledge, so that any continuation of the restriction would be pointless, we will lift the restriction.
- 53 In this context, we must mention that the submissions on behalf of the next of kin of James Wray include a list of what are said to be names of soldiers that are already known. There are 24 names on the list, including those of the five senior officers who gave evidence to Lord Widgery without anonymity. As to the remainder, the names of those numbered (iv), (v), (xiv) and (xv) in the list appear in the transcript of the Widgery Inquiry. These four include the client of Mr Lawton to whom we referred in paragraph 15(i) above. The list also contains the name of another client of Mr Lawton, Soldier 236, who has been named as the officer commanding Support Company on many occasions since 1972. We find it impossible to see how Soldier 236, or any of those whose names appear in the Widgery transcript, could possibly derive any benefit from a restriction on the disclosure of their names in the course of this Inquiry. Accordingly, in these five cases, which include the exception referred to in paragraphs 15(viii) and 49 above, we decline to impose any such restriction. Nor will we permit any application based on special reasons in these cases, since for better or worse the identities of these individuals are already in the public domain.
- 54 As to the other 14 names on the list in the Wray family's submissions, we do not think that it is appropriate for us to confirm or deny at this stage the accuracy of the information given. The reason for this is that it is not always clear to us from what source the information has been obtained, or whether those who compiled the list are in a position to match the names to the code letters and numbers used at the time of the Widgery Inquiry. We cannot therefore be sure that anonymity has been completely lost or that a continued restriction would necessarily be pointless.

- 55 We add that Mr Glasgow expressed strong objection to the fact that this list was put before the Tribunal at all. He describes it as “*inappropriate and mischievous to publish names in this way and at this time*”. Although we understand his concern, we do not think that this criticism is justified. There is no evidence to suggest that any of the information in the list was obtained by unlawful or improper means, nor that the publication of these names contravenes any legal restriction. The purpose of putting the names before the Tribunal was to demonstrate that no useful purpose would be served by permitting these witnesses to give evidence anonymously. We think that this purpose was legitimate.
- 56 A further point which appears from the submissions on behalf of the Wray family is that there may be instances in which the names of the soldiers prove to be of direct and immediate relevance to the facts into which we are inquiring. The prime example here is that of Mr Joseph Mahon, one of those wounded on Bloody Sunday in or around Glenfada Park. We understand that Mr Mahon will say that he heard one of the soldiers being referred to as “Dave”. If that is his evidence, it is very likely to become necessary for the interested parties to be told which, if any, of the soldiers who were in Glenfada Park had that name.
- 57 If satisfied that it is necessary in a case of this kind, we will be prepared to allow forenames to be disclosed, even where otherwise they would not be because of our decision to grant a limited degree of anonymity to those who fired live rounds on Bloody Sunday. Equally, if a similar situation were to arise in relation to a soldier to whom we had granted anonymity for special reasons, we would have to consider whether the restriction on the disclosure of the soldier’s name should be removed or modified. We would not, however, make any such exceptions unless persuaded that it was clearly necessary to do so, and we would give all concerned an opportunity to make representations to us before taking any decision of this kind.
- 58 We turn now to practicalities. Until statements are taken from the military witnesses, we will not know which soldiers, apart from those known to Lord Widgery as A to Z (excluding I and W) and AA to AD, admit to having fired live rounds on Bloody Sunday. For this reason, and also because of the possibility of applications based on special factors, it will not be possible for us to release the names of any of the soldiers immediately, except in so far as we do so in this ruling by refusing anonymity in five individual cases. However, after the military witness statements have been taken, we will release the witness statements, which will bear the actual names of the soldiers save to the extent that anonymity has been granted. At that stage we will also make available, again save to the

extent that anonymity has been granted, documentary material containing the names of soldiers, which has hitherto been released only in redacted form.

- 59 It is of considerable importance that any applications based on special reasons should be brought forward as soon as reasonably possible. We wish to have all issues of anonymity finally resolved by the time we have completed the taking of the main body of military witness statements. Any applications made after that are likely to be too late, and we will not hold up the publication of statements or documents containing soldiers' names in order to cater for the possibility of late applications.
- 60 It will be appreciated that instances may arise when publication of the details or grounds of the application to interested parties or otherwise would defeat the very purpose of the application itself. Subject to this we intend to circulate applications to interested parties for their comments before making a ruling, but we may not do so if on an initial review of the application we are satisfied that it should be refused. It follows that those making applications should do their best to ensure that they are prepared in a form in which they can be provided to the interested parties without defeating the purpose of the application. The Solicitor to the Inquiry will if necessary provide guidance as to how this may be done. Where appropriate, and depending on the circumstances, it may be possible for details that cannot be revealed without defeating the purpose of the application to be supplied to the Tribunal in a separate letter.
- 61 The following is a summary of the decisions that we have reached:
- i. We will withhold from publication the addresses, telephone numbers and other personal details of all military witnesses, apart from their names, unless they inform us that they are content that this information should be published.
 - ii. We will impose no restriction on the publication of the names of Soldier 236 or of the soldiers whose names appear in the transcripts of the Widgery Inquiry.
 - iii. We will allow to any soldier who admits that he fired one or more live rounds on Bloody Sunday a limited form of anonymity, under which his surname will be published but not his forenames. However, it will be open to such a soldier, or his next of kin if he is now dead, to apply for full anonymity if there are special reasons that make it necessary.
 - iv. We will not restrict the publication of the names of any other soldiers unless they, or their next of kin if they are now dead, satisfy us that there are special reasons which make such a restriction necessary.

- v. We will be prepared to lift or modify the restrictions imposed under the principles set out above if circumstances arise in which names or other restricted information prove to be of direct and immediate relevance to our factual investigation. But we will only do this if and to the extent that we are satisfied that it is clearly necessary.
- vi. We will also be prepared to lift the restrictions imposed under these principles if we are satisfied that the restricted information is in fact in the public domain.
- vii. Special reason applications must be made as soon as reasonably possible and are likely to be too late if they are made after the completion of the military statement-taking exercise. We will (subject to what we have said in paragraph 60 above) circulate them to the interested parties before ruling on them.
- viii. We will not immediately release the names of any of the soldiers, except in so far as we do so under (ii) above, because of the need first to ascertain which soldiers admit that they fired live rounds, and because of the possibility of special reason applications. In due course, however, we will release witness statements and other documents containing the names of soldiers, without redaction save to the extent that anonymity has been granted.

A2.5: Ruling (18th December 1998): submissions relating to Report No 1 of Counsel to the Tribunal

- 1 Messrs Madden & Finucane, representing the families of most of those who died and those who were wounded on Bloody Sunday, have sent us submissions signed by Counsel in respect of Report No 1 by Counsel to the Tribunal. These submissions contain what is described as an objection in principle to this Report and also set out the grounds for that objection.
- 2 The Tribunal has considered these submissions and rejects them in their entirety. In the view of the Tribunal, the submissions disclose not only a disappointing failure properly to understand the object of the Report, but also a continuing failure to accept that (as we made clear in the Opening Statement) this is an inquisitorial Inquiry which has the duty of seeking the truth with fairness, thoroughness and complete impartiality.
- 3 The first objection made to the Report is that "*Counsel to the Tribunal ought not to usurp the role of the Tribunal itself by forming and disseminating preliminary conclusions.*"
- 4 There is no question of Counsel usurping the role of the Tribunal. For the sake of thoroughness, fairness and impartiality we must look at what was said to the Widgery Tribunal. The Report contains (so far as we are aware) the most complete and detailed analysis to date of an important part of that evidence. The so-called "preliminary conclusions" are, as the Report makes clear, of a wholly tentative kind, open to revision or rejection in the light of other evidence, including evidence as to the credibility of the evidence put before Lord Widgery. The whole point of Counsel's Report, as was made clear in the Report itself, is to permit interested persons either to find fault in the analysis or otherwise to contribute or add to it. The Report was published in accordance with the stated intention of the Tribunal to keep everyone informed of what we are doing. The Tribunal itself has reached no conclusions, preliminary or otherwise, nor does it intend to do so at this stage, which is indeed why it asked Counsel to undertake the analysis. The oral evidence given to the Widgery Tribunal, both by civilians and soldier witnesses, was chosen as the first material for analysis because it was available in its entirety. Analysis of the written NICRA statements was deferred because many of those who gave NICRA statements are in the process of giving much fuller, and in many cases

clearer, evidence to the Inquiry, making it sensible to consider the written NICRA statements and the statements given to Eversheds as a whole.

- 5 The second objection is that *“To form any preliminary conclusions at this stage is dangerous when no-one, including Counsel to the Tribunal, has had an opportunity to review all the presently available evidence.”*
- 6 This objection shows clearly that those making it have simply failed to understand the object of the exercise. The Report does not attempt to analyse the Widgery evidence in the light of new evidence for the very reason that the new evidence is as yet far from complete. However, if no proper analysis were attempted of the Widgery evidence as it stands, we would be failing in our duty to act with thoroughness. Furthermore, without that analysis, it would not be possible properly to assess that evidence in the light of new evidence.
- 7 The third objection is that *“To form preliminary conclusions merely on the basis of some of the material which was before Widgery is a fatally flawed approach especially in view of the extent to which the original Widgery Tribunal and its findings have been discredited.”*
- 8 This objection is misconceived. The analysis is not based on the Widgery findings, but on an important part of the evidence presented to that Inquiry. The submission seems to contain an assertion that this part of the Widgery evidence should be treated as discredited. It is thus itself based on a conclusion (not even expressed as preliminary) reached before all the evidence has been considered. The submission accordingly begs one of the most important issues in the Inquiry. Counsel’s Report makes clear that it is dealing with the evidence as it was given almost 27 years ago. The Report does not reach any conclusion as to whether other material will discredit that evidence.
- 9 The fourth objection is that *“In arriving at his preliminary conclusions Counsel to the Tribunal has not considered the NICRA statements, which although available to Widgery, were disregarded by him – this replicates a fundamental error made by Widgery and one which has been subject to sustained criticism since.”*
- 10 The Report clearly states that it does not deal with the NICRA statements and explains why it did not do so. The suggestion that the NICRA statements are being disregarded is simply false and must be known to be false, since as all are aware we have devoted great efforts to tracing as many as possible of those who gave statements to NICRA and have asked for their further help. We are pleased to record that as a result we have been

receiving invaluable assistance from hundreds of local people. As soon as this exercise is complete we will be analysing everything that these witnesses have said in the past as well as what they have said to us.

- 11 The fifth objection is that “*Counsel to the Tribunal has taken no account of, inter alia, Professor Walsh’s report, which has been available to the Inquiry for many months and which shows compellingly that soldiers’ evidence was unreliable. On the contrary he bases his analysis on those soldiers’ evidence.*”
- 12 Once again this submission demonstrates that those making it have failed to understand the Report, which makes no claims as to the reliability or unreliability of the evidence of the soldiers other than to point out that, assuming the evidence to be broadly accurate, a number of deaths appear to be wholly inexplicable, which in turn casts doubt on the validity of the assumption. Whether or not the evidence is unreliable on the grounds set out in Professor Walsh’s report, of which the Tribunal and its Counsel are well aware, is a separate matter that we shall of course be addressing in the course of the Inquiry. Once again, however, this submission proceeds on the basis of a firm conclusion reached before considering the whole of the evidence, and is also defective for that reason alone.
- 13 The sixth objection is that “*to issue preliminary conclusions at this stage on incomplete and flawed material diverts the energies of the parties from reviewing the new and newly disclosed material and gives the appearance of prematurity, superficiality and selectivity to the work of Counsel to the Tribunal.*”
- 14 The submission, in its reference to “*flawed material*”, once again begs one of the most important questions in this Inquiry. It is precisely in order to lay the ground for considering whether this material is indeed flawed that the analysis has been carried out. Apart from this, to describe as premature, superficial and selective a Report of over 100 pages, which clearly sets out its objectives, which carefully summarises and analyses a mass of contemporaneous evidence more thoroughly than we believe has ever been done before, and which in our view provides an essential tool for beginning the process of assessing the evidence, is quite unjustifiable. It would be impossible properly to review new material without such an analysis of what was said at the time, which has led to the identification of a substantial number of important issues, as well as areas which may be common ground. The exercise was also essential in order to inform interested parties as soon as possible of issues affecting them that might arise in the course of the Inquiry.

- 15 One of the purposes of the Report was to invite interested parties to indicate whether Counsel's summary of the effect of the evidence to which the Report relates was inaccurate in any way and whether there were inaccuracies in any of the material intended for use at the hearing, such as the Tribunal plan. In paragraph 7 of the submissions we are told that an outside stairwell at the south-eastern corner of Glenfada Park South is not included on the plan. We are grateful for this information.
- 16 This paragraph continues by saying that "*the Tribunal should in our view investigate the provenance and history of this 'error',*" as well as correcting it. The use of inverted commas indicates that it is suggested that the omission of a stairwell from the plan was not an error but a deliberate and presumably reprehensible choice on the part of somebody. Until the grounds for making such a suggestion are stated, the Tribunal is not disposed to consider embarking upon any such investigation.
- 17 The submissions conclude by stating that the Report is not accepted as either accurate or helpful for the reasons given. Apart from the reference to an outside stairwell at the south-eastern corner of Glenfada Park East, no other inaccuracy was noted in the submission. If, as is inferred, there are other inaccuracies, we should like them to be disclosed to us, either by those making the submission or by other interested persons.
- 18 We are bound to record publicly our disappointment at the content and tone of these submissions, which appear to us to reflect a continuing intention to engage in an adversarial contest rather than to assist us in carrying out our task of trying to discover the truth about Bloody Sunday. Apart from the information concerning the plan, the submissions do not advance the Inquiry at all.
- 19 The statement that the Report is not accepted as accurate is simply unhelpful. The Report itself requests all those concerned to respond to it, by among other things identifying any errors in the analysis. A blanket rejection by those who have clearly not even attempted a similar exercise is neither helpful nor consistent with the oft declared aim of seeking the truth.
- 20 The statement that the Report is not helpful is simply wrong, for the reasons that we have stated.
- 21 The families of those who died and those who were wounded (as well as all others concerned) are entitled to a thorough, fair and wholly impartial Inquiry into Bloody Sunday. They are not being well served by submissions of this kind. In these circumstances we invite a response to the Report that will assist the Inquiry.

A2.6: Ruling (22nd February 1999): home addresses

- 1 This is a ruling in respect of an application made on 2nd December 1998 by Messrs Desmond J Doherty & Co on behalf of certain clients who have given statements to the Tribunal, for the addresses of those clients not to be made public. By letter dated 3rd February 1999, the application was clarified by explaining that it "*was solely to ensure that the home addresses did not appear on the Internet*".
- 2 Notice of the application was given to interested parties. Mr Lawton, representing certain soldiers, gave it "*unqualified support*". Mr McCartney, representing the James Wray family, agreed that the addresses need not appear on the Tribunal's Web Site. This agreement was subject to "*the strict condition*" that the addresses of all witnesses be made available to all interested parties except as set out in their counsel's 12th November 1998 submission concerning the anonymity of witnesses. In that submission, it was conceded that there was no need to disclose soldiers' addresses and telephone numbers as such "*particulars have no relevance to the issues to be canvassed at the Inquiry*". Apart from the responses of Mr Lawton and Mr McCartney, the Tribunal received no other response to the application.
- 3 This application was made on the basis that these witnesses felt vulnerable because of where they lived. In particular, one client had previously received "*a number of threats from certain organisations*" that caused concern. We were informed by the letter of 3rd February that the threats received by that one person occurred in 1972.
- 4 We are not persuaded that the expressed fears about personal security would justify the application were it to relate to matters relevant to the subject matter of the Inquiry. However, we have no reason to suppose (nor has anyone suggested otherwise) that the current addresses of these witnesses (which of course are known to the Tribunal) are or are likely to be of any such relevance. In our view, therefore, the application can be supported on the simple basis that since the addresses are of no relevance, we should respect the very limited request for privacy that has been made.
- 5 As to the "*strict condition*" suggested by Mr McCartney, we would merely observe that we propose to deal with any other similar applications as and when they arise. Accordingly we are not disposed to lay down any such condition, but merely to repeat our publicly

stated intention of making public everything of relevance to the subject matter of the Inquiry, unless there are compelling reasons for not doing so.

- 6** We accordingly grant the application by directing that the addresses of the clients of Messrs Desmond J Doherty & Co should not be published on the Inquiry's Web Site.

A2.7: Ruling (30th April 1999): production of material by Peter Taylor

Submissions by the BBC

- 1 At the hearing on Monday, 26th April, the BBC and Mr Peter Taylor made submissions to us as to why we should not order production of material which would tend to identify Mr Peter Taylor's confidential sources of information gathered by him as part of his research for the documentary *Remember Bloody Sunday*. That documentary was made by Mr Taylor and broadcast by the BBC on 28th January 1992.
- 2 It appears from the outline argument submitted to us in advance of the hearing, and from the course of the argument at the hearing itself, that there was and could be no objection to the production to the Inquiry of documents embodying information that the BBC and Mr Taylor have in their possession relating to Bloody Sunday ("informative material") insofar as that material does not, also, contain material tending to identifying Mr Taylor's confidential sources ("source material"). The real issue was whether Mr Taylor and/or the BBC should be ordered to produce source material.
- 3 We propose to postpone our ruling on the question of production of source material until after we have received all the informative material, which is not also source material. This is because we cannot rule out the possibility that the content of such material may be relevant to the balancing exercise that we shall have to perform under section 10 of the Contempt of Court Act of 1981.
- 4 Accordingly, we require the BBC and Mr Taylor to provide to us all the informative material relating to *Bloody Sunday* which is not, also, source material. The material which we require will include:
 - (1) material that is, in the view of the BBC and Mr Taylor, already in the public domain;
 - (2) completed transcripts of filmed interviews of people who were not interviewed against an assurance that they would not be identified; or who have waived any right of confidence they might have;
 - (3) transcripts of filmed interviews of persons who were interviewed against an assurance that they would not be identified – redacted to such extent (and only to such extent) as is necessary to ensure that the transcript, as redacted, does not tend to identify the source;

- (4) the contents of Mr Taylor's notebooks and notepads. Insofar as those contents contain information from persons who were not interviewed against an assurance that they would not be identified, the notebooks and notepads should be produced in full, unless to do so would reveal some other person as the source of information given in confidence. In the latter case, the same type of redaction as is referred to in (3) should be made. Insofar as the notebooks and notepads contain information from persons, who were interviewed against an assurance that their identity would not be revealed, a similar redaction should, also, be made.

As to (1), we do not wish to put the BBC or Mr Taylor to unnecessary trouble. We expect that most of the material that they have and which they believe to be in the public domain, is material that the Inquiry has as well. But the material in the public domain is sizeable and we cannot assume that the Inquiry already has all the material to which the BBC and Mr Taylor are referring. We suggest that, in the first instance, they list the material that they have in this category in order that the appropriate check can be made. There may be equally effective, but different, means of ensuring that there is no such material in the possession of the BBC/Mr Taylor which the Inquiry does not have. We would be prepared to accept any reasonable means of achieving the desired end.

- 5 The documentary programme *Remember Bloody Sunday* was preceded by a long article in the *Sunday Times* of 26th January 1992, entitled "Bloody Sunday: An Open Wound". This article contained information gathered from Mr Taylor's researches. A chapter headed "Bloody Sunday" in Mr Taylor's book, *Provos: The IRA and Sinn Fein* also contains material relating to Bloody Sunday. The material to be produced to the Tribunal should include informative material, which is not also source material, from the researches made for those two publications. We understand that the same body of research led to all three publications. But, if there is any distinction between the three, that is not a reason for not producing the relevant material in respect of all of them. In addition paragraph 7 of Mr Taylor's statement indicates that he took over a project that had already begun, although he did not use any of the existing research. The material to be produced should include that research (redacted as necessary).
- 6 The material to which we have referred to above is material to which section 10 of the 1981 Act does not apply. The Inquiry's request for information has been outstanding since 30th August 1998. In those circumstances, we are justified in imposing a short time scale for the production of the material. We require it to be produced by Monday, 17th May.

- 7 We propose to circulate the material, once received, to the interested parties. We may invite them to make any brief further submissions, in the light of that material, as to whether or not we should order disclosure of sources. Since, by definition, the material will not identify sources, there cannot be any grounds for failing to publish it.

A2.8: Ruling (5th May 1999): applications for anonymity (overruled in part – items 45 and 46 below)

The soldiers' applications for anonymity

- 1 In December last year the Tribunal made rulings on applications by and on behalf of soldiers for anonymity in the Inquiry. In summary the Tribunal decided that, subject to special individual circumstances, the names of the soldiers (but not their present addresses or other personal details) should be made known, though this was limited to surnames in the case of those soldiers who admitted firing live rounds on Bloody Sunday.
- 2 Four of the soldiers who fell within this latter class successfully applied to the English Courts to set aside this ruling. In its judgment the Divisional Court concluded that the Tribunal had:
 1. Misunderstood the nature and extent of the anonymity granted to the applicants by Lord Widgery in 1972, by wrongly concluding that it was not a factor to be taken into account at all;
 2. Created the impression in a statement made in July last year that if a soldier satisfied the Inquiry that he had a genuine and reasonable fear of the potential consequences of disclosure of his personal details then his name and address would not be disclosed, but then ordered otherwise notwithstanding that such a fear existed;
 3. Misinterpreted the Threat Assessment provided by the Security Services, by concluding that the threat was less than it in fact was;
 4. In its July statement indicated what those seeking anonymity should try to prove (namely a genuine and reasonable fear of reprisals), but then relied in its ruling on the absence of concrete evidence of specific threats without making clear that there was a requirement for such evidence; and
 5. Accepted that all soldiers probably had reasonable and genuine fears and that those who had fired live rounds had more compelling and substantial grounds than others for believing themselves at risk, yet granted to that limited class a form of anonymity (i.e. surnames only) for which no one had contended and the safeguarding effects of which were at best a matter of speculation.

- 3 The Tribunal accepted the judgment of the Divisional Court on all but the first of these points. As to this point the Tribunal appealed unsuccessfully to the Court of Appeal.
- 4 In these circumstances those acting for the soldiers renewed their applications for anonymity. The Tribunal decided that these should be considered on the basis of new written submissions and with oral submissions from all interested parties at a hearing at the Guildhall. This hearing took place on 26th and 27th April.
- 5 It should be noted at this point that the question is whether the names of the soldiers should be made public. As the submissions were developed at the oral hearing it seemed to us that no one was suggesting that the addresses or other personal details of the soldiers should be made public, since there is no reason to suppose that this information has any relevance to the Inquiry.
- 6 The renewed applications relate not merely to those soldiers who fired live rounds on Bloody Sunday, but to all soldiers (with the exception of four named officers) who were involved in Bloody Sunday. The basis for renewing all these applications is that although only five of the soldiers who fired live rounds obtained the setting aside of the December ruling, the reasoning of the Courts applies (in whole or in part) to all. With one qualification we accept that this is so and accordingly propose to reconsider the merits of all the renewed applications. The qualification relates to those soldiers whose names and involvement in Bloody Sunday are already in the public domain. In these cases (i.e. those we identified in the December ruling) we can see no purpose in the application.
- 7 It seemed to us that we must approach these applications entirely afresh, though of course taking into account the rulings and guidance given by the Courts. In this regard, however, the soldiers have advanced a submission that the Statement made by the Tribunal last July has given rise to a substantive legitimate expectation that those soldiers who establish a genuine and reasonable fear of reprisals would, in the absence of new compelling evidence or reasons (or, in another formulation, unless the fundamental objective of the Inquiry could not be achieved), be granted anonymity. The soldiers point to the fact that in our December ruling we accepted that the soldiers probably did have genuine and reasonable fears, and submit that since there is no new compelling evidence or reasons to displace the legitimate expectation that they say was created, nor any suggestion that the fundamental objective of the Inquiry could not be achieved, it would be unfair to depart from the test laid down by the Tribunal last July. It is in this sense, as we understand it, that the soldiers submit that it would be incorrect for us to look at the matter entirely afresh.

- 8 We cannot accept this submission. In its ruling the Divisional Court described what it called the “*imbalance*” between the July statement and the December ruling as a “*procedural impropriety*”. It is clear from the context that the Court was applying this description to points 2), 4) and 5) as set out above. In essence, what the Court said was that the Tribunal had acted unfairly by giving the impression in July (albeit inadvertently) that proof of genuine and reasonable fear would suffice and then in December, without giving proper notice or an opportunity to make further submissions, by applying a different test. If indeed the July Statement had created the legitimate expectation now contended for, the Divisional Court could hardly have described what happened in the way that it did, nor say, as it did at the end of its judgment, that “*it was clear from the information before us that there are powerful arguments both ways*” which they expressly left it to the Tribunal to determine. In other words, the Divisional Court did not hold that we were precluded on the information then available from applying a different test, but only that we had erred in not giving due notice that we proposed to do so.
- 9 If the Tribunal had continued to give the impression that those soldiers who established a genuine and reasonable fear would be granted anonymity in the absence of new compelling evidence or reasons, then we would accept unreservedly that it would be wrong and unfair of us to adopt a different test. However, the December ruling itself demonstrated that the Tribunal was merely taking such fears into account as one of the relevant factors to be considered. Furthermore, in a letter dated 22nd March 1999, which went to all interested parties, the Tribunal made it expressly clear that, among other things, the soldiers “*should not assume that a genuine and reasonable fear of reprisals on the part of the soldiers who fired live rounds will have the necessary or likely consequence that those soldiers will be entitled to total or any anonymity*”. From this date, therefore, if not earlier, it must have been apparent that there could no longer be any reliance upon the impression given last July, since even those who the Tribunal had regarded in December as having the most compelling and substantial grounds for believing themselves at risk (i.e. those who had fired live rounds) were told not to make any such assumption.
- 10 It was also submitted on behalf of the soldiers that what was described as the criteria laid down last July survived (at least as a legitimate expectation) until the Tribunal issued new criteria, and that since this had not happened, the letter of 22nd March carried the matter no further forward. This cannot be right. The purpose of asking for new submissions and of arranging an oral hearing was to enable all concerned to make full submissions on what the correct criteria should be. In the circumstances it would indeed have been unfair

to all if, in advance of those submissions, the Tribunal had in effect decided the very point at issue. As it is the soldiers, and indeed all the interested parties, have been given the opportunity to make new submissions on the matter and to answer those with which they disagree. It is on the basis of those submissions and answers that the Tribunal reconsiders the applications. As the Tribunal stated in the letter of 22nd March in relation to those who fired live rounds, it will consider the position afresh in the light of the decision of the Divisional Court [and now, of course, the Court of Appeal] and of the submissions and evidence put before it, without any predisposition to reach either the same or a different decision as that which it reached before. As the letter put it, “*Afresh’ means exactly what it says.*”

- 11 The Tribunal has as its fundamental objective the finding of the truth about Bloody Sunday. It regards itself as under a duty to carry out its public investigative function in a way that demonstrates to all concerned that it is engaged in a thorough, open and complete search for the truth about Bloody Sunday. It is this duty which, although we believe it was apparent from earlier statements of the Tribunal, was not, in the view of the Divisional Court, made clear in the context of what the Tribunal said about anonymity in the July Statement. All interested parties accept the existence of this duty, which to our minds stems not so much from the fact that Tribunals of the present kind are only established where Parliament considers that there is a matter of “*urgent public importance*”, nor from the fact that section 2 of the Act of 1921 requires us to sit in public (unless the public interest otherwise requires) but rather from the more fundamental principle of open justice in a democratic society.
- 12 In our view the existence of this duty entails that in the absence of compelling countervailing factors, those who give evidence to the Tribunal should do so under their proper names. This after all is an inquiry into events in which people lost their lives and were wounded by British Army gunfire on the streets of a city in the United Kingdom. To withhold the names of those in the Army who were concerned with that event must detract from an open search for the truth about what happened; and must need justification of an overriding kind. It is of course correct to bear in mind (as we said in December) that it is unlikely that the Tribunal would be hampered in its objective of finding the truth about Bloody Sunday by granting anonymity (since the Tribunal is an inquisitorial body and would itself know the identity of the witnesses), but this does not really take the matter much further forward, since what is presently at issue is the question of the duty laid on the Tribunal as to the manner in which it should seek that

objective. The Tribunal must conduct what Lord Justice Salmon described in his report (1966 Cmnd 3121 at paragraph 28) as a “*public investigation*”.

- 13 We note that in his judgment in the Court of Appeal, Lord Justice Otton suggested that we might reconsider the fairness of imposing the obligation “*on those who seek anonymity of any kind to justify their claim*”, and that it might be fairer “*to impose the obligation on those seeking to remove the anonymity (rather than those seeking to sustain it) and to satisfy the tribunal that there is no real or significant risk or some other formula that is less onerous to the soldiers*”. In this connection we should make clear that we are not making the present ruling on the basis of who has the burden of proof, but rather on the basis of seeking to balance the various relevant factors. However, we are bound to say that in our judgement, it is not open justice that needs to be justified, but rather any departure from open justice. If justice cannot be done if it is open, or if there are other matters that mean that open justice would cause a greater injustice, then of course a departure would be justified, for these would be compelling countervailing factors.
- 14 We thus turn to consider whether there are any such factors. It is convenient to consider first the question of the anonymity granted to soldiers by Lord Widgery in the course of his Inquiry into Bloody Sunday.
- 15 As suggested by Lord Justice Otton in the Court of Appeal, the Inquiry has conducted further investigations into the circumstances in which anonymity was granted on that occasion. The results of these investigations have been made known to the interested parties and Counsel to the Tribunal summarised them during the course of the oral hearing. The only record of Lord Widgery’s agreement to afford anonymity remains that contained in paragraph 8 of his report, in which he said: “*Since it was obvious that by giving evidence soldiers and police officers might increase the dangers which they, and indeed their families, have to run, I agreed that they should appear before me under pseudonyms. This arrangement did not apply to the senior officers, who are well-known in Northern Ireland.*” However, according to a statement recently obtained from Lieutenant Colonel Overbury, who describes himself as being at the time the legal officer in the Army’s Tribunal team with responsibility for all the legal aspects, including questions concerning the obligations and rights of all the Army witnesses, some of the soldiers concerned were suffering a loss of morale under the pressure of public attention and their apprehension about giving evidence and “*it was therefore necessary for me constantly to repeat to them all, collectively and individually, my absolute assurances as to the officially promised anonymity and the guarantee of their freedom to speak without risk*”. The guarantee to which Lieutenant Colonel Overbury refers would appear, from the rest of his

statement, to be a reference not so much to the grant of anonymity, as to the fact that the soldiers had been ordered to give evidence so that what they said could not afterwards be used against them in criminal proceedings. Be that as it may, it appears to us that what Lieutenant Colonel Overbury says is consistent with the sworn testimony of Soldier “H” put before the Divisional Court.

- 16 On the basis of that testimony, the Divisional Court, whose judgment was upheld by the Court of Appeal, held that the effect of what has become known as “the Widgery assurance” was that “*subject to some compelling unforeseen circumstance, so long as there was any danger of reprisals being taken against him or his family because he fired live rounds on Bloody Sunday, no-one in authority would do anything that would enable anyone to attach his name to that of a soldier previously identified only by letter who gave evidence before the Widgery Tribunal in 1972*”.
- 17 This part of the judgment is, strictly speaking, only referable to the soldiers who fired on Bloody Sunday, but we agree with those representing the soldiers that its reasoning must also apply to all who obtained the Widgery assurance.
- 18 Given that this is so, the first question that arises is whether there is some compelling unforeseen circumstance, for if so, the Widgery assurance would fall away.
- 19 Those acting on behalf of the families of those who died on Bloody Sunday and those that were wounded submitted before us that the present Inquiry is such a circumstance. We agree with that submission. That the present Inquiry could not have been foreseen in 1972 cannot be and has not been denied. We know of no other case where notwithstanding the report of one Inquiry another is instituted by Parliament with substantially the same terms of reference and with the object, as the Prime Minister put it, that “*the truth be established and told*”. It is clear that the present Inquiry has been instituted because the previous Inquiry did not succeed, for whatever reason, in achieving the general objective of inquiries under the 1921 Act. This objective is, as Lord Justice Salmon said in his report, to restore public confidence where a crisis in that confidence has occurred (see 1966 Cmnd 3121 at paragraph 28). Indeed, there is a substantial body of responsible public opinion to the effect that the Widgery Inquiry, so far from restoring public confidence, compounded the crisis. We consider that our ability to restore confidence will be undermined, unless we can form a wholly independent judgment, based on the facts before us, on the question of anonymity – and indeed on any other questions that we have to consider.

- 20 Even if we are wrong about the meaning of “*some compelling unforeseen circumstance*”, it is clear from the judgments both of the Divisional Court and of the Court of Appeal, that the present Inquiry is not bound by the Widgery assurance, but must weigh it in the balance when considering the question of anonymity. On this basis, it seems to us that, although it is an important consideration, it does not of itself, or together with the other matters relied upon by the soldiers, amount to a compelling countervailing factor that should override our duty as we have stated it. In this context it seems to us we can properly take into account not only the matters discussed in the previous paragraph, but also the fact that the circumstances in which Lord Widgery came to provide the assurance are markedly different from those that exist today. The soldiers were in Northern Ireland. Numbers had been killed. There was a great degree of civil unrest. Revenge was in the air. During the Widgery Inquiry itself there was an attack on the barracks of the Parachute Regiment at Aldershot in which people died, and which was publicly announced by the terrorists as a reprisal for Bloody Sunday. No one could seriously suggest that the present position is in any way comparable. Of course no one knows what the future may hold, and the bad days may return, but whether or not they will is at best a matter of speculation.
- 21 The basic submission made on behalf of the soldiers is that they do have a genuine and reasonable fear of reprisals were their names to become public and that this is particularly so in the case of those soldiers who fired live rounds on Bloody Sunday. They further submit that the reasonableness of this fear is reinforced by the latest threat assessment obtained from the security services, which is to the effect that since October 1998 (when the previous assessment was supplied) the threat of reprisals in Great Britain has increased from what is described as the “moderate” level to what is described as the “significant” level, within a classification of six levels of threat of which “moderate” and “significant” are respectively the third and fourth.
- 22 It seems to us that the soldiers have grounds for their assertion that they have genuine and reasonable fears. The question is whether these grounds are of sufficient substance to amount to such a compelling countervailing factor that it would be right for us to depart from our duty as we understand it. In this connection we see great force in the submission made by Lord Gifford QC that we should concentrate upon what we perceive to be the degree of danger if the soldiers’ names are revealed. A reasonable fear of reprisals can exist if there is any degree of danger, but the greater the danger the more compelling this factor becomes in the balancing exercise we have to perform.

- 23 We undoubtedly have a very difficult judgment to make and we have considered with the greatest care that we can muster all the written and oral submissions made to us. On the one side is our duty to carry out a public investigation; on the other the understandable fears for their personal safety and that of their families, which we accept that the soldiers have. In our December ruling we attempted to square the circle by suggesting that those who had the greatest reason to fear reprisals (the soldiers who fired live rounds on Bloody Sunday) could give their surnames only, thus providing both openness and a measure of security, but this attempt has failed on the grounds that the security of surnames only was speculative. No one now suggests that this is an appropriate solution. The conclusion that we have reached is there is in fact no way of satisfactorily reconciling the two considerations; and that the one must give way to the other. After the most anxious consideration we have concluded that on the basis of the material presently before us our duty to carry out a public investigation overrides the concerns of the soldiers and does so even if the Widgery assurance continues to apply; and that accordingly the present applications of the soldiers must fail. However, on the same basis as we set out in our ruling in December, we shall consider further the question of anonymity if it is suggested that there are special reasons in any particular cases why we should do so. In this connection we are not persuaded by the suggestion that such applications cannot be made without defeating the purpose of making them.
- 24 We fully appreciate that the removal of anonymity is permanent and that it is possible that in the future the threat to the soldiers may increase, though as we have said, whether this will happen is itself necessarily speculative. We also appreciate that in the context of deciding where the soldiers' evidence will be heard we have postponed any final decision because circumstances might change, but the difference between that case and this application is that (as the Courts accepted) we must deal now with the applications for anonymity, whereas our duty finally to decide where the evidence of the soldiers will be taken still lies in the future and thus can properly be left over for the time being.
- 25 As we have noted, the latest threat assessment would put the soldiers in the "significant" category, though as the assessment points out, this is an assessment made on a general basis and not by looking at the circumstances of any particular soldier.
- 26 According to this assessment, the threat in the significant category extends to all serving or former soldiers, who are to be regarded as "priority" targets, though the attractiveness of soldiers as targets within this category is greater in the case of members of the Special Forces and senior officers who served in Northern Ireland. The assessment continues by saying that "*in the case of soldiers who had fired live rounds on Bloody Sunday, our*

assessment is that their actions at that time would make them also stand out from the generality of soldiers and to face a higher likelihood of terrorist attack, if they were identified". Turning to the categories identified by the Inquiry, the assessment lists in order of attractiveness as targets: (1) current or former soldiers; (2) current or former soldiers from the Parachute Regiment; (3) soldiers or ex-soldiers who took part in Bloody Sunday; and (4) soldiers or ex-soldiers who fired live rounds on Bloody Sunday.

- 27 We accept that on the basis of this assessment and the other material provided to us by the Ministry of Defence, identified soldiers are in greater danger than unidentified soldiers, for the obvious reason that if a soldier is unidentified as such there is only, as the assessment puts it, a potential as opposed to an actual threat. However, we do note that all serving or former soldiers fall within the "significant" category, so all are "priority" targets. It seems that it is only those who fired live rounds on Bloody Sunday who stand out, or stand out significantly, from the generality of soldiers. As to this generality, it seems to us that since there must be many soldiers or ex-soldiers whose names have been publicised or whose identities could readily be discovered (for example from regimental or similar magazines such as the one shown to us during the hearing), the danger created by identifying soldiers is one that is borne and has for many years been borne by hundreds, if not thousands, of serving or former soldiers, and is not such as to override our duty to conduct a public investigation.
- 28 That leaves those who fired live rounds on Bloody Sunday. As to these there is a further consideration, which we pointed out in our December ruling. This is that the conduct of these soldiers lies at the very heart of this Inquiry. It is the firing on the streets that was the immediate cause of loss of life. It is that loss of life that we are publicly investigating. To conceal the identity of those soldiers would, as it seems to us, make particularly significant inroads on the public nature of the Inquiry. As a group they are assessed as more attractive targets than the generality of soldiers and thus face a higher likelihood of terrorist attack if they were identified, but this increased threat is not considered sufficient, at least at present, to move them from the "significant" to a higher category. On the basis of the general assessment, we have concluded that the danger to the soldiers who fired live rounds on Bloody Sunday does not outweigh or qualify our duty to conduct a public open inquiry.
- 29 There is a further consideration that it seems to us we can properly take into account. Immediately after Bloody Sunday, as we have already noted, a reprisal attack was carried out on the Aldershot Barracks of the Parachute Regiment. After this, and with the possible exception of General Ford, there is (at least on the material before us) no evidence to suggest

that over the following 27 years any of the soldiers involved in Bloody Sunday has been the subject of attacks for that reason, though of course large numbers of soldiers (and civilians) have been attacked and killed or injured. The names of a number of soldiers involved in Bloody Sunday are known (though not necessarily any of those who fired live rounds), or could have been identified without undue difficulty from public records, so that on any view the general anonymity of the soldiers does not provide a full explanation for the fact that (with the possible exception noted above) none of them has been the subject of an attack because of involvement in Bloody Sunday. Of course we appreciate that some at least of those whose names are or could be known may have been taking special precautions, but the fact of the matter is that (so far as we are presently aware) the danger they have been under as the result of Bloody Sunday has not resulted in any deaths or injuries.

- 30 Once again, however, we should make clear, as does the threat assessment, that consideration of individual circumstances may lead to the conclusion that in particular cases the danger is greater, and if that is so then of course we shall reconsider the question in those cases.
- 31 We have considered whether it would be appropriate to grant anonymity at the present stage, while reserving the right to reconsider the position when we came to make our report. In this connection it is accepted that if we were to conclude that any particular soldier was at fault, that consideration would be a relevant factor to take into account in deciding whether or not to withdraw anonymity from that soldier. We have decided not to take that course, for to do so would in our view derogate for no good or sufficient reason from our duty not only to report what we believe to be the truth, but also to conduct an open and public investigation.
- 32 A further point was advanced by Sir Allan Green QC, Counsel for Soldier "H". This was based on the fact that at the previous Inquiry the justification given by this soldier for firing a large number of rounds was expressly disbelieved by Lord Widgery and that the account given by this soldier, which in a recent affidavit he has maintained is the truth, has been the subject of extremely unfavourable comment in a number of published works about the Widgery Inquiry. It is suggested that these circumstances make Soldier "H", were his name to be revealed, particularly vulnerable.
- 33 We are not persuaded by this submission. It seems to us to be speculative, especially in view of the fact that accusations of serious wrongdoing have been made against all or virtually all the soldiers who fired live rounds. On the material presently before us, we would not regard the danger to Soldier "H" as being in a significantly different category from that of the other soldiers who fired live rounds.

- 34 Finally we should observe that we have borne in mind what in our December ruling we described as the real possibility that, in at least some cases, anonymity would have the effect of encouraging greater candour. In our view, this factor, alone or taken with the others, is not sufficient to override our duty to carry out a public investigation.
- 35 For these reasons, the renewed applications of the soldiers fail. Those who admit firing live rounds on Bloody Sunday are to be treated in the same way as the other soldiers; but apart from this, the summary of our decisions which appears at the end of our ruling in December stands and is now repeated as part of the present ruling. For the sake of convenience, that summary now reads as follows:
- i. We will withhold from publication the addresses, telephone numbers and other personal details of all military witnesses, apart from their names, unless they inform us that they are content that this information should be published.
 - ii. We will impose no restriction on the publication of the names of Soldier 236 or of the soldiers whose names appear in the transcripts of the Widgery Inquiry.
 - iii. We will not restrict the publication of the names of any soldiers unless they, or their next of kin if they are now dead, satisfy us that there are special reasons which make such a restriction necessary.
 - iv. We will be prepared to lift or modify the restrictions imposed under the principles set out above if circumstances arise in which names or other restricted information prove to be of direct and immediate relevance to our factual investigation. But we will only do this if and to the extent that we are satisfied that it is clearly necessary.
 - v. We will also be prepared to lift the restrictions imposed under these principles if we are satisfied that the restricted information is in fact in the public domain.
 - vi. Special reason applications must be made as soon as reasonably possible and are likely to be too late if they are made after the completion of the military statement-taking exercise. We will (subject to what we said in paragraph 60 of our December ruling) circulate them to the interested parties before ruling on them.
 - vii. We will not immediately release the names of any of the soldiers, except in so far as we do so under (ii) above, because of the possibility of special reason applications. In due course, however, we will release witness statements and other documents containing the names of soldiers without redaction, save to the extent that anonymity has been granted.

The RUC application for anonymity

- 36 The RUC originally made an application for anonymity for five officers, but at the oral hearing Mr Ritchie, appearing for the Chief Constable, informed us that he was in a position only to make submissions for those described as Officers “A”, “B” and “C”.
- 37 The application was that the names of these officers should not be made public and that each should be permitted to give oral evidence, if called upon to do so, screened from the public though not from the Tribunal or the legal representatives of interested parties.
- 38 Mr Ritchie accepted that the names of these officers were or would inevitably become public knowledge, because of what has already been disclosed during the course of this Inquiry before the RUC intimated that they wished to make an application for anonymity. In his words “*it is the putting the face to the name mischief we are trying to avoid*”. In these circumstances, it seems to us that little purpose would be served by giving these officers pseudonyms, and that the question is whether the limited form of screening requested is justified.
- 39 We approach the application in the same way as we have approached the application made by the soldiers. The central question therefore is whether there are compelling countervailing factors in these cases sufficient to displace our duty as we have described it.
- 40 In our judgment those factors exist in these three cases. The security assessment provided to us for the purpose of considering the soldiers’ application relates to the situation in Great Britain and deals with the soldiers on a group as opposed to an individual basis, whereas the officers in question are in Northern Ireland and the assessment that we have received from the RUC of the situation there deals with them individually. The effect of that assessment is to our minds that in the view of those responsible for considering the risks in relation to these specific individuals, the life of two of the three officers concerned would, because of the nature of their work, be in special danger were they to be recognised. As to the third officer, he too is regarded as being under a special threat of personal danger were he to give evidence in the view of the public. The evidence is that he has already been specifically targeted by republican terrorists in the past, and indeed that on one occasion his home was attacked with an explosive device. In those circumstances, and bearing in mind that there has been a recent attack on a police station in West Belfast, it seems to us that this officer’s genuine and reasonable fears of reprisals were he to be recognised have very considerable

substance. In all three cases, therefore, it seems to us that the level of danger is such as to outweigh the need (if any of the officers are required to give oral evidence) for them to be visible to the public and thus justifies the limited degree of screening sought.

- 41 It remains to say that although the application in respect of the remaining two officers was not advanced at the oral hearing, we would consider it unfair to refuse it for that reason, though if it is to be pursued this must be done without further delay.

A2.9: Ruling (12th October 1999): anonymity for soldiers; public interest immunity; experts; disclosure of confidential sources of information by various media; procedure in respect of allegations

- 1 During the week commencing Monday 27th September 1999 we heard oral submissions on several matters and we can now make a number of further rulings and observations.

Anonymity

(a) Soldiers who fired or who are alleged to have fired live rounds

- 2 The Court of Appeal has now reversed the decision of the Tribunal given in May and has ordered that those soldiers who accept that they fired live rounds on Bloody Sunday or who are alleged to have done so should be granted anonymity by the Tribunal.
- 3 It is clear from the judgments of the Court of Appeal (and indeed from the majority judgments in the Divisional Court which the Court of Appeal approved) that this decision only relates to the situation as it presently exists and does not prevent the Tribunal from reconsidering the question of anonymity in the future, for example if it became apparent that the grant of anonymity was impeding the Tribunal in its search for the truth, or at the stage of producing its report. It is also clear that the decision does not relate to those soldiers whose identity is clearly already in the public domain or who do not wish to be treated anonymously. Furthermore, it is accepted by Counsel acting on behalf of the family of Soldier T (who is deceased) that the decision cannot at present extend to him, since there is at present no evidence that his family have reasonable grounds to fear for their safety should his name be published. The same must apply to other deceased soldiers.

- 4 On this basis therefore we now rule that all living soldiers whose identity is not already clearly in the public domain and who admit firing live rounds on Bloody Sunday or who are alleged to have done so, shall not without their consent be identified in the course of the proceedings of this Inquiry unless the Tribunal directs or rules otherwise. As is implicit in the decision of the Court of Appeal, the Inquiry may itself, of course, identify soldiers to others if this is necessary for the purpose of seeking the truth about Bloody Sunday, for example in order to trace possible witnesses or to take meaningful statements from witnesses. Subject to this, our ruling means that the identity of these soldiers cannot be disclosed to interested parties or otherwise in the course of the proceedings of this Inquiry and that all concerned will have to take great care to preserve this anonymity, by not disclosing the names, addresses, telephone numbers or other personal details of these soldiers.
- 5 If any question arises as to whether the identity of any particular soldier otherwise covered by this ruling is clearly in the public domain, the Tribunal will rule on the matter, but until it does so that soldier will be treated as being entitled to anonymity.
- 6 For the time being deceased soldiers who would otherwise be covered by this ruling will also be treated as being entitled to anonymity. The Tribunal will obtain security assessments in respect of the families of those soldiers and will also consider any submissions on anonymity from those families if these are made within a month from the date of this ruling, before deciding whether these deceased soldiers should continue to be anonymous. Any such submissions must be presented in the form specified in our previous rulings so that all interested parties can, to the greatest extent possible, be given an opportunity to comment on them.

(b) Soldiers who did not fire or who are not alleged to have fired live rounds

- 7 Counsel for those soldiers who have not admitted firing live rounds on Bloody Sunday or who are presently not alleged to have done so have submitted to us that the reasoning of the Court of Appeal applies with equal force to non-firing soldiers, so that although the previous ruling of the Tribunal in respect of those soldiers was not reversed by that Court (which was only dealing with soldiers who fired), nevertheless the Tribunal must itself now reverse that ruling. Although strictly Counsel could speak only for those soldiers they represent, the submission must apply to all soldiers in this category.
- 8 We have concluded that we have no option but to accept this submission.

- 9 The Court of Appeal held that *“the right approach here once it is accepted that the fears of the soldiers are based on reasonable grounds should be to ask if there is any compelling justification for naming the soldiers, the evidence being that this would increase the risk.”*
- 10 The Court of Appeal decided that there was no compelling justification in the case of the soldiers who fired, notwithstanding that in the view of the Tribunal it was the conduct of these soldiers that lay at the heart of the Inquiry. It seems to us that it follows that there is either a lesser or at least a no greater justification for those soldiers who did not fire, nor has anyone to date suggested that their conduct is of equal or greater importance.
- 11 We have already concluded that all soldiers (whether or not they fired) have grounds for their assertion that they have genuine and reasonable fears for their personal safety were their identities to be revealed. To our minds therefore the only possible distinction between the soldiers who fired and those that did not is that the level or degree of risk is lower in the latter cases. Indeed this was the only distinction suggested to us by those who are opposed to anonymity. However, there is nothing in the judgments to suggest that this is a material distinction. On the contrary the Master of the Rolls was of the view that from the point of view of the soldiers *“it is what they reasonably fear which is important not the degree of risk which the Tribunal identifies”*. Such an observation must apply equally to the non-firing soldiers.
- 12 It was suggested that to grant anonymity to all the non-firing soldiers would make it very difficult properly to investigate the events of Bloody Sunday, especially for those representing the interests of the people who died or who were injured on that day. We accept that difficulties may arise, but we are not at present persuaded that they are insuperable or of such a nature as to impede the search for the truth. If we are later persuaded to the contrary, then we would have no hesitation in reconsidering the matter.
- 13 It was also suggested that granting anonymity to non-firing soldiers would undermine public confidence in the Inquiry and its public investigative function. However, the Court of Appeal considered that this would not be so in the case of the soldiers who fired. Again it seems to us that we must accept that view, which must be at least equally applicable in relation to the soldiers who did not fire.
- 14 Reliance was also placed by those who are opposed to extending anonymity to non-firing soldiers on the words of the Master of the Rolls at the end of his judgment, where he said this:

“We were asked to indicate our views as to the position of other soldiers. We would like to do so because we are conscious that more attention has already been given to this issue than is desirable and further disputes should if possible be avoided. However, reluctantly we have come to the conclusion that it would not be right to say more than that we cannot say on the material before us that it would be unlawful for the Tribunal to insist on other soldiers being named.”

- 15 Although this passage is open to a number of possible interpretations, it seems to us that what the Master of the Rolls was probably doing was to acknowledge that further disputes were likely to arise over the question of anonymity for other soldiers, that the Court would have liked to have said something that would prevent this happening, but that it reluctantly felt unable to do so. The Master of the Rolls was clearly not attempting to resolve or materially to help to resolve the position of other soldiers, for were that to have been his intention, he would not have reached his conclusion with reluctance.
- 16 In these circumstances it is our view that in accordance with the principles now laid down by the Courts we must reverse the ruling that we made in May and instead extend the ruling that we have now made in respect of the soldiers who accept that they fired live rounds or who are alleged to have done so to all soldiers who played a part in relation to Bloody Sunday, whether before, during or after the event. This we therefore do.
- 17 What we have said in relation to the ruling on the soldiers who fired also applies to those that did not. Thus, for example, we shall deal with deceased soldiers and with any question whether names are already clearly in the public domain in the same way, though the latter does not apply to (1) those soldiers whose identity the Tribunal has already ruled is in the public domain, (2) those soldiers who gave evidence to the Widgery Inquiry under their own names, (3) those soldiers whose names appear in documents which are available from the Public Record Offices, (4) Colonel Overbury, whose witness statement (given under his own name) was read out to us at our April hearing and (5) General Sir Anthony Farrar-Hockley and General Sir Frank Kitson, since the Tribunal considers that their identities are clearly public knowledge.

Public interest immunity

- 18 The Ministry of Defence has made an application for public interest immunity in respect of parts of a number of Intelligence Summaries prepared in 1972. After considering the oral argument we have concluded that this application should be supported by a PII Certificate from the Secretary of State. We have accordingly requested the Minister to provide a Certificate as soon as possible if the application is to be maintained. Upon receipt of the Certificate we shall make our ruling on the application.

Experts

- 19 We have now received and distributed five reports from experts retained by the Inquiry and expect to receive and distribute further reports in the near future. It seemed to us that this was an appropriate time to invite submissions from interested parties on the subject of experts and expert evidence and have now considered both written and oral submissions on this subject.
- 20 Two main issues emerged. The first of these relates to the use that may be made of experts retained by interested parties.
- 21 All interested parties may, of course, engage the services of whatever experts they like in order to evaluate the reports produced by the Tribunal or to help explain those reports, where this is necessary, and communications between such experts and interested parties would, other things being equal, attract legal professional privilege. However, if any interested party wishes to cross-examine experts retained by the Inquiry, or to put in evidence the views of their own experts, other considerations apply.
- 22 The reason for this is the inquisitorial nature of an Inquiry of the present kind. In our rulings and observations of July 1998 we quoted with approval the views of Professor Walsh on the proper nature and function of such an Inquiry; and it is worth quoting again what he said:

“Under our adversarial system of justice when the High Court is hearing a case between two opposing parties, it does not play an active role in adducing evidence to determine the factual truth of a matter in dispute between the parties. Its primary role is to make a final determination on the basis of the evidence presented to it by the opposing parties. In discharging this role it relies on the parties to present all the relevant evidence and to subject the evidence of their opponents to searching scrutiny.

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The High Court itself will not pursue this task. Its input is largely confined to ensuring that the parties respect the rules of procedure in adducing the evidence and in scrutinising each other's evidence. At the end of the day the primary function of the High Court is to decide in favour of one side or the other in accordance with the rules of the game. It is not concerned first and foremost with establishing the truth. It may be, of course, that the adversarial procedure and the attendant rules applied by the Court are best suited to producing a final determination which accords with the truth in any case. That, however, is not necessarily the same thing as saying that the High Court is actively engaged in a search for the truth.

The Tribunal of Inquiry by contrast is set up specifically to find the truth. It is expected to take a positive and primary role in searching out the truth as best it can. Certainly, it will seek the assistance of any interested party who has evidence to give or who has an interest in challenging the evidence offered by another party. It must be emphasised, however, that it is the Tribunal, and not the parties, which decides what witnesses will be called to give evidence. Indeed, strictly speaking there are no parties, no plaintiff and defendant, no prosecutor and accused, only an inquiry after the truth. It is the Tribunal which directs that inquiry. All the witnesses are the Tribunal's witnesses, not the witnesses of the parties who wish them to be called. Whether any individual witness will be called is a matter for the Tribunal. Moreover, the Tribunal can be expected to act on its own initiative to seek out witnesses who may be able to assist in the quest for the truth. Ultimately, the task facing the Tribunal is to establish the truth, not to make a determination in favour of one party engaged in an adversarial contest with another."

23 It will be recalled that we expressed similar views in our Opening Statement. As Lord Justice Salmon put it in his Royal Commission Report on Tribunals of Inquiry:

"The task of inquiring cannot be delegated by the Tribunal for it is the Tribunal which is appointed to inquire as well as to report. The public reposes its confidence not in some other body or person but in the Tribunal to make and direct all the necessary searching investigations and to produce the witnesses in order to arrive at the truth. It is only thus that public confidence can be fully restored."

24 In these circumstances, if any challenge is to be mounted to the views expressed by the experts to the Inquiry, it is for the Tribunal first to evaluate the basis and strength of such a challenge, because it is the Tribunal that is charged with the duty of seeking the truth. It follows from this that before the Tribunal will consider cross-examination by interested

parties of its experts it will have first to be satisfied that this is required in the quest for the truth. It could only be satisfied if it is informed in advance of the reasons why it is thought that cross-examination is required, the nature of the cross-examination proposed, and the material (including its source) upon which it is proposed to base the cross-examination. Since the Tribunal is determined to conduct a thorough, full and fair inquiry, this information would then be provided to all interested parties, since, as we have said on numerous occasions, we are not minded to allow surprise and ambush.

- 25 If the Tribunal concluded that there was substance in the challenge, it would then decide whether it was appropriate for that challenge to be developed by way of cross-examination (by its own Counsel or by interested parties) or by some other means.
- 26 We now turn to the question of evidence from experts retained by interested parties. In this context much the same considerations apply. As Professor Walsh points out, all the witnesses are the Tribunal's witnesses, not the witnesses of the parties who wish them to be called. There is, therefore, no question of any of the interested parties being permitted to call their own expert witnesses. What they can do, however, is to seek to persuade the Tribunal that in the interests of seeking the truth, it is not only necessary for the Tribunal to call additional experts, but also to call those that they have retained.
- 27 As we said in our rulings and observations of July 1998, in the nature of things the Tribunal cannot simply accept evidence (whether factual or expert) prepared by interested parties, for such evidence is, inevitably, likely to be carefully selected and presented so as best to support the contentions of those who proffer it. As we said, "*the Tribunal alone is in a position to collect, collate, analyse and present all the available evidence, with no pre-conceived views at all, and with only its desire to seek the truth*".
- 28 It follows from what we have said that before any question of calling additional experts can arise, the Tribunal will have to be satisfied that the expert in question can materially assist in the impartial search for the truth. The Tribunal could only be satisfied if it is first provided with full particulars of all instructions given to the expert from time to time, copies of all written reports received from the expert, and attendance notes of all oral reports; and if the expert in question is made available for interview on behalf of the Inquiry. Once again, and for the same reasons as those expressed above, this information would be made available to all interested parties.

29 On the basis of these considerations, we give the following directions:

1. Interested parties have the period expiring on 30th November 1999, during which they may in writing seek through the Inquiry explanation or clarification of anything contained in any of the Reports so far served, or make suggestions for further work.
2. The Tribunal will request its experts as may be appropriate to provide a response by 14th January 2000.
3. Interested parties have the period expiring on 29th February 2000, during which they may apply to the Tribunal for leave to cross-examine the Tribunal's experts. Any such application must set out the reasons why it is thought that cross-examination is required, the nature of the cross-examination proposed, and the material (including its source) upon which it is proposed to base the cross-examination.
4. Interested parties have until the same date to apply to the Tribunal for the Tribunal to call additional expert evidence. If the expert is one consulted or retained by the interested party, the application must be accompanied by full particulars of all instructions given to that expert from time to time, copies of all written reports received from that expert, and attendance notes of all oral reports; and the expert must be made available for interview on behalf of the Inquiry. In any event the application must explain in full detail why it is submitted that the evidence is necessary for the purposes of the Inquiry.
5. Depending on when further Reports are received from experts retained by the Tribunal and distributed to interested parties, we shall provide appropriate modifications to this timetable to cover those cases.

30 We have set out these time limits since it is obvious that any questions concerning experts and expert evidence must be resolved at the earliest possible opportunity. We would strongly urge all concerned to adopt a "rolling" approach to this matter, rather than waiting until the end of the specified periods. We appreciate, of course, that we cannot anticipate every eventuality or circumstance and thus, as with other directions that we have given, we are always ready to reconsider the matter if good reason for doing so is shown.

31 The second of the two main issues that has arisen in relation to experts and expert evidence is whether the Tribunal should recommend the payment out of public funds for the families of those who died and those who were wounded on Bloody Sunday to retain their own experts at this stage, in order to evaluate the reports produced by the Tribunal or to help explain those reports where this is necessary; and perhaps (depending on the

circumstances) to form the basis of an application to cross-examine or for the Tribunal to call further expert evidence.

- 32 At the recent oral hearings Counsel for some of the soldiers acknowledged that his clients were seeking the assistance of experts for at least some of these purposes. Counsel for some of the families and the wounded submitted that equality of arms and the concept of a level playing field demanded that his clients should not be deprived of similar facilities through lack of funds.
- 33 Put simply, we agree. Although this is an inquisitorial inquiry we accept that it would be unfair, or at least appear to be unfair, if those interested parties who have one view of what happened on Bloody Sunday were able to employ expert assistance, while others with sharply conflicting views were unable to do so. Counsel for all the families and the wounded were agreed that this was a case where they could and would pool their interests and engage common experts. Accordingly, we shall recommend that such funds as are necessary and reasonable to allow the families and the wounded to retain and instruct experts on the basis proposed should be provided from the public purse.
- 34 The directions that we have given above in relation to experts and expert evidence will apply of course to any experts retained under these arrangements. As at present advised, it seems to us that in the first instance all that is necessary is the reasonable cost of instructing experts for the following purposes:
- i. assisting clients, solicitors and counsel to understand fully the reports of the Tribunal's experts;
 - ii. advising on any questions, criticisms or suggestions for further work that should be put to the Tribunal's experts;
 - iii. advising on any responses received from the Tribunal's experts to any such questions, criticisms or suggestions; and
 - iv. formulating proposals for any further work to be carried out, subject to the Tribunal's approval, by experts other than the Tribunal's experts.
- 35 The Tribunal will have to be satisfied that any expenditure for these purposes is reasonable before it is incurred. The Tribunal will also have to be satisfied that any further proposed expenditure (for example for the preparation of formal reports) is both reasonable and necessary before it is incurred.

Sources

36 We have considered a series of applications made by different sectors or representatives of the media to the effect that we should not require them to identify their confidential sources of information. The applications involved are as follows:

- a. an application by the BBC and Mr Peter Taylor, a well-known journalist, that we should not require them to identify sources of information contained in a documentary entitled *Remember Bloody Sunday*, made by Mr Taylor, and in certain other materials;
- b. an application by ITN that we should set aside a witness summons issued on 16th August 1999 requiring them to produce, inter alia:

“(iii) All transcripts, notes and other written records of all interviews, including telephone attendance notes, made in the course of research and preparatory work carried out for the purposes of the Channel 4 News broadcasts;

(iv) All untransmitted recordings of filmed or video taped interviews conducted for the purposes of the Channel 4 News broadcasts;”

- c. an application by the *Daily Telegraph* and Mr Toby Harnden that we should set aside two witness summonses issued on 5th August 1999 requiring them to produce to the Tribunal:

“(i) the full accounts given to the *Daily Telegraph* by former members of the Parachute Regiment, to which reference is made in the article by Toby Harnden entitled “We want the truth of Bloody Sunday to come out” published in the *Daily Telegraph* on 20 May 1999, in so far as those accounts were given in writing and;

(ii) the notes recording those accounts, in so far as the accounts were given orally”;

- d. an application by UTV that we should set aside a summons issued on 16th September 1999 requiring them to produce the unredacted original of the statement of a particular soldier.

BBC

37 On Tuesday, 28th January 1992 the BBC broadcast a documentary entitled *Remember Bloody Sunday* which had been made by Mr Taylor. On Sunday the 26th January 1992 the *Sunday Times* published an article written by Mr Taylor entitled “Bloody Sunday – An Open Wound” which covered much the same ground as the documentary. In 1997

Mr Taylor wrote a book entitled *Provos: The IRA and Sinn Fein*, a chapter of which covered Bloody Sunday.

- 38 The Inquiry Secretariat asked the BBC and Mr Taylor for the research material that underpinned his documentary. Both of them made it plain that they would not be willing to reveal any confidential sources and a hearing was, accordingly, fixed for April of this year in order to consider whether the Tribunal should make an order which would have that effect. During the argument on that occasion it became apparent that some of the material that had not been provided (“informative material”) did not, or need not, reveal confidential sources – either because the source was not confidential or because the name could be redacted. There was, and could be, no objection to the production of informative material, as opposed to material that revealed a confidential source (“source material”), and after the hearing this informative material was produced. It consisted either of transcripts of untransmitted interviews or Mr Taylor’s notes, redacted where necessary.
- 39 Prior to the April hearing Counsel to the Tribunal had identified seven items of source material which remained undisclosed in the documentary, the article and the book. These were the following:

“Tape Reference

9.33 The identity of those in the IRA who had “*agreed to remove [its] weapons from the area*”.

11.45 The identity of the person[s] who knew that the Army had a secret plan to teach the Derry hooligans a lesson.

27.22 The identity of “Denis”, who appears to have been an eye-witness of a man shot in the face, and of the shooting of Donaghy [27.22] and that Donaghy had no nail bombs [43.26].

“The Provos”

Page Number

117 The identity of the RGJ Officer who telephoned Brigadier MacLellan and said that it was “mad” to bring the Paras in.

120 The identity of the IRA men who revealed the PIRA’s orders and disposition – in addition to Tony Miller.

123 The identity of the former Official who gave information about the Officials' orders.

"Bloody Sunday – An Open Wound"

The Article refers on the penultimate page, 4th column, to an Official gunman being above the Bogside around Bishop Street firing shots."

After the hearing in April the Tribunal issued a ruling, dated 30th April 1999, whereby it postponed a decision as to whether to order the production of source material until after the production of the informative material.

40 We have, therefore, to decide whether or not to require Mr Taylor now to identify the sources referred to in paragraph 39 above, save for the identity of "Denis" whose identity has been discovered by the Tribunal by other means. No one has suggested that the content of the informative material affects this question. But that informative material does, itself, contain a transcript of an interview with an unidentified officer in 1 Para who was present on Bloody Sunday. This gives some important evidence about the orders given by Colonel Wilford to his men and by the Brigade to Colonel Wilford and as to the officer coming under fire and hearing explosions like nail bombs. The question, therefore, arises as to whether we should order the identification of the source in relation to that material as well.

41 The notebooks provided to the Inquiry were very difficult to decipher. A dispute arose as to whether or not Mr Taylor should provide details of the relevant entries by dictating them onto an audiotape. That dispute was not resolved in time for intelligible transcripts to be available at the hearing derived from those audiotapes. As a result it became necessary for the Inquiry to arrange for the notebooks to be professionally transcribed. Shortly after this Mr Taylor agreed to dictate the relevant material. The result is that only a partially satisfactory transcript has been provided. More work needs to be done in order to create a legible and intelligible copy of the notebook. It is plain from what has already been transcribed that those notes refer to a number of confidential sources. Nothing in this ruling deals with such sources, which may have to be the subject of a separate application.

ITN

42 Between 17th January 1997 and 28th January 1998 Channel 4 News broadcast seven news reports about Bloody Sunday. Four of them contained information derived from confidential sources. Counsel for the Tribunal identified that source material as follows:

- a. In the programme broadcast on 29th January 1997 statements are made by an ex-soldier from the Royal Anglian Regiment. He says that he formed part of a 14-man platoon on the Walls and that there was an Army sniper from the Royal Anglians in a derelict house nearby. That sniper shouted, "*He has got a gun.*" Then three rounds were fired. Then he heard him yell, "*Bloody Hell, I've got two with three shots.*" The witness could not say for certain whether the soldiers near the Walls were fired at first. See Transcript, page 14. This witness is referred to by ITN as Soldier A. (These and the following ITN letters are not the same as the letters given to soldiers in the course of Lord Widgery's Inquiry.)
- b. In the news report of 18th March 1997, there is an interview with an unnamed paratrooper. In that interview he says that command and control of the forward soldiers was absent or relatively absent for 15 minutes on Bloody Sunday and that there were a number of unfortunate actions and shameful and disgraceful acts and that there were unjustified shootings. Transcript pages 27–30. This witness is referred to by ITN as Soldier B.
- c. In the news report for 16th May 1997, a soldier, who was a marksman with the 22nd Light Air Defence Regiment, says that he was not aware of paratroopers being fired upon at any stage, and that they fired from the hip in one area (Transcript, pages 35 and 36). At the end of the programme he says that a big wrong was done (Transcript, page 38). This soldier is referred to by ITN as Soldier C.

A second soldier, a paratrooper, says that there were certain individuals who overreacted and probably did go beyond the line. He appears to be saying that the paratroopers were fired upon, but it is not possible to be satisfied as to that without seeing the whole of the untransmitted material from which the transmitted material was taken. This soldier is referred to by ITN as Soldier E.

A third soldier says that if the Government officially apologised for Bloody Sunday he would take Irish Citizenship. This soldier is referred to by ITN as Soldier D.

- d. In the report for 12th January 1998 Alex Thomson, the news reporter says:

"We took an army ballistics expert with many years' experience in Northern Ireland to the sound laboratory. He said this was the Paratroopers' rifles firing and the IRA replying with an automatic pistol... that's confirmed by a source from the official IRA who told Channel 4 News they used a Smith & Weston hand gun that day."

We were told that the Official IRA source referred to in (d) is not known to ITN or to either of the reporters. The reference was, apparently, to a source referred to in a book, details of which ITN have undertaken to provide to us.

- 43 ITN is, also, in the course of providing to the Tribunal the informative material, not contained in the reports themselves, which underpins the broadcasts. It was not suggested to us that that informative material had any bearing on the question of whether we should require ITN to identify any of its confidential sources.

UTV

- 44 UTV broadcast on 22nd January 1998 an *Insight* programme. In the course of that programme there appears the following passage (the words of the soldier in question being spoken by an actor):

“22:53 ...making quick decisions about gunmen did cost innocent lives. I am sorry, I deeply regret that, but when you find yourself under threat in situations like that your judgment and your training are the only things you have to rely on.

23:12 The words of a paratrooper who claimed he fired the first fatal shots that day. He is from Belfast and doesn't want to be identified but we have interviewed him extensively and we have his full statement.

23:24 I agree the relatives are justified in demanding the truth about their loved ones, and the innocent should be exonerated, which I believe is most if not all that were killed and injured that day.”

The Tribunal asked for and received a copy of the statement there referred to but with the name of the soldier redacted.

- 45 The summons of 16th September 1999 called for the unredacted copy of that statement.

The Daily Telegraph

- 46 On 20th May 1999 the *Daily Telegraph* published two articles, written by Toby Harnden, then its Irish correspondent. The first one was headed “We want the truth of Bloody Sunday to come out”. The second was headed “Paras fear for lives over Bloody Sunday inquiry”. We adopt the summary of the gist of those articles made by Counsel for the Tribunal.

- 47 The gist of the first article was that some former members of the Parachute Regiment had a burning desire to give evidence to the Inquiry so as to set the record straight and to contradict the conventional wisdom that what happened on Bloody Sunday was somewhere between a military misdemeanour and a war crime. However, unless their identities were protected, “*their full accounts given to the Daily Telegraph*” would not be given to the Inquiry. The article then recounted some of the accounts of Soldiers X and Y (these are not the code letters used in Lord Widgery’s Inquiry). That part of X’s evidence that is referred to in the article is to the effect that he was in one of the first “pigs” i.e. Armoured Personnel Carriers (APCs), that he identified gunmen and bombers on the barricade and to the sides and could see the puff of smoke from their gunfire, and that weapons were removed by remnants of a mob from two bodies (it is not clear whether he saw the actual removal).
- 48 In the second article X is reported to have said that he told the Inquiry’s lawyers the bare minimum earlier this year. Both X and Y are reported as saying that if anonymity was not granted they would refuse to give evidence and if anonymity was refused they would omit the details of events.
- 49 In the first article Soldier Y, who is reported not to have given a statement to Lord Widgery, is said to have seen a sniper with a long-arm rifle, and said that one “idiot” fired 20 shots at a window and that others opened fire when they should not have done, but that there were legitimate targets as well. He said that some of the victims were innocent.
- 50 In the second article Soldier Y is reported as saying that, without anonymity, he would say that he could not recall what happened.
- 51 On 24th August 1999 a letter was written purportedly on behalf of Mr Harnden (but not in fact authorised by him) which said as follows:

“Soldiers X and Y only agreed to be interviewed on the strict understanding that I would not, under any circumstances, disclose their identities to anyone. Bearing that in mind, I destroyed all records of the meetings on the day that the article was published or the day after.”

- 52 Prior to the hearing in September the Inquiry notified the *Daily Telegraph* that, in the light of the response that had been received to the summons, it would wish to consider, at the September hearing, whether or not it should order Mr Harnden both to reveal the identity

of X and Y and to tell the Inquiry what information X and Y had given him about the events of Bloody Sunday that was not contained in the *Daily Telegraph* articles.

53 Mr Harnden produced a written statement and, at the hearing in September, gave evidence before us. From this it appears, and we find, that:

- i. Mr Harnden's notes of the interviews with X and Y were destroyed soon after the publication of the article. This destruction was contrary to normal journalistic practice;
- ii. the reason why the notes were destroyed was because Mr Harnden realised that he might be ordered to produce the notes either by the Tribunal or by some other body having authority to require him so to do;
- iii. the destroyed notes were substantial. They were a major part of at least one reporter's notebook and possibly two or even three. They were destroyed by tearing out the relevant pages from the notebook or notebooks, tearing them into shreds and disposing of them. In addition Mr Harnden recorded his conversations with X and Y on two tapes. These he intentionally recorded over so as to destroy the record of the conversations on the tape;
- iv. the information contained in the *Daily Telegraph* article is, thus, only a limited part of the information about Bloody Sunday given to Mr Harnden by X and Y; and
- v. Mr Harnden cannot, in his view, give evidence as to the information given to him by X and Y as to the events of Bloody Sunday, which is not contained in the two articles, without revealing or tending to reveal the identity of X and Y.

54 On Friday 1st October 1999 Mr Harnden was served with a witness summons requiring him to give oral evidence before us and the question for decision is whether we should set aside that summons or whether we should require Mr Harnden to give us any and, if so, what evidence either about his sources or the information that they gave to him.

The law

55 Section 10 of the Contempt of Court Act 1981 provides:

"No court may require a person to disclose ... the source of information contained in a publication for which he is responsible, unless it is established to the satisfaction of the court that disclosure is necessary in the interests of justice..."

56 We have had helpful submissions from Mr Andrew Caldecott QC for the BBC and ITN, Mr Andrew Nicol QC for the *Daily Telegraph*, Mr JR Rodgers for Ulster Television and from Counsel to the Tribunal. There is little dispute as to the approach to be adopted which we summarise as follows:

- i. The protection of journalists' confidential sources is, itself, a matter of high public importance. The law does not, however, enable the press to protect their sources in all circumstances.
- ii. Journalistic confidence can be over-ridden only if, so far as presently relevant, it is necessary to do so in the interests of justice. As to that we respectfully adopt the words of the speech of Lord Bridge in *X Limited v Morgan-Grampian (Publishers) Limited* [1991] 1 AC 1 at page 44:

"The judge's task will always be to weigh in the scales the importance of enabling the ends of justice to be attained in the circumstances of the particular case on the one hand against the importance of protecting the source on the other hand. In this balancing exercise it is only if the judge is satisfied that disclosure in the interests of justice is of such preponderating importance as to override the statutory privilege against disclosure that the threshold of necessity will be reached."

To the same effect is Lord Oliver at page 53:

"The court is not permitted to require the disclosure of a journalistic source unless it is satisfied that one or more of the four enumerated considerations (i.e. the interests of justice etc) are of such preponderating importance in the individual case that the ban on disclosure imposed by the opening words of the section really needs to be overridden."

- i. Even if disclosure is necessary in the interests of justice, there remains a residual discretion (although, once it has been established that such disclosure is necessary, the room for the proper exercise of such discretion is limited).
- ii. Whether or not the important public interest in the anonymity of press sources is outweighed by the relevant countervailing public interests is a question of fact, albeit one involving a considerable degree of value judgement.
- iii. Many factors will be relevant on either side of the scale including (a) the fact that "*the greater the legitimate public interest in the information which the source has given to the publisher or intended publisher, the greater will be the importance of protecting the source*"; (b) the conduct of the journalist and of the source; and (c) the risk of personal danger to the journalist or the source if disclosure is ordered.

iv. The onus is on those who seek disclosure to show that it is necessary in the interests of justice. We should not do so unless, on the material available to us, we are so satisfied.

57 The “*interests of justice*” in the present context are that the true facts of what happened on Bloody Sunday should be discovered by a fair, thorough and open public inquiry.

58 We have also taken into account the following considerations:

- i. The potential “chilling effect” of making orders for the disclosure of sources, the effect of which may be to cause those sources to dry up.
- ii. Section 10 does not, however, provide that sources are not to be identified because of the chilling effect of doing so. Nor does Article 10 of the Convention as considered by the European Court of Human Rights in *Goodwin v UK* [1996] 22 EHRR 123. On the contrary it is because disclosure of sources has a potentially chilling effect that disclosure is not to be ordered “*unless it is justified by an overriding requirement in the public interest (see Goodwin)*” such as the interests of justice, which is one of the four competing considerations for which section 10 provides.
- iii. Mr Caldecott’s submission that we should not confuse what is necessary with what is expedient and Mr Nicol’s submission that we should not, in focussing on the particular needs of this Inquiry, lose sight of the general need to protect journalistic sources in the wider public interest.

The BBC

59 Mr Caldecott submitted to us in April that the public interest element in Mr Taylor’s source material could hardly be stronger; that such material formed part of a corpus of work by Mr Taylor on Northern Ireland whose quality was dependent, in large measure, on the relationship of trust created between Mr Taylor and his sources which was founded on his promise to those sources of anonymity. He contended that the effect of ordering Mr Taylor to disclose his sources might be a permanent curtailment of his future investigative work in Northern Ireland. Further, such disclosure would put him at risk of reprisals.

60 The BBC source material, which remains unidentified, divides into Army sources and IRA sources. As to the Army sources, Mr Lawton informed us by a letter of 28th September that he was aware of the identities of four soldiers who were among Mr Taylor’s sources. Three of them were clients of Mr Lawton and they waived any duty of confidence owed to

them by Mr Taylor. Mr Lawton also indicated that the fourth soldier had previously been prepared to give a similar waiver, but that this soldier was no longer one of his clients. In the course of the hearing on 29th September, Mr Glasgow confirmed what Mr Lawton had said in his letter, and added that overnight he had obtained instructions from a fifth soldier who had spoken to Mr Taylor, and that this soldier too released Mr Taylor from any duty of confidence. We have now learned that the five soldiers concerned are General Ford, Lt Col Wilford, Lt Col Welsh, CSM 202 and Sergeant O. Of these five, it is CSM 202 who is no longer a client of Mr Lawton.

- 61 There can be no question of the section 10 restriction applying in respect of the information derived from the four soldiers represented by Mr Lawton who have clearly waived any duty of confidence owed to them by Mr Taylor. Despite the fact that leading Counsel for these soldiers confirmed this waiver before us, Mr Taylor remained concerned about it and he asked the Tribunal, as a matter of indulgence, not to order him to reveal which part of the material was communicated to him by each of the soldiers. Rather, he suggested, we should ask the soldiers who gave the waiver to do so.
- 62 We have found it possible to identify parts of the transcripts of the transmitted and untransmitted material as being statements or interviews made or given by Colonel Wilford, CSM 202 and Sergeant O. This only takes the matter so far. There may be statements recorded in the notebooks from these three witnesses that are not apparent as being theirs. Mr Taylor may have further information in his head which was derived from them and which is not reflected in the notebooks. So the expedient of asking these witnesses what statements they made or information they gave to Mr Taylor may not necessarily reveal all that they told him.
- 63 The identities of the persons who told Mr Taylor that the Army had a secret plan to teach the Derry hooligans a lesson, and of the Royal Green Jackets Officer who is said to have telephoned Brigadier MacLellan to say that it was “mad” to bring the Paras in are of great importance to the Inquiry.
- 64 As to the former the relevant passage and transcript reads:

“But what the marchers did not know was that the Army also had a secret plan, ordered at the highest level by General Robert Ford – again acting on political instructions. (Pause:) Derry’s hooligans were to be taught a lesson, and the Paras had been imported to do the teaching.”

One of the central issues for the Inquiry to resolve is whether there was any sort of plan from on high to teach the hooligans a lesson and, if so, what sort of lesson. For this purpose it is highly material to know who told Mr Taylor that there was such a plan.

- 65 As to the latter, the use of 1 Para has been controversial since 1972. One of the issues, which the Tribunal has to decide, is why such a battalion was used for arresting civilian hooligans. It has to decide that issue in the context of allegations that have been made that the Parachute Battalion was chosen precisely because there was some sort of plan to teach the Derry hooligans a lesson (including killing them if occasion demanded) or to engage with the IRA. Evidence that an Officer from one of the resident battalions telephoned Brigadier MacLellan to tell him that it was “mad” to bring the Paras in is plainly material for these purposes.
- 66 In relation to the IRA, both the Official and Provisional wings, the Inquiry is concerned to discover (a) what their plans and orders were and (b) what they did on the day. On the one hand it has been alleged that both wings of the IRA had agreed to let the march go off peacefully, and to withdraw their weapons in whole or in part from the Bogside, and that the IRA only intervened late in the day and ineffectually after the Army had opened fire. On the other hand there are documents which, if accurate, suggest that the Army had intelligence reports shortly before Bloody Sunday to the effect that the IRA would use the march as cover from which to fire upon the soldiers. In those circumstances it is highly important to know the identity of those who told Mr Taylor what the orders for the Official and Provisional IRA were and what they had or had not agreed to do.
- 67 Equally controversial is the question whether or not, whatever the IRA orders were, members of the IRA did in fact fire on the Army and for that purpose the identity of the informant(s) who told Mr Taylor that there was an Official gunman above the Bogside around Bishop Street firing shots is important.

ITN

- 68 The source material that remains unrevealed is as follows:
- i. The identity of ITN Soldier A in the 29th January 1997 report.
 - ii. The identity of ITN Soldier B in the report of 18th March 1997.
 - iii. The identity of ITN Soldiers C, E and D in the report of 16th May 1997.
 - iv. The IRA source in the report of 12th January 1998.

As to (iv), in the light of the explanation given to the Tribunal as to the nature of this source, we need take the matter no further.

69 Mr Andrew Caldecott, for ITN, submitted to us in September that ITN should not be required to give details of the identity of any of Soldiers A–E. The undertaking given by ITN as to confidentiality was not given lightly. It was only given because without it the soldiers, who were seeking to have what they regarded as a wrong put right, were not prepared to give information, which was of the highest public importance (because of the doubt it cast on the conclusions and completeness of Lord Widgery’s Inquiry). But for such assurances, the information would, in all probability, never have been revealed. He submitted that orders should not be made which would be liable to inhibit the free flow of information as to the misconduct of the Government or its agents. He contrasted the present case with reported cases, where disclosure had been ordered in which publication by the journalist of the information in question had served no public interest at all. He invited the Tribunal not to ignore the press’s wider role as a public watchdog. He, also, relied on two dicta from *X Limited*. The first is in the speech of Lord Bridge at page 44:

“Conversely, if it appears that the information was obtained illegally, this will diminish the importance of protecting the source *unless, of course, this factor is counterbalanced by a clear public interest in the publication of the information, as in the classic case where the source has acted for the purpose of exposing iniquity.*” (emphasis added)

And from Lord Templeman in the same case at page 49:

“This is not absolute immunity for a journalist to conceal his sources. Such an absolute immunity would enable the source or the journalist or both to make use of any untrue, misleading or confidential information with impunity. This means that the journalist is in a dilemma. He wishes to encourage disclosure but he cannot promise *absolute immunity* to his source *unless the information reveals crime or some other iniquity.*” (emphasis added)

He submitted that on the facts of this case the undertakings should, in accordance with the above dicta, be treated as absolute. We do not, however, think that Lord Bridge, who was careful to refer to the difficult balancing exercise that has to be performed and to make plain that the illustrations that he gave as to relevant considerations must not be regarded as a code, was intending to lay down the proposition that once it was shown

that the information revealed crime or some other iniquity, the restriction on disclosure was absolute. Nor, despite the wording used, do we think that Lord Templeman can have meant to enunciate such a proposition, which is not consistent with section 10 of the Act.

- 70 Mr Caldecott's submissions, on behalf of both BBC and ITN, reflect the fact that the importance of the information increases not only the importance of protecting the source but also the importance of the Tribunal knowing the identity of that source. Without that knowledge the utility of the information is drastically reduced. He also relied upon the risks to the ITN soldier sources (of reprisals by paramilitaries or their own comrades) that was involved in the revelation of sources; and the risk to the journalists if they were thought to have revealed such sources. Further, he questioned why it was necessary to obtain disclosure of this information from ITN, as opposed to elsewhere.

The importance of the ITN evidence

- 71 The significance of the evidence in question is as follows:

i. *Soldier A:*

One of the many issues to be resolved in the present Inquiry is whether or not any of those who died or were wounded were shot from the City Walls and, if so, in what circumstances. Lord Widgery did not (apparently) consider this issue and it is a matter of acute controversy. It cannot be disputed that there was some shooting from the Walls: but one of the central current allegations is that there was shooting from the Walls at innocent civilians including, but not necessarily limited to, three of those who died at the barricade between the Rossville Flats and Glenfada Park. To this issue the evidence of Soldier A is critical.

ii. *Soldier B:*

Another of the many issues is whether the Army was guilty of any unjustifiable shootings: particularly in Glenfada Park or to the south of Block 2 – the most forward positions to which soldiers went. It is highly important for the Tribunal to know whether any, and if so which, of the soldiers were guilty of unfortunate actions or shameful and disgraceful acts or unjustified shootings.

iii. *Soldier C:*

Whether or not soldiers were fired on and, if so, to what extent, is another matter of acute controversy and has been so since 1972. The evidence of a soldier who says

that he was not aware of paratroopers being fired upon at any stage, that they fired from the hip in one area (i.e. in an uncontrolled manner) and that a big wrong was done, is obviously of great importance.

iv. *Soldier D:*

The tenor of Soldier D's remarks is that there was nothing for which the Government should apologise.

v. *Soldier E:*

One of the allegations that have been made is that, whatever the initial firing upon the soldiers, they grossly overreacted. Again, evidence from a soldier that they did so is of very great importance.

Conclusion on BBC/ITN

- 72 We have carefully considered all the submissions that have been made to us in the light of the importance of the evidence to which we have referred above.
- 73 In relation to the BBC we have come to the conclusion that the identity of the sources referred to in paragraph 39 above (with the exception of "Denis") is likely to be of such predominating importance as to make it necessary in the interest of justice that it should be revealed to us, unless the Tribunal is able to obtain sufficient evidence from other sources as to what the IRA orders were and as to the firing that is said to have taken place at Bishop Street.
- 74 As to ITN we have come to the conclusion in respect of Soldiers A, B, C and E, but not D (the content of whose evidence appears to be wholly unspecific) that the identity of the informants is of such predominating importance as to make it necessary in the interests of justice that it should be revealed to us by ITN if it cannot be obtained by other means.
- 75 The reasons why we have reached that view are as follows:
- i. We have to weigh the public interest in non-disclosure of journalistic sources and the public interest in the course of justice in these proceedings. In so doing we need to take into account "*the relative public importance of the interests of justice in the particular case*": per Lord Oliver in *X Limited* at page 53.
 - ii. In the present case the public importance of the interests of justice in the working of this Inquiry is very high indeed. Our Inquiry was established by the affirmative

resolution of both Houses of Parliament as a matter of urgent public importance.

The task imposed upon us by Parliament includes that of taking into account “*any new information relating to the events of the day*”.

- iii. In those circumstances we take the view that it is necessary in the interests of justice to know the identity of those informants who gave the information to the BBC and ITN: particularly when, in the case of ITN, that information formed part of the material upon which the Government was asked, and agreed, to establish an inquiry in the first place.
- iv. Insofar as the sources are soldiers, they will all, in the light of our ruling, enjoy anonymity so that, by ordering the disclosure of sources, we would not be requiring anything more than that the identity of the soldiers in question should be given to us as it was to ITN. That identity will then be protected upon the same basis and subject to the same conditions as those that apply to all other soldiers.
- v. We have not ignored the potential effect that an order might have on Mr Taylor’s ability to conduct investigative journalism in Northern Ireland or the risk to himself if he is ordered to make and does make such a disclosure. We do not, however, regard either of those as an absolute bar to making such an order. We have to decide, in relation to the present case, whether the nature of the information is such that the public interest in the course of justice in these proceedings is so great as to outweigh those considerations. In our view it is. In reaching this conclusion we pay regard to the exceptional nature of these proceedings and the exceptional public interest in their outcome.

76 We are not, however, satisfied that we should immediately make an order for disclosure.

77 As to Mr Taylor’s Army sources, to whom we refer in paragraph 39, we regard it as possible (but no higher) that the identity of the relevant soldiers and their full account of what happened may be revealed in the course of Eversheds taking statements from the military witnesses. As to Mr Taylor’s IRA sources, there are obvious difficulties in obtaining direct evidence from either wing of the IRA as to what the relevant orders were and as to whether an Official was shooting (and at what) around Bishop Street. Despite this we believe that there is some prospect of obtaining sufficient reliable evidence as to what the orders – for both wings – were and as to what happened in Bishop Street as to make it unnecessary to override journalistic confidence. In particular we do not regard it as wholly illusory to suppose that witnesses connected with the IRA will provide information to the Inquiry. We may well be proved wrong on that, but we are prepared to

wait and see. Further we wish to take a statement from Mr Taylor, which deals, amongst other things, with the content of his notebooks and we think it appropriate to defer making any order requiring the disclosure of sources, to which section 10 applies, until that exercise has been performed.

- 78 We wish, however, to make it plain that, in the case of those witnesses who have clearly waived any right of confidence that they may have, there is no justification for Mr Taylor declining to reveal what statements they made and what information they gave to him. If Eversheds or the Inquiry staff are able, by questioning those witnesses, satisfactorily to identify what statements they made and what information they gave to Mr Taylor, all well and good. But if they are not, or there is doubt as to whether they have been able to do so, the Tribunal will expect Mr Taylor to identify the statements and the information, regardless of whether or not the Tribunal makes any order for the disclosure of sources to which section 10 of the 1981 Act applies.
- 79 The soldiers whose waiver of any right of confidence is clear are General Ford, Colonel Wilford, and Sergeant O, and, also, Lt Col Welsh. The Tribunal will contact CSM 202's legal representatives to see whether the same position applies in respect of him.
- 80 Lastly, in relation to the redacted statement of an Officer, to which we refer in paragraph 40 above, there is reason to suppose that the Officer in question is identifiable to the Tribunal by reason of the content of his statement and we shall endeavour to see whether that identification can be achieved before making any order.
- 81 As to the ITN sources, although Eversheds our solicitors have not yet discovered the evidence of any soldier, which conforms to the evidence of Soldiers A–E, the exercise of taking statements from military witnesses is not complete. It may be, therefore, particularly in the light of our decision on anonymity, that each of A–E will come forward and identify themselves. In the case of A and C it is possible that Eversheds will be able, themselves, to identify the soldier in question. In those circumstances we have not been satisfied that it is necessary to order discovery of the name now. It will, however, in our opinion, be necessary to do so if information as to the identity of the soldiers in question cannot be obtained by either of these routes.
- 82 Accordingly, we shall defer making any order in respect of the soldier sources until after 30th November (by which date the body of military evidence should be in hand) when we shall revert to the issue. We shall defer making any order in respect of Mr Taylor's IRA sources until we are in a position to take a view as to the extent to which, if at all,

satisfactory evidence may be forthcoming as to the plans and orders of the IRA and as to what happened in Bishop Street.

- 83 We request ITN, in the meantime, to contact their soldier sources (including D) in order to inform them of its application and of this ruling and to invite them either to release ITN from its obligation of confidence (at least so far as providing details of their identity to this Tribunal) or at any event to contact the Tribunal in order to give evidence – anonymously, in accordance with the Tribunal’s ruling.
- 84 We make a similar request to the BBC and Mr Taylor in respect of their soldier and IRA sources.
- 85 If, in the case of the sources, it turns out that they are legally represented it will, of course, be possible for the BBC, Mr Taylor and ITN to invite those sources to cause their legal representatives to communicate with the Tribunal in order to avoid any dispute as to whether they have truly waived any obligation of confidence.
- 86 We shall take into account whether such requests are made and the response thereto in finally deciding whether to order identification of sources.

UTV

- 87 The contents of the redacted statement provided by Ulster Television are of critical importance in at least the following respects:
- i. In paragraph 3 the soldier says of his orders:

“We were not to impede the civil rights march but let them clear the area of operation to allow us into Rossville/Glenfada Flats. We were also to seek out and engage the IRA (ops) in the Rossville Flats and to take them out and to hand over arrests to Charlie Company who would secure Chamberlain Street. To hold secure Rossville/Glenfada areas and prevent any IRA groups coming in and engaging within our operational area until the local RUC and troops could take over from us.”

One of the major issues for us to resolve is whether the operation carried out by 1 Para on 30th January 1972 was an arrest operation, properly so called, in the course of which troops were fired on, or whether – as has been alleged – it was an attempt to draw out the IRA and engage with them. The soldier’s evidence, if true, appears to be direct evidence of the latter.

- ii. In paragraph 4 the soldier says that after shots were fired at soldiers carrying some barbed wire near the Presbyterian Church:

“The operational plan was changed, the original plan was to conduct the arrest operation on foot, APC (pigs) were now to be employed instead.”

This evidence, if true, suggests that the original plan did not involve the use of APCs at all, whereas the evidence given to Lord Widgery was to the effect that the reference in the operational order to the operation taking place on foot was not inconsistent with the use of APCs to enter the Bogside.

- iii. In paragraph 6 the soldier describes being in an APC which turned left into the car park of the Rossville Flats when:

“I heard a ping hitting against the rear door of our APC, I shouted “Incoming” to note that we were fired at, but by this time the forward APC had stopped and debussed and making arrests. We stopped near the corner of Chamberlain Street, I debussed to the right of my APC and saw a blast or nail bomb explode forward and right of me, which blinded me for a moment. I turned my head away for a few seconds to clear my vision and turned back to take up aim at the man, I believed responsible, he was running away from me towards the exit between the left and centre flats where the crowd was escaping. He stopped, turned, just passed the centre of the car park, bent down and struck an object against the ground and threw it. I squeezed the trigger of my rifle but the safety catch was on, I flicked it off with my right thumb, and fired one shot, catching him as he was about to run on the rear right shoulder. He was thrown to the left, I ran forward and touched his neck and believed he was dead. Suddenly pistol shots were fired from the alleyway between the left and centre flats. I ran and took cover at the end of the flat close to Chamberlain Street, I took aim to take him out when shots came up from Chamberlain Street towards him. I shouted at my Platoon Sergeant “Friendly firing coming”, pointing at Chamberlain Street. He ran back to the APC to radio back to check firing from the street. At the same time, I noticed a Priest crawling towards the man I had shot shouting back at the man with the pistol and covering his head when the friendly fire was coming in.”

This evidence, if true, suggests:

- a. that this soldier shot Jack Duddy, who was the victim tended by Father Daly, now Bishop Daly, in the car park of the Rossville Flats and who was shot in the right

shoulder. Lord Widgery was not able to find who killed Jack Duddy but believed him to be innocent of any wrong doing;

- b. Jack Duddy was shot because he was or was believed to be the man responsible for throwing a nail bomb and was, or appeared to be, in the act of throwing some object (possibly a nail bomb) which he had struck against the ground;
 - c. after pistol shots were fired from the alleyway from the left and centre flats (it is not clear to which blocks he refers), shots came from Chamberlain Street from other Army units. Lord Widgery heard no evidence of fire from the Army coming up Chamberlain Street in the direction of the Rossville Street car park;
 - d. Father Daly shouted back at a man with a pistol (who would have been to the south of him). Father Daly gave evidence to Lord Widgery of a man with a pistol, to the north of him, at the southwestern gable end of Chamberlain Street.
- iv. The soldier goes on in paragraph 6 to say as follows:

“I decided to go forward to engage the gunmen when shots were fired to the right of me, I looked to see two of my comrades engaging targets somewhere high over Rossville Flats. I carried on and entered the alleyway between the left and centre flats, into Joseph Place, to my right I noticed two bodys (sic) surrounded by people, they took cover against the wall when they seen my mate and I, the body nearest to us had a pool of blood around his head and the other body was lying near the corner of the flats close to Rossville Street. I realised that my mate and I had gone further forward than anyone else and decide to return back to the car park in Rossville Flats. Going back we heard high velocity gun fire behind us, we entered the car park when C.O. Support Company was ordering everyone to re-group around our APC and also ordering “Do not return fire unless you can clearly see your target”, but we still heard firing coming from Glenfada Flats. It was then I heard the Company Sergeant Major shouting at the C.O. to get over there to see what was going on, which he did. Five minutes later all firing had stopped.

My mate who was with me, said to me that they were firing from Derrys wall. I said to him I think they were firing up Rossville Street from Little James Street. We both knew then something had badly gone wrong. We were then ordered to mount up and left the area.”

Whether or not people were wrongly killed by the Army firing from the City Walls is, again, one of the principal issues in the Inquiry. Further there was no evidence before Lord

Widgery, so far as we are aware, that soldiers came from the car park of the Rossville Flats to the south of Block 2.

- 88 This soldier witness is, therefore, on his account, someone who fired live rounds. In accordance with our ruling he will be entitled to anonymity. On his evidence he was in APC 2, the “Pig” in which Sergeant O travelled down Rossville Street, and which drew up at the entrance to the Rossville Flats car park. He says in a postscript to his statement that the evidence in that statement is “*as close as I can remember that I give to the Widgery*”. But the only soldiers, who, in their evidence to Lord Widgery, admitted firing live rounds and who, on that evidence, could have been responsible for the death of Jack Duddy are Soldiers O, Q, R, S and V. The Inquiry was told by UTV in correspondence that the soldier in question claimed to be Widgery Soldier Q. Soldier O was in command of the APC (reference is made to “*the commander of our APC*” in paragraph 5 of the statement). So he can be ruled out. The only other soldiers who, according to their evidence to Lord Widgery, fired live rounds in this sector are Lieutenant N, who was in the first APC and who fired three shots in the air and one at somebody at the south of Chamberlain Street, whom he hit in the thigh, and T who is dead. That only leaves, as soldiers in Pig 2, Soldiers P, R, and U. P did not, on his evidence to Lord Widgery, fire in this sector. Each of P, R and U are soldiers represented by Mr Anthony Lawton of the Treasury Solicitor’s Department. Each has confirmed through their Leading Counsel, Mr Edwin Glasgow QC, that they are not the person who gave the Ulster TV statement. Q and V have also given a similar confirmation.
- 89 It is apparent from the above that the unidentified soldier is, probably, either (1) someone who fired live rounds but concealed that fact from Lord Widgery (and the Royal Military Police) or (2) one of those who gave instructions that they were not the maker of the statement to Mr Glasgow, or (3) someone who for some reason is making up a story.
- 90 We were told by Mr Rodgers, who appeared for UTV, that Mr Morrison, UTV’s Head of News, who gave the soldier in question the undertaking of confidentiality “*had received at least one serious threat which he has reasonably understood to be a threat to his life*”. Mr Morrison had the opportunity of elaborating on that statement, either by providing a witness statement, or by giving evidence orally, but this opportunity was not taken up. In those circumstances we are short on any details of this incident. Mr Rodgers also told us that the soldier in question “*may not be who he says he is*” and “*may have an unstable personality and a drink problem*”.

- 91 We regard knowledge of the identity of this soldier as indispensable to our task. The content of his evidence is of critical importance upon essential issues. His identity is equally critical for two reasons. First, it will tell us either that, contrary to his statement, he is a previously unidentified firer or that what he said to Lord Widgery was false or that he is some sort of storyteller, in which case the reason for him doing so is highly material. Secondly unless we know who he is, neither the interested parties nor we can assess his evidence by questioning him or others on its content.
- 92 We are quite satisfied that the importance of knowing his identity is of such weight and preponderance that we should decline, as we do, to set aside the summons. We see no real prospect of discovering his true identity otherwise than by requiring UTV to provide it to us. We have taken into account as a factor against reaching this conclusion the rather limited information about the threat to Mr Morrison. But, even doing so, we remain wholly satisfied that the identity of the soldier should be revealed. In our view there is a compelling justification for making the order notwithstanding such risk as there may be to the journalist in question. That risk (which is to some extent mitigated by the fact that, if the soldier is identified to us, he will know that his name is known to the authorities and that he can, therefore, be traced) should be addressed by Mr Morrison placing the full facts of the incident in the hands of the police.
- 93 Accordingly, we decline to set aside the witness summons and we require the production to us of the unredacted document. The name will, of course, remain anonymous in accordance with and subject to the terms of our ruling on anonymity in respect of those soldiers who fired live rounds.

The *Daily Telegraph* and Toby Harnden

- 94 Discovering the identity of X and Y and the full contents of the evidence they had to give (*“the full accounts given to the Daily Telegraph”*) are of great importance to this Inquiry. X is one of those who fired. Y saw a sniper and one “idiot” who fired 20 rounds and others who opened fire when they should not have done. That “idiot” may well be Soldier H, who, on his account to Lord Widgery, fired 19 bullets at a single target. Lord Widgery did not accept that those 19 bullets were fired at a single target. Sir Allan Green, who appears for Soldier H, urged us to order Mr Harnden to disclose the identity of X. According to Mr Harnden it is not, however, possible for him to testify as to the full content of the evidence given to him without, also, revealing or tending to reveal the identity of X and Y. We must, therefore, consider whether or not to order disclosure of the identities of X and Y together with the additional information about Bloody Sunday given by them to

Mr Harnden and known only to him. If Mr Harnden is right, ordering disclosure of the information alone is not an option.

- 95 There are certain clues in the two articles as to who X and Y may be. X is said to have been in one of the first “pigs”, to have fired shots, and to have spoken to Eversheds by 20th May 1999. He gave evidence to Lord Widgery. Y drove a pig; was a non-firer; did not give evidence to Lord Widgery and lives in Northern Ireland. It may be possible to identify one or other of these two on the basis of this information: but that would, itself, assume that X told sufficient of the truth to Lord Widgery and to Eversheds as to make it possible to identify him, and that Y can be traced and tells sufficient of the truth to Eversheds as to make it possible to identify him also. Since the burden of the article is that both were, in certain circumstances, prepared not to tell the whole truth, and that X has already been economical with it, any such assumption may well be misplaced. Further, even if their identity is discovered, and even if they tell Eversheds what they claim to be the full story, it will not be possible to know whether what they say as to the events of Bloody Sunday is the full account as given to the *Daily Telegraph* or some half truth. The answer to that question cannot be known unless the Tribunal has the full account of what they said to that newspaper.
- 96 In those circumstances, we are satisfied that it is necessary in the interests of justice that Mr Harnden should give evidence to us as to the identity of X and Y (who will be anonymous in accordance with our rulings on anonymity) and as to the full account given to him by X and Y of what they did on 30th January 1972, if accurate information as to their identity cannot be obtained by other means.
- 97 But, again, as in the case of ITN, we are not satisfied that we should immediately make an order requiring Mr Harnden to identify his sources. It is possible that Eversheds and the Inquiry’s staff will be able to identify Soldiers X and Y and that, in the light of our ruling on anonymity of soldiers in the course of this Inquiry, X and Y will be prepared to identify themselves as the soldiers referred to in the *Daily Telegraph* articles, to tell their full story, and to release Mr Harnden from any obligation of confidence. If the Tribunal learns the true identity of X and Y (who, as we have said, will, because they are soldiers, remain anonymous to the public) and if their evidence, anonymised for the purposes of the Inquiry, can be publicly identified as being the evidence of X and Y and is both full and frank, the revelation of the full information which they have given to Mr Harnden may not involve any breach of confidentiality. Indeed Mr Harnden may be able to confirm that nothing of significance that they told him is omitted from their statements to the Tribunal. We are by no means confident that this approach will resolve the dilemma, not least

because Mr Harnden told us that he could give no further information as to what he was told that did not tend to disclose the identity of the two sources. In this respect, however, we have noticed that at page 15 of the bundle of working drafts provided by the *Daily Telegraph* on Friday 1st October 1999 there is a note which reads:

“I have kept this as tight as possible but there’s plenty more if it is wanted.”

We do not find this observation, taken at face value, easy to reconcile with Mr Harnden’s evidence that:

“When I was writing the article I was very careful to give as much information about what the soldiers said had happened on Bloody Sunday as was possible ... without stepping over the line which would have meant that their identities could have been revealed.”

We have not, however, heard any explanation that Mr Harnden may have to give as to this apparent discrepancy, and we shall suspend judgment upon it until we have heard what that explanation might be.

- 98 Accordingly, as in the case of ITN, we shall defer our decision until after 30th November 1999, in order to see whether or not X and Y are prepared, whilst remaining anonymous before the Inquiry under different pseudonyms, to identify themselves as the X and Y referred to in the *Daily Telegraph*, to give a full account of what happened, so far as they are aware, on 30th January 1972, and to release Mr Harnden from any obligation he may regard himself as having not to reveal the content of what they told him. If, of course, it becomes clear before 30th November that X and Y are so prepared we shall revert at an earlier date to the question of what evidence Mr Harnden should be required to give.
- 99 The course that we are taking cannot be described as either convenient or expedient: but, as we remind ourselves, the test is “necessity” not “convenience”. We bear in mind also that the general tenor of the article was that the soldiers in question desired the full truth to come out and that they were inhibited from telling it to the Inquiry because of our ruling on anonymity. That inhibition no longer exists and we propose to see whether its removal generates a change of mind.

Mr Harnden's notes and tapes

100 We now return to the subject of the destruction by Mr Harnden of his notes and the over-recording of his audiotapes. At the recent hearing we expressed our grave concern at the steps that Mr Harnden had taken in this respect. We indicated that we would consider reporting the matter to the appropriate authorities and that that might include reporting the matter to those responsible for the prosecution of criminal offences. We have duly considered the question and we have decided that we should refer the matter to the Director of Public Prosecutions for Northern Ireland, in order that he may consider whether any criminal offence has been committed and if so, what action he should take. In the light of that decision it is not appropriate for us to say anything further in this ruling.

Procedure in respect of allegations

- 101 Lastly we deal with the procedure that is to be followed if the interested parties intend to make allegations, in the course of the proceedings, against witnesses to the Inquiry. By "allegations" we mean allegations of misconduct, improper behaviour, irresponsibility or incompetence. The procedure that we propose to lay down is this:
- i. If any of the interested parties seek to make an allegation against any of the Inquiry's witnesses they must give details to the Inquiry of the allegation that they intend to make.
 - ii. The Inquiry will give notice to the interested parties and to the relevant witness or witnesses of any allegations of which it is informed, unless any such allegation is clearly without sensible foundation, or is not within the Tribunal's remit, or there is some other sound reason why it should not be entertained.
 - iii. The Inquiry may require further information as to the nature of the allegation, or the evidence in support of it, or the basis upon which it is made before notifying the interested parties of it.
 - iv. None of the interested parties will be allowed, without the permission of the Tribunal, which is unlikely to be given save for very good reason, to pursue an allegation against any of the witnesses unless it has been the subject of a notice given to the Inquiry in good time, as to which see paragraph (v) below. Nor will they be allowed to pursue an allegation, which the Inquiry has declined to notify to the interested parties on one of the grounds set out in (ii) above.

- v. Any allegations that are to be made must be notified to the Inquiry so soon as is reasonably practicable and, in any event, in such time as will enable the Inquiry to give notice to the witness concerned at least 3 weeks before the witness is first due to give evidence. The Tribunal appreciates that it will be necessary to have a rolling witness programme so that the interested parties know when any given witness or category of witnesses is first due to give evidence. The Tribunal appreciates that the making of allegations is something that requires careful thought and judgment; that there is much material to consider; and that it may be inappropriate to make an allegation without considering more material than that which prima facie appear to justify the allegation in question. That said, the Tribunal is not prepared to countenance a situation where allegations are made that could and should appropriately have been made at an earlier stage. It will be for those making allegations to satisfy the Tribunal that they were made at the earliest practicable moment. The Tribunal believes that it can trust in the good sense and judgment of Counsel for the interested parties and their instructing solicitors to ensure that any allegations that are to be made are, indeed, made as soon as is reasonably practicable, having regard to the considerations outlined above, and in accordance with the overall objective of this ruling which is that of preventing ambush and surprise.
- vi. It is not necessary for the interested parties to adopt for themselves the issues referred to in Counsel's Report No 1, which identifies, with different degrees of specificity, a number of issues that are likely to arise in the course of the Inquiry. But it is necessary for them to use the procedure laid down above if they intend to make a positive case that, for instance, a particular lettered or numbered soldier shot a particular victim. Similarly if any of the interested parties intends, for instance, to make a positive case that a particular witness was shot whilst throwing a nail bomb, they should make an allegation to that effect.
- vii. It may be that allegations are sought to be made against witnesses whom the Inquiry had not intended to call. If that is so the party seeking to make the allegation will be expected to have asked that the witness should be called, and to have given notice of the allegation as the reason, or one of the reasons, for him or her being called.
- viii. If allegations are to be made against persons who are deceased they must be made as soon as is reasonably practicable and in any event in sufficient time to enable the witnesses who have relevant evidence to give in relation to that deceased to give evidence in the knowledge of that allegation. In practice that means no later than

3 weeks before the first witness whose evidence relates to the death of that deceased. What we have said in (v) above applies, of course, in this context.

- ix. This procedure is not intended to be limited to allegations of misconduct on the day. If the interested parties intend to make a positive case in respect of, for instance, the planning for the day, e.g. that there was a deliberate plan to engage the IRA, they should make use of this procedure.
- x. The fact that the Inquiry notifies any person of an allegation does not imply any view by the Inquiry as to the strength or validity of that allegation. Nor does it imply that the Tribunal or its Counsel will adopt any particular position in respect of it.
- xi. Any interested party, who has made an allegation, is at liberty to withdraw it, in whole or in part, at any time. This should be done by notice in writing to the Inquiry. The Inquiry will give notice of the withdrawal of any allegation.
- xii. The Tribunal will make any alterations to this procedure that prove to be necessary or desirable in order to secure the overall objective mentioned in (v) above. It will, also, be the arbiter in the event of any dispute in relation to the procedure.

A2.10: Ruling (7th February 2000): disclosure of confidential sources; public interest immunity; legal representation; statements on the Inquiry website

Sources

- 1 In our October 1999 rulings and observations, we considered a series of applications made by different sectors or representatives of the media to the effect that we should not require them to identify their sources.
- 2 In the case of Ulster Television, we ordered the production of an unredacted statement of a particular soldier, in order that the Inquiry could identify the soldier concerned. However, we were subsequently given information from another source which enabled us to identify the soldier, and consequently we have informed Ulster Television that we no longer require them to comply with our order.
- 3 In the case of the *Daily Telegraph* and its then Irish Correspondent Mr Harnden, we concluded that if we could not obtain the information from other sources, it was necessary in the interests of justice that Mr Harnden should give evidence to us as to the identity of X and Y (who will remain anonymous in accordance with the October 1999 ruling on anonymity) and as to the full account given to him by X and Y as to what they did on 30th January 1972. However, we did not make an order in this case in October, since it seemed then that there was some prospect that we could identify X and Y from other sources without undue delay, in which case an order might well be unnecessary.
- 4 In the case of Y, this remains the case, since there is still a prospect (albeit slim) that we can identify this soldier from other sources. In the case of X, however, we are now satisfied that the only realistic means of identifying this soldier and of learning the full account of what he said is through Mr Harnden. X (according to the article written by Mr Harnden) had been interviewed by Eversheds on behalf of the Inquiry before 20th May 1999, had been in one of the first pigs, had fired shots and had given evidence at the Widgery Inquiry. The only soldier who had been interviewed by Eversheds before 20th May 1999 who could fit this description is Soldier J, but Mr Lawton, his legal adviser, has informed us on instructions that Soldier J denies that he is X.

- 5 On 1st October 1999 the Inquiry served a subpoena on Mr Harnden and explained to him that this put him under a legal obligation to attend the Inquiry and that he would have to do so if the Tribunal ruled that he should reveal his sources and give a full account of what he was told. We now make such a ruling in relation to X. We invite Mr Harnden's legal advisers to discuss with the Solicitor to the Inquiry the most convenient way for Mr Harnden to comply with this ruling, bearing in mind that the Inquiry needs the information in question as soon as possible. If it is not possible to agree a suitable time and place, the Tribunal will itself fix a date for Mr Harnden to attend.
- 6 So far as the remaining applications are concerned, we are not yet in a position to make further rulings.

Public interest immunity

- 7 At the hearings last autumn, we considered both oral and written submissions from interested parties on the application by the Ministry of Defence to redact six documents by removing what was said to be sensitive information from them.
- 8 In our October 1999 rulings and observations we announced our conclusion that the application should be supported by a Public Interest Certificate from the Secretary of State. Such a Certificate was in due course produced and has been circulated to interested parties, who were given an opportunity to make further submissions. We are accordingly now in a position to rule on this matter.
- 9 The Certificate in question is dated 13th December 1999. It relates to five documents, namely IntSums 2/72, 3/72, 4/72, 5/72 and 102. All these documents are Intelligence Summaries dating from around the time of Bloody Sunday. The first four emanate from Headquarters Northern Ireland and the fifth from the headquarters of 8th Infantry Brigade.
- 10 At the hearing last autumn there was mention of another Intelligence Summary (IntSum 101), but since we are satisfied (having examined an unredacted copy) that the redactions to that document are of matters that have no relevance to the Inquiry, we can see no good reason why an unredacted version should be published.
- 11 We have also examined unredacted copies of the remaining documents. We raised with the Ministry of Defence the question whether it was necessary, in paragraph 36 of IntSum 102, for the names of the Chairman and Secretary of the James Connolly Republican Club to be redacted, since these names had appeared in the *Derry Journal* of

23rd November 1971. The Ministry of Defence accepted this point and accordingly those names are no longer redacted.

- 12 We also raised with the Ministry of Defence whether it was necessary to make certain other redactions. This led to the issue by the Secretary of State of another Certificate, which contained an explanation of why this particular material was covered by the grounds put forward in the first Certificate. We are satisfied with this explanation. We have not published this Certificate, because to do so would reveal the very material in question.
- 13 The application is based on three main grounds. The first is that the redacted material gives rise to a genuine risk that informers who provided information might be identified, and that were this to happen, the lives of those informers would be put in jeopardy, since it is the customary practice of terrorists in Northern Ireland to murder informers; and that even if the informer has died, there is a real prospect that reprisals would be exacted against the family of the informer. The second ground is that revealing information of this kind would undermine the confidence which current informers have in the determination of the Ministry of Defence to protect them and would thus run the risk that such informers would cease to provide information. The third ground is that revealing information of this kind would deter potential informers from coming forward.
- 14 At present there is a ceasefire in Northern Ireland, but not all terrorist organisations have declared themselves party to that ceasefire, nor (as the Certificate points out) has there to date been much progress in the decommissioning of weapons. The Secretary of State in his Certificate states, and we accept, that over the years, intelligence provided by informers has been of crucial importance in countering terrorism in Northern Ireland. We further accept that it is in the public interest that the lives of informers and their families should not be put at risk and that nothing should be done which would prejudice the capability of the Government to respond to the threat of terrorism or which would be of assistance to terrorists, either now or in the future.
- 15 We are satisfied that the material in question does prima facie attract public interest immunity for the reasons given by the Secretary of State. We therefore turn to consider whether the public interest in non-disclosure is outweighed by the public interest in disclosure for the purposes of this Inquiry. Again we have considered this aspect of the matter in the light of the presently redacted material.

- 16 As we have said on a number of occasions, the Tribunal is determined to conduct as open an Inquiry as possible, so that we require powerful reasons for departing from this principle of open justice. The very nature and importance of this Inquiry makes this approach doubly essential. Thus we are not persuaded that any of the matters relied upon by the Secretary of State in the first Certificate entails the automatic acceptance of the application. However, having considered the submissions made to us, we have concluded that these matters do outweigh the need for openness and so rule. In reaching this conclusion we have taken into account the fact that in the redacted portions of the documents, there is nothing relating to IRA plans for the march on 30th January 1972. This deals with a point of concern raised by the families at the autumn hearing. We should also observe that if hereafter we concluded that the existence of the redactions was materially impeding us in our search for the truth, then we would reconsider our ruling.

Legal representation

- 17 It has been suggested that civilian witnesses called to give evidence to the Inquiry should as a general rule be legally represented and that the cost of such representation should be met from public funds. We do not accept that there should be any such general rule. As we have said before, we shall recommend that the reasonable costs of legal representation should be met from public funds in any cases where we are persuaded that the interests of justice require legal representation. An obvious case for representation is where a witness is facing serious allegations. We are not persuaded that the interests of justice require legal representation merely on the grounds that the person concerned is called to give oral evidence.

Statements on the Inquiry website

- 18 We wish to revisit our 4th June 1999 announcement that statements given by witnesses who do not testify orally will not be posted on our Internet website (www.bloody-sunday-inquiry.org.uk). That direction was issued following our May 1999 ruling on anonymity. Subsequently, the soldiers successfully challenged our decision, thus removing the reason for not posting the statements of those witnesses who do not testify orally.
- 19 We have said that we will take into account all statements that witnesses give to the Inquiry – whether they testify orally or not. Indeed, in appropriate cases we may consider unsigned statements and statements (both oral and written) given to others. In keeping

with our objective of making the Inquiry as open as possible, it is important that the public have access to, and be able to view, the material upon which our decision is based. As statements given by those witnesses who do not testify orally form part of the record of the Inquiry and will be taken into account in our decision, we propose at an appropriate time to post all witness statements on our Internet website, unless we are persuaded in any particular case that there are good reasons for not doing so.

A2.11: Ruling (29th February 2000): anonymity for deceased soldiers granted

Deceased soldiers: anonymity

- 1 In our October 1999 rulings and observations, we made rulings granting anonymity to living soldiers. So far as deceased soldiers were concerned, we ordered that they should for the time being be treated as entitled to anonymity, while we obtained security assessments in respect of the families of those soldiers and considered submissions on the question whether they should remain anonymous.
- 2 We have now received a threat assessment, which is to the effect that the threat from terrorists to the families of those soldiers who were involved in Bloody Sunday but who have since died is low. This assessment is to be contrasted with the moderate assessment upon which the Court of Appeal made its ruling on anonymity. We have also considered submissions on the question of anonymity for deceased soldiers.
- 3 In our October ruling we extended anonymity to all living soldiers who played a part in Bloody Sunday. We did so on the basis that in our judgment the ruling of the Court of Appeal necessarily applied to all such soldiers, and not merely to those who fired or who were alleged to have fired live rounds.
- 4 In the course of his judgment in the Court of Appeal, the Master of the Rolls pointed out that there was a significant requirement of fairness to the soldiers and their families. In the present context it seems to us that the families of those soldiers who have died are justified in feeling, notwithstanding the low threat assessment, that it would simply be unfair for their names now to be singled out from virtually all the other soldiers and published. Coupled to this is the fact that to keep these few names anonymous would make insignificant inroads on the principle of openness, especially in view of the anonymity now being accorded to the vast majority of soldiers. Furthermore, although anonymity has caused and is causing delays and administrative difficulties, non-disclosure of deceased soldiers' names will not, as it presently seems to us, hamper the Inquiry in its search for the truth, though of course we shall constantly keep this matter under review.
- 5 For these reasons, we now rule that our anonymity ruling of October 1999 relating to living soldiers should extend to include deceased soldiers.

A2.12: Ruling (13th April 2000): Toby Harnden found in contempt of the Tribunal and certified to the High Court

Hearing transcript – 13th April 2000, pp78–79

LORD SAVILLE: In these circumstances, my colleagues and I are of the view that Mr Harnden is in contempt of this Tribunal. According to the 1921 Act under which we are operating, the next step is for the Chairman of the Tribunal to certify that contempt to the High Court and it is for the High Court to decide what action should be taken. I have accordingly signed such a certificate and referred the matter to the High Court in Belfast. The certificate and the statement which I have made to the High Court and the relevant correspondence will be made available on request to anyone who would like to see it.

A2.13: Ruling (13th June 2000): reconsideration of anonymity for certain soldiers

Hearing transcript – 13th June 2000, p4

LORD SAVILLE: One of those submissions is in paragraph 8 and is in effect a request for the Tribunal to reconsider the ruling of 13th October where we excluded from the scope of the anonymity those soldiers whose name appeared in documents which were available from the Public Record Offices.

MR WEIR: Yes.

LORD SAVILLE: The submission asks us, for the reasons set out above, to reconsider the ruling. The reasons set out above, so far as we can understand them – we hope we have done so correctly – is the contention that these names are not necessarily clearly public knowledge; that is simply to challenge the ruling we made in October and to put forward no further reasons for that ruling so that the Tribunal, as at present, is not disposed to accede to that request.

A2.14: Ruling (14th June 2000): limited screening granted for three RUC officers

Hearing transcript – 14th June 2000, pp47–50

LORD SAVILLE: Mr Ritchie, we need not trouble you further. These are three applications made by the Chief Constable of the Royal Ulster Constabulary in relation to three retired police officers. The applications in each case are for a limited form of screening, that is to say that if these officers or any of them are called to give evidence, then they should give evidence screened from the public, though not from the Tribunal or the legal representatives of the interested parties.

The three officers are described as follows: Officer F, who I interject to say is not the same officer as one given the same pseudonym a year ago, is a retired Special Branch officer who lives in the northwest of Northern Ireland and has relatives in Londonderry, whom he visits regularly. Whilst a serving police officer attempts were made by terrorists to murder him on more than one occasion, in circumstances where it was clear he was the target.

The second officer is described as Officer G and is a retired Special Branch officer who has friends in Londonderry, whom he visits regularly. Whilst a serving police officer an attempt was made by terrorists to murder him in his home and he has been threatened on the street while in the company of his wife.

The third officer is Officer H, of whom it is said he is a retired officer who served in Special Branch at the time of Bloody Sunday. An attempt to murder him was made when terrorists planted a bomb under his car. He has received threats by letter sent to him at Strand Road RUC station. He also has friends living in Londonderry whom he visits from time to time.

Bearing in mind the murderous attacks that have been made in the past on these three officers and the threat assessments that we have received in rather more general terms, we have no doubt that these three officers have reasonable and genuine fears for their safety, if they were not allowed the limited form of screening for which they apply, were they to give evidence.

It seems to us in fact that really no valid distinction can be drawn between these cases and those cases of applications by the RUC with which we dealt in our ruling of 5th May 1999. Indeed, it seems to us, quite apart from anything else, that since there is no such valid distinction it would be quite unfair for the present applicants to treat them differently from the three we dealt with last year, unless there were very strong countervailing reasons for so doing.

We can find no such reasons. These officers, unlike those with whom we dealt with last year, are retired, so of course there is no question that their operational effectiveness could be affected or prejudiced. To our minds that is not the point. The point is that there is a threat, in our view, to their personal safety, and this seems to us to arise irrespective of the fact that they are now retired.

The point has been made that these officers have given no statements to date, although there are in existence draft statements which the Tribunal hopes and trusts that the officers will be able to sign in the near future.

However, as to that, the fact is that it seems to us that there is a real danger to the safety of these officers, irrespective of anything they may have to say in any evidence they give to the Tribunal. It is suggested that in the case of at least two of these officers, what they are likely to say is controversial; that is put forward for a reason for refusing screening. But it is to be remembered in that context that both the Tribunal and the lawyers for the interested parties will be able to observe these witnesses if they are called while they are giving their evidence.

In short we consider, as we did last May, that there is especial danger to these officers which overrides the public duty to conduct an open Inquiry, but of course only to the limited extent of the limited screening which is sought.

Lord Gifford suggested in the course of his submissions that the application was premature and it should be left over as the security situation may improve and the matter should be reconsidered at a later stage. We are not persuaded of that submission. As with all our rulings, if there becomes a material change of circumstance we will of course revisit the topic.

This particular application does not form an exception to that general rule.

In those circumstances, we should accede to the application and order the limited form screening sought, in the event that these officers are asked to give evidence.

A2.15: Ruling (15th June 2000): Observer B is entitled to anonymity and may testify by way of video link

Hearing transcript – 15th June 2000, pp17–21

MR HOYT: A former agent for the British Army and for the Security Service, who claims to have relevant evidence to give to this Tribunal, and whom the Tribunal has designated Observer B, has applied to us for anonymity. Together with the claim for anonymity, there are two interrelated applications which Observer B claims are necessary to achieve anonymity, namely that his written statement to the Tribunal and the documents attached to it be redacted in such a way that his anonymity is preserved, and that his image be concealed while testifying.

This latter application goes further than screening in that Observer B wants to testify by audio link only.

I should note here that we have previously ruled that, for reasons of health, Observer B is permitted to give oral evidence to the Tribunal from elsewhere by video link.

These applications are exceptional, both in what they seek and because the grounds upon which they are based cannot be disclosed, as to do so would defeat the purpose of the applications. The applications are made to protect the personal security of Observer B, who has genuine and reasonable fears for his safety and that of his family.

We have obtained a threat assessment relating to Observer B from the Security Service. We are not attracted to Mr Coyle's suggestion that we should not take much account of that assessment because it was about a former member. Because the assessment contains material that tends to identify Observer B, it was not made available to the interested parties.

Three points emerge from that assessment:

- (i) there already exists a potential for him to be located and singled out for attack.
- (ii) the threat to him from Irish-related terrorism is assessed as moderate.
- (iii) the threat to him could rise if his name and activities as an agent are disclosed.

Put briefly, the statement of Observer B to the Inquiry discloses his role as an agent and names, by cipher, the persons to whom he reported. It discloses that before 30th January 1972 he observed what he assumed were training exercises of IRA auxiliaries and had conversations that confirmed that assumption.

Following that date he had conversations with persons who claimed to be present during the events that are the subject of this Inquiry. These conversations refer to firearms being distributed and fired by those other than British soldiers. He refers to reports that he made to his handlers.

Attached to his statement are copies of Security Service documents, themselves sometimes redacted, relating to reports and observations made by Observer B. Some of the redactions of the documents were made by the Security Service before they were delivered to the Tribunal, while the remaining have been proposed by Observer B in order to preserve his anonymity. The former redactions have not been seen by either the Tribunal or Observer B.

No claim for Public Interest Immunity has yet been made by the Security Service in respect of these redactions. We understand that such a claim will be made. Unless that claim is made shortly we shall require unredacted copies of these documents to be delivered by the Security Service to the Tribunal.

To get back to the applications: there is little doubt that the evidence of Observer B is likely to be important. There is no doubt that he has a reasonable and genuine fear for his safety and that the threat to him will likely be increased if his name becomes known. We are satisfied that granting anonymity to Observer B and the proposed redactions to his statement will not impede us in our search for the truth. The proposed redactions, unlike a previous application this week, do not contain anything that is material to the subject matter of the Inquiry and are exclusively for the purpose of preserving the anonymity of Observer B, which would otherwise be disclosed.

The differences between and the consequences arising from the two methods of testifying, that is by either video or audio link, were canvassed at some length yesterday. In short, it is our view that the testimony of Observer B should not be given by an audio link. Such a method would prevent the Tribunal, its counsel, and counsel for the interested parties from observing him while he is testifying and would unduly detract from the requirement of openness.

At the same time, we are satisfied that limited screening is appropriate in the circumstances here and, for that reason, we rule that Observer B is entitled to give oral evidence by video link, the viewing of which will be limited to the Tribunal, its staff and qualified barristers and solicitors who represent the interested parties.

To summarise, we rule that Observer B is entitled to anonymity, that his statements and accompanying documents be redacted as proposed, and that he be permitted to testify by video link, the viewing of which will be limited as above. As we said in paragraph 12 of our October 1999 ruling concerning anonymity for the soldiers, if it becomes apparent that this ruling makes it very difficult to investigate properly the events of Bloody Sunday, or materially impedes the search for the truth of what happened that day, we will reconsider this matter.

A2.16: Ruling (24th May 2001): soldiers' names in the public domain

- 1 On 12 October 1999, the Tribunal made a number of further rulings and observations. One ruling, consequent upon a decision of the Court of Appeal, extended a grant of anonymity to non-firing soldiers as well as to those who fired or were alleged to have fired live rounds on Bloody Sunday.
- 2 In treating all the soldiers in the same way, the Tribunal applied equally an exception where the name of a soldier was "already clearly in the public domain" thus making unnecessary any form of anonymity for such soldiers. The Tribunal identified several such exceptions on the basis that those soldiers or senior officers constituted examples of names being clearly public knowledge. Those exceptions were:
 - (1) those soldiers whose identity the Tribunal has already held to be in the public domain
 - (2) those soldiers who gave evidence under their own names to the Widgery Inquiry
 - (3) those soldiers whose names appear in documents available at the Public Record Offices
 - (4) Colonel Colin Overbury
 - (5) General Sir Anthony Farrar-Hockley and
 - (6) General Sir Frank Kitson
- 3 On 1 November 1999, we received an application on behalf of the family of James Wray. They put forth names that they contend are in the public domain, some of which are linked by them to the following codes (as designated at the Widgery Inquiry): 027, 119/237, F, G, E, H, 236, and J. Also, it was requested that the identity of all soldiers in Support Company with the name of or known as "Dave" be disclosed. This disclosure was requested because a civilian witness in Glenfada Park claims to have heard a soldier refer to one of his colleagues as "Dave".
- 4 The basis for claiming that the names of some of the coded soldiers listed below are in the public domain comes from a document authored by 027. Redacted portions of the document were published in a weekly newspaper and the unredacted document was given to Madden & Finucane and submitted to the Irish government. The Tribunal has an

unredacted copy. Also, we are told, the families of the deceased and the wounded, their solicitors and the Bloody Sunday Justice campaign, none of whom, it can be thought, would make use of the document to place soldiers at risk, have unredacted copies of the document. We are not satisfied that this limited distribution of the unredacted document places it “*clearly in the public domain*”. Thus, we cannot use the document to conclude that the names mentioned therein are clearly in the public domain. Also submitted were copies of Army lists, a copy of the London *Gazette* containing an honours list and a copy of a photograph with names, from *Pegasus*, a Parachute Regiment magazine, showing “The Battalion Cross-country team”. While these documents are in the public domain, the mention of a name in the lists or in a photograph is not sufficient to link a soldier with the code assigned to his name.

- 5 For the above reasons, we are not satisfied that the names of the following soldiers are in the public domain: 119/237, E, F, G, H and J.
- 6 One of the soldiers who has been identified in the course of proceedings only as 027 (subject to an important qualification to be mentioned later) has sought from the Tribunal a ruling designed to protect his anonymity during the course of future proceedings. To understand the reason for the application, it is necessary to go back in time.
- 7 At the hearing in 1999 which considered the anonymity of the soldiers, a submission was made on behalf of the family of James Wray that the names of certain soldiers were in the public domain and that henceforth they should be referred to by name and not by a coded number. One of those soldiers was 027.
- 8 During the hearing mention was made of “*a statement of a soldier whose code number is 027*”. Later in the day counsel for some of the soldiers said:

“Of course we know that [mentioning a soldier by name] has publicised his views and his name, but that is not what we are concerned about; he brings that on himself.”

The disclosure by counsel was not accidental. It was made in the belief that the name of the soldier had been published in some documents in a way that sufficiently linked the soldier with the code. Counsel to the Inquiry pointed out that the name of the person who made the statement was not necessarily public knowledge but the above extract was then on the transcript which, in the ordinary course, would go on the Internet.

- 9 The Tribunal decided that the transcript of the day's proceedings should not be edited but published in "*the ordinary way*". The result was that the name of the soldier who made the statement was known, not only to those present in the Guildhall that day, including the families of those who had been killed or wounded and the media, but also to anyone who picked up the transcript on the Tribunal's website. However, nothing said at the hearing that day directly linked the name of the maker of the statement with any coded number.
- 10 Although the Tribunal thereafter dealt with anonymity in regard to other soldiers, the particular question of 027's anonymity did not surface again until 10 October 2000 when the Solicitor to the Inquiry wrote to 027's solicitor to say that the Tribunal had "*in principle concluded that subject to anything you may wish to say on behalf of your client, that his name is in the public [domain]*".
- 11 This letter provoked a response from 027's solicitor to the effect that the mention of his client's name by counsel on the earlier occasion did not result in his name being in the public domain. The Tribunal heard from the solicitor, Mr Bindman, and also from counsel appearing for certain interests represented before the Tribunal. The Tribunal reserved its decision on what might be described, though not entirely accurately, as 027's application.
- 12 Before the Tribunal could deliver its decision there was a further development. At a subsequent hearing, counsel for the family of James Wray said that he had been instructed by his solicitors that a newspaper report of the earlier hearing had mentioned the name of 027 and that a TV broadcast about the same hearing had repeated the name. The solicitors informed the Tribunal that they had been unable to locate the newspaper article they believed to exist but they forwarded a video of the TV programme. At a later date the solicitors were able to locate the newspaper article.
- 13 The Tribunal has seen the video. It would only compound the problem to identify the date, the channel or the title of the programme or details of the newspaper article. Certainly the commentator in the video names a soldier as having his anonymity revealed at the hearing but he does not link the name with any coded number. However, it must be said, in the much more detailed newspaper article the journalist does make a direct connection between the coded number and the name of the soldier.
- 14 The exception to anonymity identified by the Tribunal in terms of "*clearly in the public domain*" simply recognises that, while the decision of the Court of Appeal established a general rule of anonymity, there are situations in which anonymity is pointless because the identity of the person in question is public knowledge. Whether it is public knowledge

is a question of fact which, in some cases, may be readily apparent and, in other cases, may need some inquiry. But it is important to keep in mind that the issue in this Inquiry is not simply revelation of the name of a soldier; it is the linking of that name with the number the Tribunal has given to the soldier for the purposes of anonymity. It is that link which effectively destroys anonymity.

- 15** Counsel to the Inquiry suggested that an appropriate test of whether a name was clearly in the public domain was whether a member of the public can readily find and lawfully publish the name, again in a context which links the name with any code designed to protect anonymity. The test is useful because it points up that it is not mention of the name of a witness that destroys anonymity. What places the identity of a witness in the public domain where that witness has been given a coded name is something said that readily links the name with the code. The test is not whether that connection can be made by some thorough investigative process. This is a question of fact and, to some extent, of degree.
- 16** Applying that test to the present case, the Tribunal is not persuaded that what was said at the earlier hearings readily links 027 with any named person. It is only the newspaper article that makes that connection. This is undoubtedly a borderline case but, in all the circumstances, we consider that the name of 027 is not clearly in the public domain in the sense in which the Tribunal has used that expression.
- 17** Mr Bindman accepted that the Tribunal could do nothing in regard to what had happened at any earlier hearing but submitted that the soldier should be granted anonymity in any future proceedings of the Tribunal. It may be said that a certain unreality attaches to any direction which operates only as to the future. Nevertheless, if, as the Tribunal considers, the name of 027 is not clearly in the public domain, he is entitled to the protection accorded to other soldiers so far as that can now be done. The direction to be made gives him as much protection as can be given in the circumstances.
- 18** During the course of the present hearing there was some discussion of an agreement made by 027 with the Northern Ireland Office. We have considered the agreement but do not think it is necessary to say anything about it. It does not bear on our decision.
- 19** The Tribunal directs that in any future proceedings Soldier 027 will be referred to by that coded description only.

20 A soldier. This soldier, now known as INQ 23, was featured and named in an April 1995 Ulster Television programme entitled *A Tour of Duty*. He acknowledged that he was a member of the Parachute Regiment and that he fired in the Bogside on Bloody Sunday. He was not given a code at the Widgery Inquiry as he neither testified nor gave a statement to either the Widgery Inquiry or to the RMP. In his statement to this Inquiry, he said:

“I took part in a television programme called *A Tour of Duty* with two former colleagues ... in 1994. Consequently my name has always been in the public domain.”

His counsel offered no response to the application that his name was in the public domain. Indeed, by letter dated 5 December 2000, his solicitor advised that INQ 23 accepted that the maintenance of his anonymity is impractical and that he did not seek “to prevent his name appearing instead of the cipher that has been allocated”. INQ 23 is David Longstaff.

21 236. We ruled on 17 December 1998 that this soldier, Major E.C. Loden, was not entitled to anonymity.

22 Another soldier. This soldier was given the code 202 by the Widgery Inquiry and his surname and rank were given in a statement that is in the Public Record Office. He therefore falls within our October 1999 ruling as someone whose name and rank are in the public domain. Even accepting that the surname should have been redacted before it was placed in the PRO, the fact remains that his surname appears in a document that is in the public domain. In addition, on 8 March 2001, the Inquiry wrote to the solicitor for 202 asking whether there was any continuing objection to the use of the surname. No reply has been received. For the above reasons, the rank and surname of 202 will be disclosed on 8 June 2001.

23 “Dave”. This request is made because Joseph Mahon, a civilian witness who was wounded in Glenfada Park North on Bloody Sunday, says that a soldier there referred to one of his colleagues as “Dave”. Counsel for the soldiers submit that, at the most, we should only indicate whether a soldier in Glenfada Park North had the forename “Dave”, which is a diminutive of a common forename.

24 To properly inquire into the events in Glenfada Park North, it is necessary to consider to whom the remark heard by Mr Mahon may have been addressed. The effective questioning of witnesses requires the disclosure of the cipher of any soldier who may

have been in Glenfada Park North that afternoon with the forename of David. We noted in paragraph 56 of our 17 December 1998 ruling that it was “*very likely to become necessary for the interested parties to be told which, if any, of the soldiers who were in Glenfada Park had that name*”. We are still of the same view.

- 25 For the above reasons, we confirm that David is the forename of David Longstaff and another member of the Anti-Tank Platoon, whose cipher we will disclose on 8 June 2001 and that, as far as we are aware, no other member of the Anti-Tank Platoon has that forename.
- 26 We make the above rulings knowing that in order to make sense of the evidence, it may become necessary, from time to time during the hearings, to reconsider whether to disclose some of the above names and perhaps others.

A2.17: Ruling (1st June 2001): use of intelligence material held by the security services

- 1 We have considered written and oral submissions on the question of what the Tribunal should do about intelligence material held by a number of government security agencies, including in particular information about persons who have given or who are likely to give evidence to the Inquiry.
- 2 The Tribunal expressed its preliminary view on this matter in a letter to the interested parties dated 21st February 2001. In that letter the Tribunal divided the material in question into two categories, namely material that might be directly relevant to the subject matter of the Inquiry and material that might go to the credibility of witnesses, though of course (as the letter pointed out) these two categories could well overlap unless the latter category was confined to material relating exclusively to the credibility of witnesses. In essence the Tribunal considered that directly relevant material should be produced to the Inquiry, but that there was no need to produce material relating exclusively to the credibility of witnesses i.e. material that did not contain matters of direct relevance. In the nature of things, the material held by the agencies that could be of interest to this Inquiry is likely to be related to membership of or association with paramilitary organisations operating in Northern Ireland and the plans and activities of those organisations.
- 3 The first matter that we must consider is whether the Tribunal has the power to call for the production of any of this material at all.
- 4 The starting point is the Security Service Act 1989, which gave statutory continuance to a Security Service under the authority of the Secretary of State (Section 1(1)). Its function is essentially the protection of national security (Section 1(2)). Section 2(1) continues the operations of the Service under the control of a Director-General. The Director-General is responsible for the efficiency of the Service and, by reason of Section 2(2), it is his duty to ensure:

“(a) that there are arrangements for securing that no information is obtained by the Service except so far as necessary for the proper discharge of its functions or disclosed by it except so far as necessary for that purpose or for the purpose of preventing or detecting serious crime.”

- 5 While Section 2(2) is concerned with the duties of the Director-General, an argument before the Tribunal suggested that the section operated as a barrier to a court or tribunal demanding the material unless the demand was compatible with the section.
- 6 Section 2(2) of the Security Service Act is concerned with and prescribes the obligations of the Director-General. It says nothing about the power of a court or tribunal to call for material in the possession of the agency. Much stronger language would be required to deprive a court or tribunal of its statutory power to compel the production of relevant material.
- 7 Section 1 of the Tribunals of Inquiry (Evidence) Act 1921 gives to this Tribunal the powers of the High Court inter alia to enforce the attendance of witnesses and to compel the production of documents. There is no doubt that the Tribunal may require the production of the material. Its use of that material is another question.
- 8 The Intelligence Services Act 1994 Sections 2(2) and 4(2) contain comparable provisions in relation to the Secret Intelligence Service and the Government Communications Headquarters. It is unnecessary to spend time on this particular statute since it falls to be dealt with in the same way as the Security Service Act.
- 9 It should be noted that Schedule 4 paragraphs 4 and 6 of the Regulation of Investigatory Powers Act amend the Security Service Act and the Intelligence Services Act by importing Section 81(5) of the former into the latter statutes. In consequence Section 81(5), which gives an inclusive definition of “detecting crime” carries that definition into the Security Service Act and the Intelligence Services Act.
- 10 Mr Sales, Counsel for the agencies, argued that if the activities of the Inquiry involved detecting crime, there was no bar to the Director-General disclosing to the Inquiry material relating to witnesses. Section 81(5) provides that “detecting crime” shall be taken to include:
- “(a) establishing by whom, for what purpose, by what means and generally in what circumstances any crime was committed; and

(b) the apprehension of the person by whom any crime was committed.”
- 11 In our view it is unnecessary to consider the operation of Section 81(5) because none of the provisions in question is a bar to the production of material at the instance of the Inquiry.

- 12 The Interception of Communications Act 1985 dealt with the interception of a communication in the course of its transmission. It was repealed by the Regulation of Investigatory Powers Acts 2000. In so far as both Acts deal with the authorisation of interceptions, it is most likely that it is the earlier Act that bears upon the circumstances in which intercepted material has come to be held by the agencies.
- 13 However it was Section 17 of the later Act upon which considerable reliance was placed by Lord Gifford QC and other Counsel for the families. Section 17(1) provides as follows:
- “Subject to section 18, no evidence shall be adduced, question asked, assertion or disclosure made or other thing done in, or for the purposes of or in connection with any legal proceedings which (in any manner) -
- (a) discloses, in circumstances from which its origin in anything falling within subsection (2) may be inferred, any of the contents of an intercepted communication or any related communications data; or
- (b) tends (apart from any such disclosure to suggest that anything falling within subsection (2) has or may have occurred or be going to occur.”
- 14 Section 17(2) specifies various matters, of which for present purposes the most important is “*the issue of an interception warrant or of a warrant under the Interception of Communications Act 1985*”. The term “interception warrant” is defined in Section 81(5) as meaning a warrant under Section 5 of the Act.
- 15 Section 17 is concerned with “legal proceedings”. In ordinary language it might be argued that the Tribunal does not involve legal proceedings. However, “legal proceedings” is defined by Section 81(1) to mean civil or criminal proceedings in or before any court or tribunal and civil proceedings means any proceedings that are not criminal.
- 16 The principal object of section 17 is to prevent disclosure that interception under warrant has taken place. It does not exclude evidence from which the issue of a warrant may not be inferred.
- 17 In our opinion section 17 is capable of operating to prevent the agencies from disclosing the contents of intercepted communications even to the Tribunal, but whether it has that effect in any given case will depend upon whether or not it is possible for the material in question to be provided to the Tribunal in a form that will not give rise to the inference that the material derives from a warrant issued under the Acts (or from anything else falling within Section 17(2)). We recognise that it might be difficult or impossible for the agencies

to disclose such material, even in redacted form, without allowing such an inference to be drawn. This is however a matter which they will have to consider for themselves, since they hold the material. We shall not require the agencies to produce material to us if they are satisfied that by doing so they would be in breach of section 17.

- 18** Section 17(2) relates only to interceptions occurring after the coming into force of the Interception of Communications Act 1985 and various connected matters. It follows that Section 17(1) does not affect the disclosure of the contents of communications intercepted before then. We must however take account of the decision of the European Court of Human Rights in *Malone v United Kingdom* [1984] 7 EHRR 14. The 1985 Act was passed as the result of this decision, in which it was held that the previously applicable domestic law relating to the interception of communications lacked sufficient clarity, so that the interception of the applicant's telephone calls could not be regarded as "*in accordance with the law*" and hence represented a breach of his rights under Article 8 of the European Convention on Human Rights, now part of our domestic law.
- 19** The Court in *Malone* (at paragraph 64) held that telephone conversations were covered by the notions of "*private life*" and "*correspondence*" in Article 8. Upon the assumption that the agencies hold records of communications intercepted before the 1985 Act came into force, it appears to us that such interceptions must be regarded as having occurred in breach of Article 8 and that it would represent a fresh interference with the Article 8 rights of the parties to those communications, now protected by domestic law, if such records were to be disclosed to the Tribunal. Accordingly we shall not require the agencies to produce to us any records of communications intercepted prior to the coming into force of the 1985 Act.
- 20** We now turn to consider the Data Protection Act 1998, which, it was argued, precludes the Tribunal from using the material in the possession of the agencies. We reject that argument.
- 21** If material in relation to witnesses comes into the possession of the Inquiry, the Inquiry becomes a data controller within the meaning of the Act. That is a consequence of various definitions in Section 1, including "data", "personal data", "sensitive personal data" and "processing". Section 4 requires a data controller to comply with the data protection principles in relation to personal data, which he controls. Those principles are to be found in schedules to the Act. There is no doubt that the processing by the Tribunal of personal data satisfies the requirements of Schedule 2 (see paragraph 5(a), (b) and (d)) and the

processing of sensitive personal data satisfies the requirements of Schedule 3 (see paragraph 7(1)(a) and (b)).

22 The Data Protection Act does not operate as a barrier to the receipt of the material.

23 At this point it is convenient to deal with a submission by Lord Gifford QC on behalf of the family of James Wray to the effect that, quite apart from the special case of intercepted communications, Article 8 of the European Convention on Human Rights would make unlawful the disclosure to the Tribunal of any of the material held by the agencies.

24 Paragraph 2 of Article 8 provides as follows:

“There shall be no interference by a public authority with the exercise of this right except such as is in accordance with the law and is necessary in a democratic society in the interests of national security, public safety or the economic well-being of the country, for the prevention of disorder or crime, for the protection of health or morals, or for the protection of the rights and freedoms of others.”

25 The submission must be rejected, certainly in that absolute form. To begin with, it is apparent from the hypothetical summary prepared by the Security Service that many of the activities to which material relates, for instance causing explosions endangering life and property, cannot be said to relate to a person’s private life.

26 It is true that in *Rotaru v Romania* (European Court of Human Rights, 4 May 2000) the Court said:

“Moreover, public information can fall within the scope of private life where it is systematically collected and stored in files held by the authorities. That is all the truer where such information concerns a person’s distant past.”

27 Clearly, whether the collection of public information constitutes an infringement of Article 8 is a matter for determination in the particular case. It will turn on very special circumstances such as existed in *Rotaru v Romania*.

28 In any event Article 8.2 authorises interference with the right to privacy by a public authority for the reasons set out. That too requires a determination.

29 It may be the case (we do not know) that material is held by an agency in breach of Article 8. That does not mean that the Tribunal cannot exercise its power to call for material so as to consider the implications of the article for the material in question.

Furthermore other rights may have to be taken into account such as the right to life afforded by Article 2 of the Convention, and more generally the rights of interested parties and witnesses to be treated fairly in the course of the proceedings of the Tribunal.

- 30 Having concluded that we are entitled (subject to what we have said above in relation to records of intercepted communications) to call for the production of material from the concerned agencies, we now turn to the question of the steps that the Inquiry should take in relation to the production of the material. In this context it seems to us that it remains useful to deal separately with the two categories identified in the letter dated 21st February 2001, namely directly relevant material and material that goes only to the credibility of witnesses.
- 31 In that letter we identified three sub-categories of directly relevant material. The first of these was *“material that would add to the Inquiry’s knowledge and understanding of the events of Bloody Sunday. In other words information that throws any light either on the plans made by any paramilitary organisation for Bloody Sunday or on the actual events of that day.”* So far as this sub-category is concerned it is the case that early on in the life of this Inquiry the agencies were asked to produce all such material to the Inquiry and we have the assurance of their Counsel that the agencies believe that they have fully complied with this request. It seems to us that we would have been in breach of our duty to carry out as thorough and complete an Inquiry as possible had we not made this request; and nothing we have read or heard in the submissions made to us has caused us to alter this view.
- 32 The second sub-category of directly relevant material was described in the letter as *“material that would identify those persons who are not presently witnesses before the Inquiry who might reasonably be supposed to be likely to have, or to be able to provide, information about the planning of the paramilitary organisations for Bloody Sunday or about the actual events of the day”*.
- 33 This formulation has caused the agencies difficulties. As stated, we accept that it would require the agencies to conduct a trawl through all or virtually all their voluminous material relating to the troubles in Northern Ireland to see whether there were persons who might know about the plans or activities of the paramilitaries in respect of Bloody Sunday. In truth this would be a virtually impossible task that would in any event take literally years to carry out. It seems to us that in order to keep the matter within the limits of practicability, we should ask the agencies, at least in the first instance, to confine their search to material in the files of those individuals identified to them by the Inquiry, namely those

individuals from or in respect of whom the Inquiry has or expects to have some evidence about the events of Bloody Sunday. Since it appears to be much easier for the agencies to conduct a search in respect of identified individuals, it should not be unduly onerous for them to examine any files on those individuals to see if in those files there is anything that identifies others who may reasonably be supposed to have relevant information on the plans of paramilitary organisations for Bloody Sunday or the events of the day.

- 34 The third sub-category of directly relevant material was described in the letter as “*material in relation to the Inquiry’s witnesses that contains information that tends to show or which permits one reasonably to suppose that those witnesses have, or are able to provide, information about the planning of the paramilitary organisations for Bloody Sunday or about the actual events of the day*”.
- 35 We do not see any overwhelming difficulties in the agencies searching for and providing the Inquiry with any such material, since the request is limited to identifiable witnesses. The request does not mean that the agencies will have to check what the witnesses have said to us, but rather whether in their files there is anything to indicate that witnesses may know something about the plans of paramilitaries for Bloody Sunday or the events of that day. In cases where there is any doubt, the material must be produced for consideration by the Inquiry.
- 36 In the context of directly relevant material, another apparent sub-category was mentioned in the letter in the context of credibility. This relates to information that either adds to or contradicts what the witness to whom it relates, or other witnesses, have told the Inquiry about Bloody Sunday. As the letter pointed out, such information might be said to go to the credibility of the witness or witnesses concerned (a topic to which we shall return below), but would in addition also be of direct relevance. However, such material does not in our view form a separate sub-category, for whether or not the information adds to or contradicts other testimony it would itself fall within one of the sub-categories that we have been discussing.
- 37 Some of the submissions addressed to us appeared to suggest that the Inquiry should not seek even directly relevant material from the concerned agencies. As is apparent, we cannot accept this submission, since it seems to us that we would be in derogation of our duty to conduct as thorough an Inquiry as possible if we did not at least investigate and consider what material of this nature was held by the agencies.

38 The grounds put forward in support of these submissions were that in the nature of things any such material was likely to be of dubious value in the light of alleged shortcomings in the intelligence gathering operation in Northern Ireland, that calling for its production would lead people to believe that the Tribunal was not acting in an impartial and independent way, and that the rights of individuals could be seriously prejudiced.

39 We are not persuaded that any of these matters lead to the conclusion that we should simply refrain from requesting the agencies to produce any material of direct relevance. The weight of any such material cannot be assessed in the abstract and will of course be assessed in due course in the light of all the material put before the Inquiry. The fact that the Tribunal has asked the agencies to produce directly relevant material does not, as it seems to us, indicate any partiality or lack of independence, but merely a desire to explore all avenues of inquiry properly open to us. As to the rights of individuals, we were at pains, during the course of the submissions, to make clear our intention to safeguard their rights. Thus there would be no question of the Inquiry publishing or otherwise dealing with any material so as to prejudice possible rights of individuals, whether these arise under the Convention on Human Rights, or otherwise.

40 The concerned agencies have made the point that it is very likely indeed that much of the material in question will, if there is any question of publication beyond the Inquiry itself, be the subject of Public Interest Immunity applications designed to prevent such publication to the interested parties or otherwise of directly relevant material. It seems to us that this is a point of real substance. For example, to reveal details of the provenance of information in the possession of the agencies might well put informers and the like at risk or prejudice the future flow of intelligence. In the nature of things such applications take a very long time to prepare and we accept that if the agencies were required to make formal applications to the Tribunal, the process could well be measured in years. Accordingly it has been suggested by the agencies that a possible way forward would be for them to prepare summaries of the information that they possess, giving such of the information as can properly be put into the public domain. The agencies were at pains to emphasise that Counsel to the Inquiry, who would have access to all the underlying material, would be able to check the accuracy of any summaries. This, it was suggested, would avoid the need for the extremely time consuming PII applications.

41 We have no doubt that this suggestion has been put forward in good faith as a genuine attempt to speed the process. However, we see difficulties in adopting this approach. Such summaries would clearly be most unlikely to include all the relevant information or information about the source of the material and would take many months to prepare,

since great care would have to be taken to reveal as much as possible without including material that could properly be the subject of a PII application. Furthermore, so far as the individuals to whom the material relates are concerned, they would on the face of it be able to say that, apart from anything else, it was hardly fair to question them about such material unless they were provided with full details of what was said about them, so that they could deal properly with the allegations made against them.

- 42 We find the suggestion put forward by Counsel to the Inquiry of rather greater assistance. This involves the preparation of summaries by the agencies for use only by Counsel to the Inquiry, who would then be able to do a sifting exercise under the guidance of the Tribunal, excluding for example matters of minor or peripheral relevance, or matters on which there was already abundant evidence. Such summaries would include details of the provenance of the information and any other matters that would be the subject of a PII application were they intended for publication. Counsel would of course be able to check the underlying material.
- 43 The advantages of taking this course are that it would on the face of it take the agencies much less time to prepare such summaries than it would to prepare summaries intended for public distribution and would assist the Inquiry in sifting out material of no real assistance. The disadvantage is, of course, that such summaries would not solve the problem of PII applications, for if the Inquiry concluded in respect of any particular material that it was of sufficient relevance and importance that it had to be taken further, the concerned agencies would in all probability wish to apply to prohibit publication of some at least of the material beyond the Inquiry itself. This of course would in turn be likely to entail delay in getting on with the reception of evidence by the Tribunal.
- 44 We see no valid way of wholly avoiding such delays, though the sifting exercise to which we have referred would, as we trust, reduce the time spent on PII applications. Furthermore, we can envisage cases, for example where the lives of agents or informers would clearly be put at risk by publication of material, where the Tribunal could properly conclude that there was really no point in requiring the agencies to go through the time-consuming process of making formal applications for PII.
- 45 Whether or not the Tribunal would require the agencies to go through this formal process or felt justified in proceeding in a less formal manner depends on the particular circumstances under consideration. The same applies to the questions that arise if the Tribunal concludes that the agencies are justified in withholding material from public distribution. The Tribunal would then have to consider whether in the particular

circumstances of any given case, it would be proper to proceed on the basis of such limited material as could be put into the public domain, or on the basis of relying, or also relying, on material that was known only to the Tribunal and could never be published, or on the basis of ignoring the material altogether. We take the view that we cannot decide in the abstract which course of action we would take, for this would depend on the particular circumstances of the particular case. For example, we might well conclude that it was simply unfair to the individual concerned to proceed on the basis of incomplete material, or on material that was kept from that individual; or that the deployment of incomplete material would breach the rights of the individual, in which cases we would accordingly be likely to have to ignore the material in reaching our findings. This would mean that our report would not be as full or complete as might otherwise be the case, but we do not believe that we have the power, or indeed that Parliament intended us, to treat individuals unfairly or in breach of their rights, in our search for the truth about Bloody Sunday.

- 46 In addition to these considerations, even where PII applications are unnecessary, it may be the case that individuals will be able successfully to assert that the material cannot be used by the Inquiry, as to do so would interfere with their rights, for example their right to life under the Human Rights Convention. We note in passing that this could well be the case whether or not the material in the possession of the agencies is accepted as truth or denied as untrue, for there may, for example, be a real risk that the mere making of an allegation relating to membership of or association with paramilitary organisations or their activities would endanger the life or other rights of the individual concerned.
- 47 Despite the difficulties and delays that will be likely to attend the process, we repeat that it seems to us that our duty to explore all available avenues that could extend our knowledge of what happened on Bloody Sunday must lead us at least to start on the process of discovering whether the agencies have any directly relevant material, while appreciating that for the sort of reasons that we have discussed above, this may cause delays and we may not in the end be able to use some at least of that material.
- 48 There remains the suggestion raised by the soldiers that we should add to the categories of relevant material any information in the possession of the agencies which relates to the general practice of paramilitary organisations in Northern Ireland, for example their tactics, their use of vantage points and sniper positions, their use of crowds as cover, or their procedures for dealing with casualties or fatalities. As to this we accept the submission of Counsel for the agencies that this would again require a trawl through their entire files on the troubles in Northern Ireland. We further accept that a suggested

limitation to the years 1968–1972 inclusive would be of no real assistance, since the files are not kept in date order. If any such information appears from materials relating to the list of identified individuals to which we have referred, then it seems to us that it can and should be provided, but to go beyond this seems to us to be a wholly impracticable suggestion.

- 49 We now turn to the question of material that goes exclusively to the credibility of witnesses.
- 50 The soldiers submit that material showing membership of or association with paramilitary groups and material showing the extent of such involvement should be made available for use in publicly questioning the individual concerned. In their most extreme submission, it is said that the mere fact of membership of an individual should lead the Tribunal without more to reject the testimony of that individual. This submission can hardly be taken literally, for if it were then the soldiers should logically be submitting that the Tribunal is wasting its time even calling those who have admitted such membership, which is the opposite of the attitude that they have adopted to date. The real point made by the soldiers is that membership of or association with paramilitary associations, by itself or in conjunction with the degree of involvement of the individuals concerned, is a factor of great importance in assessing the credibility of those individuals, since their evidence is in the nature of things likely to be slanted against the British Army. It would be quite unfair, it is submitted, for the soldiers who are facing very serious allegations to be deprived of the opportunity of challenging the veracity of such individuals on this basis.
- 51 The first difficulty with this submission is that it assumes that the material in possession of the agencies establishes to at least a reasonable degree of probability that the individual was a member of or associated with a paramilitary organisation or involved in its activities. We do not accept that this assumption is necessarily well founded. In the nature of things, as Counsel for the agencies put it, the material is generally at best only suggestive of membership of or involvement with the paramilitaries.
- 52 If the material is only suggestive rather than probative of membership or involvement, then it is difficult to see how without more it could fairly be deployed in the context of credibility to any useful effect. It is true, as Mr Elias QC said on behalf of some of the soldiers, that the material would not be deployed for the purpose of proving membership of or association with paramilitary organisations or their activities but rather to discredit the witness. However unless the material was probative of such involvement it could in our view hardly discredit a witness who denied the allegation, since the Tribunal would be

left in doubt whether the individual was involved in the activities that it is suggested would discredit that individual. The only way of resolving that doubt would be to embark on a satellite inquiry into the validity of the material i.e. an inquiry into the truth or falsity of information that at best only goes to credibility. We do not accept that this is an appropriate course for the Inquiry to take.

- 53 It could be said that this reasoning ignores the possibility that faced with the material, the witness would admit the allegations. We consider this to be a somewhat remote possibility, especially in the context of the mistrust and suspicion of the agencies that exists within some of the communities in Northern Ireland. To our minds it is much more likely in the context of this Inquiry that the witness would exercise the right to refuse to answer on the grounds that his answer would tend to incriminate him, in which latter event it seems to us that it would be quite wrong to hold his refusal against him. We should note that in our view the Attorney General's undertaking not to use anything said to us in criminal proceedings would be irrelevant, since the undertaking extends only to matters relating to the events of Bloody Sunday. Allegations of criminal conduct unconnected with Bloody Sunday and which go exclusively to credibility are not matters relating to the events of Bloody Sunday.
- 54 Problems arise even in relation to material that could be said to be probative rather than merely suggestive of involvement with paramilitary organisations or their activities. Again the witness could refuse to answer on the basis of his right not to incriminate himself. It is said that nevertheless the Tribunal could use the material to discredit the witness, but this involves the proposition that discrediting material can be adduced and used in an inquiry of the present kind even in circumstances where the witness exercises a legal right not to comment on the material; a proposition that we are not disposed to accept.
- 55 There are further formidable difficulties in seeking to deploy material for the purpose suggested, whether or not it is probative or only suggestive. As we have already indicated, it is likely that the agencies will claim PII in respect of some of the material in question and on much if not all of the material will seek to withhold from all but the Inquiry itself its provenance. As in the case of directly relevant material, however such applications are dealt with they will necessarily take up additional and probably substantial time. Again as in the case of directly relevant material, it is likely that the Tribunal would hold the agencies entitled to withhold material. In such event it could hardly be suggested that it would be fair for the Tribunal to use material for the purpose of discrediting a witness who has not been fully informed of the allegation or the source of the allegation or both. Even if the application for PII did not succeed, or if there was

otherwise material which could in its entirety be shown to the witness, we can envisage many cases where the witness would request the Tribunal, before deciding on his credibility, to allow him to cross-examine those who made the allegation or even to adduce evidence to rebut what was alleged. This is not a fanciful prospect. For example, a witness may have apparently made a statement to the police when interned in which he admits his involvement with a paramilitary organisation, but who now claims that he was unlawfully induced to do so and wishes to seek to establish this. Unless the Tribunal allowed him to do so (and thus embarked on a further satellite inquiry) it would hardly be fair to treat the untested material as discrediting the witness.

- 56 The possible ramifications do not end here. The mere fact of publishing the allegation, irrespective of its truth or falsity, may be said to put the life of the individual at risk or otherwise amount to a breach of his human rights. Once again, the Tribunal, if it were to take the matter further, would have to embark on difficult and time-consuming arguments which might again end in court, and which might well entail that at the end of the day the Tribunal could not use the material to the discredit of the witness.
- 57 As will be seen, many of the problems that would arise in the context of material going exclusively to credibility also exist in relation to material that is directly relevant to the subject matter of the Inquiry. In the latter case, however, it seems to us that it is clearly our duty to do all that we reasonably can to collect and consider so far as is practicable and lawful, all such material. The question is whether it is also our duty to go down the same or a similar road in relation to materials going exclusively to credibility.
- 58 We have, of course, firmly in mind that we must treat the soldiers, as we must treat everyone concerned, with fairness and justice. At the same time, it must be appreciated that to spend what is likely to be months if not years dealing with matters relating exclusively to the credibility of witnesses could only be justified where it could clearly be shown that fairness and justice dictated that this was the course that had to be taken. In our judgment this is not the case here. As we have pointed out, the obstacles in the way of using credibility material to any useful effect are formidable and would occupy a very considerable time; and it seems to us likely that in a substantial number of cases at least, the chances of being able to deploy the material to useful effect are not great, and would not be greatly improved even if the Tribunal embarked on the sort of lengthy satellite inquiries that we have mentioned. In those cases, a great deal of time and money would be spent to no good effect at all. Above all, however, it seems to us that this is an inquiry in which, at least as matters presently stand, the credibility of particular civilian witnesses is unlikely to play a pivotal role. We are considering the evidence of some 1200 civilian

witnesses. We are already aware that many have strong feelings against both the British Government and the British Army. We are conscious that we must bear this in mind when considering much of the civilian evidence. We also have the evidence of photographs taken on the day and of films shot on the day, as well as evidence from journalists and others. We have the advantage of observing hundreds of the civilians giving oral evidence before us. In this context we are not persuaded that we are likely to be materially misled simply because we are not made aware that at some time wholly unconnected with Bloody Sunday, particular witnesses may have been involved to a greater or lesser extent in paramilitary or analogous activities. We are accordingly not persuaded that it is necessary, in the interests of justice and fairness, that we should devote what will inevitably be an inordinate length of time in taking the course urged upon us by the soldiers.

- 59 In relation to credibility there are two further points worthy of note.
- 60 The first is that the present ruling relates to material that goes exclusively to credibility; apart from what we have said about records of intercepted communications, nothing in the ruling excuses the agencies from producing to the Inquiry directly relevant material that might be said also to go to credibility. We repeat that if the agencies have any doubt about the relevance of material, they should produce it for consideration by the Inquiry.
- 61 The second point is the suggestion by the soldiers that so far as their credibility is concerned, the Inquiry is adopting a different and wider basis, by seeking Army records in relation to any relevant discreditable activities.
- 62 The Tribunal accepts that the information sought from the Ministry of Defence in this connection might be read as requiring the production of all Army records of any kind relating to alleged discreditable activities, but this was not the intention. We have already indicated that for both civilian and Army witnesses, we shall take into account to the degree that we consider appropriate, any relevant unspent criminal convictions of the individual concerned. Such convictions do not give rise to the sort of problems that we have been discussing, since the fact of the conviction is public knowledge and the conviction has followed the due process of the law. To our minds the same applies to records of discreditable activities found as the result of analogous Army disciplinary proceedings, where a proper judicial process has been engaged.

63 In summary therefore, we rule as follows:

- (1) Subject to the exception and qualification set out in (2) below, we shall seek from the agencies directly relevant material that falls within the categories that we have described and refined in this ruling in the manner indicated;
- (2) We shall not require the production of records of communications intercepted before the coming into force of the Interception of Communications Act 1985; and will require the production of records of communications intercepted after the coming into force of that Act only if the producing agency is satisfied that it may produce such records to us without contravening Section 17 of the Regulation of Investigatory Powers Act 2000;
- (3) We shall not, at least on the basis of our current state of knowledge, require the production of material that goes exclusively to the credibility of witnesses, except records of criminal convictions or analogous Army disciplinary proceedings.

A2.18: Ruling (13th June 2001): the Tribunal to meet with security services

Hearing transcript – 13th June 2001, pp193–194

LORD SAVILLE: Thank you. There is something else we would like to say, which is that the Tribunal has been considering the oral and written submissions of the Ministry of Defence and the interested parties on the question of where the soldiers should give oral evidence.

The Tribunal has concluded that it may be assisted in making a ruling by seeking more information on the security situation. To this end, the Tribunal has decided to have a meeting with the relevant security authorities, including the Ministry of Defence and the RUC.

The meeting will be held in private since it will necessarily involve discussion of security matters that, for obvious reasons, cannot be made public.

However, the Tribunal will, of course, make public to the greatest degree possible the outcome of the meeting and will then decide how to proceed.

A2.19: Ruling (1st August 2001): venue for soldiers' oral evidence (overruled – items 47 and 48 below)

- 1 In December 1998 we considered the question of where the soldiers should give oral evidence to the Inquiry, in response to a submission made on behalf of some of the soldiers that this should be done in London rather than the Guildhall. We did not rule upon the matter at that time, but expressed our then view in the following terms:

- “4. From the point of view of personal convenience, it would doubtless be easier for many of the soldiers to give their oral evidence in London. In 1972 all or virtually all the soldiers involved were still in Northern Ireland, so that this question hardly arose. After a distance of 26 years only a handful of these individuals are still serving in the Army, and we recognise that a call to give evidence in Northern Ireland will require much more personal disruption than was the case in 1972.
5. In addition, it will be necessary to make appropriate security and accommodation arrangements. These arrangements may in themselves be more expensive than those for a hearing in London, but we are not persuaded that the overall costs of the Inquiry would be materially affected by holding hearings of soldiers' evidence in Northern Ireland.
6. In our view there is another major consideration to bear in mind.
7. This is the fact that we are investigating events which took place in a city a long way from London, events which led to people of that city being killed or wounded through the actions of soldiers who were there in an official capacity. Whatever the rights and wrongs of what occurred on Bloody Sunday, in our view the natural place to hold at least the bulk of the oral hearings is, in these circumstances, where the events in question occurred.
8. We have concluded on the information presently available to us that this factor, so far as the soldiers generally are concerned, outweighs personal convenience and the expenditure required to make appropriate security and accommodation arrangements.

9. In their submissions dated 9th December 1998, it seems to be suggested that the soldiers are already at a disadvantage because it will, in effect, be impossible for them to attend while those who are alleging that they committed murder are giving their oral evidence; so that to refuse to allow the soldiers to give evidence in London further tilts the balance of convenience unfairly against them. In addition, the point is made that the soldiers will not be able to follow the proceedings by video link and are unlikely to have access to daily transcripts, but at best will have to follow what is going on through the Internet.
10. We do not accept this submission. Those representing soldiers have accepted without challenge (and in our view correctly) that the civilians' evidence should be heard in the city where the events in question occurred. Hearing the evidence of the soldiers in London would not alter this state of affairs or its consequences. Furthermore, as we have repeatedly sought to explain, this is an inquisitorial inquiry and before oral hearings start all concerned will be given a proper opportunity to consider and prepare to deal with whatever allegations the Tribunal considers require an answer. This is not an adversarial proceeding and thus, for example, we shall not allow any interested party to keep oral (or indeed other evidence) in reserve in order to spring it by surprise in an adversarial fashion. Furthermore, we see no reason why those representing soldiers should not use to the full modern technology (not just the Internet) to keep those of their clients who wish it fully informed at all times of what is going on and to give advice to and receive instructions from those clients.
11. Accordingly, we are not persuaded that we should now rule that soldiers should give their oral evidence in London. On the contrary it seems to us that, as matters at present stand, and subject to changing circumstances and particular matters affecting individual soldiers, those who are called to give oral evidence should expect to give their evidence in the Guildhall. We shall not make a ruling to that effect now, since hearings involving soldiers are a long time ahead and meanwhile we want to keep the matter under review. Changing circumstances and particular matters affecting individual soldiers may cause us to reconsider the matter.
12. All concerned have expressed a desire to see justice done. That is our desire as well. Justice can only be done and be seen to be done if the Inquiry is conducted in a calm and quiet manner, so that (among other things) all those who have relevant evidence to give have a proper and fair opportunity to be heard, without

distraction or interference and without grounds for any concern save that they should speak the truth. We expect a hearing in the Guildhall to provide that opportunity. If for any reason our expectation turned out to be misplaced we would not hesitate to make other arrangements which (if justice required it) would include continuing our search for the truth elsewhere.”

- 2 It is now appropriate to revisit this topic and to make a ruling upon the question. We do so by approaching the matter afresh, with the advantage of considering extensive oral and written submissions by the interested parties.
- 3 The soldiers submit that it would be unlawful and unfair to require them to give their oral evidence at the Guildhall. This submission is based upon the following principal propositions:
 1. the terrorist threat and, in particular, the genuine and reasonable fear on the part of the soldiers that they will be subject to revenge attacks by terrorists;
 2. the threat of public disorder;
 3. the hostile and intimidating environment of the Guildhall;
 4. the practical prejudice that will be caused to the soldiers in the conduct of the proceedings if they are required to give their evidence in Northern Ireland.
- 4 Before examining these propositions in detail, it is convenient to consider first whether we were right in our preliminary view that the natural place to hold an inquiry of the present kind was where the events in question occurred.
- 5 We have no doubt that our preliminary view is correct. We are a tribunal comprised of members from three countries charged with seeking the truth about Bloody Sunday. On that day in a city in Northern Ireland, citizens of the United Kingdom were killed and wounded by British troops. The events of that day, though of great national and international concern, have undoubtedly had their most serious and lasting effects on the people of that city. It is there that the grief and outrage that the events occasioned are centred. It seems to us that the chances of this Inquiry restoring public confidence in general and that of the people most affected in particular (which is the object of public inquiries of this kind) would be very seriously diminished (if not destroyed) by holding the Inquiry or a major part of the Inquiry far away and across the Irish Sea, unless there were compelling reasons to do so. It is for similar reasons that public inquiries generally are held in or near to the place where the events to be investigated occurred.

- 6 In an apparent attempt to downplay the importance attached by local people to the fact that the Inquiry is being conducted here, the legal representatives acting for some of the soldiers submitted to us a statistical analysis of those who have to date attended the Inquiry to listen to the hearings. We are bound to say that we find this analysis both misleading and unhelpful.
- 7 The analysis is misleading because it gives the impression that less people have attended the Inquiry than is in fact the case. The analysis takes the number of people attending at each half hour of the hearing day and then divides the total number of people by the number of half hours of the day to give a so-called “average attendance”. Thus if 50 people attended for two of the five hours of a given day, the “average” attendance for that day according to the analysis would only be 20.
- 8 The analysis is unhelpful because it ignores the fact that local people have their own lives to lead and cannot be expected to attend at the Guildhall all day and every day. The real fact of central importance to local people is that the Inquiry has come to where Bloody Sunday took place in order to try and discover how their relatives, friends and neighbours in this close knit community came to be killed and injured on that day. Furthermore, the analysis simply ignores the fact that what will clearly be of the greatest interest to local people will be the soldier witnesses and those in positions of authority at the time offering their explanation of how such deaths and injuries came about.
- 9 In our judgment, since the oral evidence of the soldiers will form a major part of the Inquiry, the starting point is that this evidence should be given at the Guildhall, where all or virtually all the other oral evidence will be heard, unless indeed there are compelling reasons to take a different course.
- 10 At the forefront of their submissions, those acting on behalf of the soldiers submit that for the Tribunal to require the soldiers to give oral evidence in the Guildhall would be to act in a way which is incompatible with their rights under Article 2 of the European Convention on Human Rights and would accordingly be unlawful by reason of Section 6(1) of the Human Rights Act 1998.

- 11 This sub-section reads:

“It is unlawful for a public authority to act in a way which is incompatible with a Convention right.”

This Tribunal is a public authority: see section 6(3).

- 12 The Act prescribes various consequences where a public authority is in breach of the Act. It is clear that the Tribunal must not act in a way which is incompatible with a Convention right; in the present case it is Article 2 on which the argument has focused. Article 2.1 reads:

“Everyone’s right to life shall be protected by law. No one shall be deprived of his life intentionally save in the execution of a sentence of a court following his conviction of a crime for which this penalty is provided by law.”

- 13 In *R v (Mahmood) v Secretary of State for the Home Department* [2001] 1 WLR 840 where the Secretary of State had made a decision before the Human Rights Act came into effect but where the decision was reviewed after the Act came into effect, Lord Phillips MR said at page 857:

“Interference with human rights can only be justified to the extent permitted by the Convention itself. Some articles of the Convention brook no interference with the rights enshrined within them.”

- 14 Article 2.2 identifies circumstances in which deprivation of life shall not be regarded as inflicted in derogation of the article but those circumstances are not applicable here. It follows therefore that for relevant purposes Article 2 is non-derogable. Nevertheless, to say that the right to life shall be protected by law leaves for consideration a range of questions. Some of those questions have been examined in decisions of the European Court of Human Rights.

- 15 In considering those decisions it is necessary to keep in mind that the Court is usually concerned with events that have occurred already and often with an interference with human life at the hands of an agency of the State. This Tribunal is asked to make a decision on venue by reference to events which may or may not occur though of course the past may throw light on the likelihood of such events taking place in the future. Furthermore the protection of human life, in this case of the soldiers, is not something over which the Tribunal has any direct control. That must be in the hands of State agencies, in particular the Ministry of Defence (MoD) and the Royal Ulster Constabulary (RUC). However, that does not relieve the Tribunal of the obligation to assess, as best it can on the material available to it, the risk to the soldiers in hearing their evidence in one place rather than another.

16 With these observations in mind, the most helpful judgment is that of *Osman v United Kingdom* [1998] 29 ECHR 245. In essence the Court was faced with a complaint that the State had failed to protect the lives of the second applicant and his family. The allegation was that the police had failed to protect those persons from the criminal actions of a third party.

17 The Court took as common ground “*that Article 2 of the Convention may also imply in certain well-defined circumstances a positive obligation on the authorities to take preventive operational measures to protect an individual whose life is at risk from the criminal acts of another individual*” (para. 115). Turning to the scope of this obligation, the Court continued:

“116. For the Court, and bearing in mind the difficulties involved in policing modern societies, the unpredictability of human conduct and the operational choices which must be made in terms of priorities and resources, such an obligation must be interpreted in a way which does not impose an impossible or disproportionate burden on the authorities. Accordingly, not every claimed risk to life can entail for the authorities a Convention requirement to take operational measures to prevent that risk from materialising. Another relevant consideration is the need to ensure that the police exercise their powers to control and prevent crime in a manner which fully respects the due process and other guarantees which legitimately place restraints on the scope of their action to investigate crime and bring offenders to justice, including the guarantees contained in Articles 5 and 8 of the Convention.

In the opinion of the Court where there is an allegation that the authorities have violated their positive obligation to protect the right to life in the context of their above-mentioned duty to prevent and suppress offences against the person, it must be established to its satisfaction that the authorities knew or ought to have known at the time of the existence of a real and immediate risk to the life of an identified individual or individuals from the criminal acts of a third party and that they failed to take measures within the scope of their powers which, judged reasonably, might have been expected to avoid that risk... For the Court, and having regard to the nature of the right protected by Article 2, a right fundamental in the scheme of the Convention, it is sufficient for an applicant to show that the authorities did not do all that could be reasonably expected of them to avoid a real and immediate risk to life of which they have or ought to have knowledge. This is a question that can only be answered in the light of all the circumstances of any particular case.”

- 18 The Tribunal was referred to *Ergi v Turkey* (ECHR 28 July 1998), in particular to a passage in the judgment at p 25 that reads:

“Thus, even though it had not been established beyond reasonable doubt that the bullet which killed Havva Ergi had been fired by the security forces, the Court must consider whether the security forces’ operation had been planned and conducted in such a way as to avoid or minimise, to the greatest extent possible, any risk to the lives of the villagers, including from the fire-power of the PKK members caught in the ambush.”

However, the words “*to the greatest extent possible*” do not purport to lay down some general principle. They are expressed in the context of the particular factual situation with which the Court had to deal, one in which the security forces had carried out an ambush operation and took part in an armed clash with the PKK in the vicinity of a village.

- 19 *Chahal v United Kingdom* [1996] 23 EHRR 413 is concerned with Article 3 – Prohibition of Torture – and with the situation of a person faced with expulsion from the United Kingdom on the ground that he was a threat to national security. The Court was at pains to point out that the applicant’s alleged terrorist activities could not prevent the operation of Article 3, adding:

“Thus, whenever substantial grounds have been shown for believing that an individual would face a real risk of being subjected to treatment contrary to Article 3 if removed to another State, the responsibility of the contracting State to safeguard him or her against such treatment is engaged in the event of expulsion.”

The decision is interesting in so far as it is concerned with events in the future, but in terms of general principle it adds little to what was said in *Osman*. An important feature of that case, but not of this, was that, once the relevant decision (extradition or not) had been taken, there were no steps open to the United Kingdom to protect him from the risk of ill treatment which he faced, and he would not be subject to the protection of the Convention.

- 20 *Osman* recognises a principle of proportionate obligations on the authorities and the need to recognise the lawful constraints placed on the authorities in meeting those obligations. Authorities are not in breach of those obligations unless they knew or ought to have known of the existence of a real and immediate risk to life and failed to take measures which, judged reasonably, might have been expected to avoid that risk. This is not

because guarantees such as those that appear in Articles 5 and 8 of the Convention in any sense override Article 2. What the Court sought to do was to give meaningful content to the expression: *Everyone's right to life shall be protected by law.*

- 21 At the request of the Tribunal the RUC (in relation to Northern Ireland) and the Security Service (in relation to Great Britain) provided assessments of the threat to soldiers (including former soldiers) giving oral evidence to the Inquiry. The threat was assessed as moderate in both Northern Ireland and Great Britain. However, as the Security Service pointed out, threat is only one of the two factors to be taken into account when considering the risk to a person, the other being the vulnerability of the person in question.
- 22 Having considered these assessments together with other material including the comparative incidence of terrorist attacks in Northern Ireland and Great Britain supplied by the MoD, as well as the written and oral submissions of the interested parties, we concluded that we would be assisted by arranging a meeting at which we could discuss the question of security with all the agencies who might be responsible for the security of potential witnesses, so that we could be as properly and fully informed as possible about the security position at the possible locations for the hearing of the soldiers' evidence. This meeting took place on 18th June 2001. It was held in private, since it was likely that the discussion would include (as it did) matters concerning security that for obvious reasons could not be made public. However, it has proved possible to prepare a full summary of the meeting, which has been agreed with all present and which can be made public. This summary, which is attached to this ruling [at p163, below], was then distributed to the interested parties in order for them to make such additional written submissions as they felt appropriate. These further submissions we have of course taken into account.
- 23 As will be seen from the summary, it is the view of the concerned security agencies that the risk to soldier witnesses of terrorist reprisals would be higher in Northern Ireland than in Great Britain. The soldiers submit that accordingly it would be an infringement of their rights for the Tribunal to require them to give evidence at the Guildhall rather than in Great Britain. Their case is that the Tribunal is bound to take all feasible precautions to avoid or minimise, to the greatest extent possible, any risks to the life of the individual; and that this can only be done by hearing the evidence of the soldiers in Great Britain, where the risk is lower.

- 24 It seems to us that the fact that the risk is greater in the one place rather than the other is not of itself determinative of the matter. On the basis of the *Osman* decision, it is incumbent on the authorities (which in the present case include both the Tribunal and the agencies responsible for the protection of witnesses) to do all that can reasonably be expected of them to avoid a real and immediate risk to life of which they have or ought to have knowledge. We are satisfied, on the basis of the security advice that we have received, that the security authorities in Northern Ireland can provide, for soldiers giving evidence at the Guildhall, a level of protection sufficient to avoid any such risk. In such circumstances we consider that the Tribunal would not be acting incompatibly with the rights of the soldiers by requiring them to give evidence at the Guildhall rather than in London, for in neither place would there be a real and immediate risk to them. Neither the MoD nor the RUC (the state authorities who have the duty to protect the soldiers while giving evidence and who must accordingly deploy the proper resources to do so) have advised us that, notwithstanding the security precautions that they could and would put in place for soldiers giving evidence at the Guildhall, the level of risk would be so high that it could be described as real and immediate or in terms to the same or similar effect.
- 25 We have of course borne in mind the history of terrorist attacks on military and other targets in Northern Ireland, particularly those that have recently taken place in and around the city, and the present situation with regard to terrorist organisations. We have also borne in mind that over at least the last thirty years, it appears that the protection afforded by state authorities to those required to attend courts in Northern Ireland, often in circumstances of the greatest controversy where the risk of terrorist attacks has clearly been high, has been sufficient to avert any loss of life or injury from terrorist organisations. In our judgment the authorities will have done all that could reasonably be expected of them by providing, as they say that they can, a level of security commensurate with what has regularly (and successfully) been provided for trials in Northern Ireland where persons at risk such as soldiers, security officers, informers and others have been required to attend.
- 26 In these circumstances we consider that it could not properly or reasonably be said that the Tribunal should remove itself from the Guildhall to Great Britain for the purpose of hearing the evidence of the soldiers, which forms, of course, a central part of the Inquiry. In this connection we draw attention to the fact that Article 2 of the European Convention on Human Rights has what has been described as procedural as well as substantive aspects. As to the former, the jurisprudence establishes that there must be a proper procedure for reviewing the lawfulness of the use of lethal force by state authorities, for

otherwise there would be no practical and effective means of protecting the rights afforded by the Article: see *Jordan v UK* (Application No 24746/94, 4th May 2001). The present Inquiry is concerned with the use of lethal force by state authorities. For the reasons that we have already given, we consider that such an Inquiry should be conducted where the events in question occurred. We accept that this procedural requirement could not be used to override the substantive rights afforded by Article 2, but since in our view those rights would not be infringed by requiring the soldiers to give their evidence at the Guildhall with the protection that can be given to them, it seems to us that it would be unreasonable and indeed in contravention of the Article 2 procedural requirements for the Tribunal to conduct a central part of the Inquiry at somewhere other than the natural and proper place for it.

27 We have considered whether, quite apart from the Human Rights Act, it could properly be said that it would be unlawful or unfair to require the soldiers to give their oral evidence at the Guildhall.

28 Such a claim was made by the soldiers, based on the common law and as an alternative to the claim based on Article 2. Reliance was placed on what was said by Lord Diplock in *Fernandez v Government of Singapore* [1971] 1 WLR 987 and on the remarks of Lord Woolf MR, delivering the judgment of the Court of Appeal in *R v Lord Saville, ex parte A* [1999] 4 All ER 860.

29 *Fernandez* concerned the approach to be taken to a provision of the Fugitive Offenders Act 1967 which precluded the making of an order under the Act where the person, if returned, might be detained or restricted in his personal liberty – Lord Diplock rejected a test of more likely than not, saying at p 994:

“A lesser degree of likelihood is, in my view, sufficient and I would not quarrel with the way in which the test was stated by the magistrate or with the alternative way in which it was expressed by the Divisional Court. “A reasonable chance”, “substantial grounds for thinking”, “a serious possibility”.”

30 *R v Saville* concerned a ruling of this Tribunal as to whether certain soldiers should be granted anonymity for the purpose of giving evidence. The Court of Appeal propounded the test in language different from that used in *Fernandez* but found support in that decision for the test it did propound at p 881:

“The right approach here once it is accepted that the fears of the soldiers are based on reasonable grounds should be to ask: is there any compelling justification for naming the soldiers, the evidence being that this would increase the risk?”

- 31 Earlier, the Court dealt expressly with the right to life in a non-Convention context, saying at p 872:

“When a fundamental right such as the right to life is engaged, the options available to the reasonable decision maker are curtailed ... it is unreasonable to reach a decision which contravenes or could contravene human rights unless there are sufficiently significant countervailing considerations.”

- 32 *Mahmood*, to which reference is made earlier in this ruling, was decided by reference to the Human Rights Act which had come into effect by the time the decision under challenge came to be reviewed. Nevertheless Lord Phillips MR discussed the approach to the review of an executive discretion where the Minister was not required as a matter of domestic law to comply with the Convention. He said at p 856:

“Where the decision interfered with human rights, the court would require substantial justification for the interference in order to be satisfied that the response fell within the range of responses open to a reasonable decision-maker. The more substantial the interference, the more that was required to justify it.”

- 33 Lord Phillips MR referred to some earlier decisions, including *R v Saville*, where the decision-maker was not required as a matter of domestic law to comply with the Convention and expressed no disagreement with those decisions. And, of the three principles that were supported by those authorities, it was only the third that he said required modification under the Human Rights Act. That appears in the passage quoted earlier in this ruling where the Master of the Rolls said that interference can only be justified to the extent permitted by the Convention itself, thereby rejecting any doctrine of substantial justification.

- 34 While the language of the decisions under the Human Rights Act and of those under the common law differs, it does not appear that in truth the common law imposes a higher or different obligation than does the Convention. Indeed *Mahmood* and decisions of the European Court of Human Rights stressing that justification for interference with human rights must be found within the Convention itself point to the opposite conclusion. Certainly there is every reason to conclude that the emphasis placed in *Osman* on a

principle of proportionate obligations on an authority and the need for awareness, actual or imputed, of the existence of a real and immediate risk to life can fairly be seen as equally relevant to the common law. References to “*compelling justification*” are made in the context of a decision that truly interferes with human rights. Since none of the concerned agencies has suggested that such a real and immediate risk would exist notwithstanding the precautions that would be put in place, it seems to us that to require the soldiers to give their oral evidence at the Guildhall would not offend their common law rights. In other words, we consider that we are justified in requiring of the soldiers no more than what has been required on many occasions of others who have had to give evidence of killings in Northern Ireland, namely to appear and testify where the events took place, with the security authorities doing all that can reasonably be expected of them to provide a safe environment.

35 Clearly the soldiers would prefer to give their evidence in Great Britain, but this does not demonstrate, nor do we accept, that they have reasonable fears for their safety while going to or from the Guildhall or actually giving their evidence there, in view of the security precautions that the RUC and MoD would have in place. The soldiers (with few exceptions) have the advantage of anonymity and all have the right to require the state security services to protect them. They have our assurance that they will not be required to give oral evidence here if anything occurs that means that they cannot do so in proper calm and quiet conditions. They have the benefit of the most expert legal advice and assistance. In these circumstances we can see nothing unfair (let alone unlawful) in requiring the soldiers to give their oral evidence at the Guildhall, which in our view is where this Inquiry should be conducted.

36 The next point advanced on behalf of the soldiers is that there is a real danger of public disorder should they have to give their oral evidence in the Guildhall.

37 In its threat assessment of May 2000 (which according to a later assessment made in April this year remains valid), the RUC said this:

“Arguably, one of the most contentious periods during the current Inquiry will be when the former soldiers give their evidence. At the very least, if considered politically expedient, this could lead to protest, posing public order difficulties. It is estimated that an average of 3 to 6 thousand people have attended the annual Bloody Sunday parades in recent years. A large emotive crowd could make it difficult for police to ensure the safety of protesters and soldiers attending the Inquiry without segregation.”

- 38 The soldiers also point to other incidents of public disorder that have occurred in the city in recent times.
- 39 We made clear in our observations of December 1998 that justice can only be done and be seen to be done if the Inquiry is conducted in a calm and quiet manner, so that (among other things) all those who have relevant evidence to give have a proper and fair opportunity to be heard, without distraction or interference and without grounds for any concern save that they should speak the truth. We have also made clear that we would have no hesitation in moving elsewhere if it seemed that these conditions could not be maintained. In this connection we should make clear that, apart from anything else, any attack on those providing protection for witnesses would be treated by us as calculated to destroy the necessary environment for the Inquiry to be conducted at the Guildhall.
- 40 Those who organise such events as the Bloody Sunday parades, and who clearly wish for the Inquiry to be conducted at the Guildhall, are in our judgment hardly likely to indulge in or do other than oppose activities that would be calculated to drive it away, and it appears that the RUC are of the same view. We have nothing which suggests that political expediency would lead to protests or the like disrupting the orderly progress of the Inquiry. Our experience of the last year suggests strongly that the quiet and calm atmosphere that has prevailed to date will continue when the soldiers give their evidence. We reject the suggestion by the soldiers that there is a serious risk of public disorder should the soldiers give their oral evidence in the Guildhall, which to our minds is neither supported by the May 2000 threat assessment made by the RUC nor by the views expressed at the meeting of 18th June, nor indeed by anything else.
- 41 Those acting on behalf of the soldiers next submit that it would be procedurally unfair to require the soldiers to come here to give their evidence in what they describe as a hostile and intimidating environment, in circumstances where they would have to come and go under stringent security guard at all times.
- 42 Any inquiry into the use of lethal force by a state against its own citizens is likely to engender or rekindle very strong feelings, as no doubt Parliament appreciated when it decided upon the present Inquiry. Those said to be responsible for death and injuries are in the nature of things likely to find it an unpleasant and intimidating experience to give evidence, however justified they may consider their or their colleagues' actions to have been, in the presence both of the relatives of those whom they shot dead and of those whom they wounded. This, however, is an unavoidable aspect of an inquiry of the present kind. What we cannot accept, however, is that the Guildhall is somehow an especially

hostile or intimidating environment for the soldiers. To date the proceedings have been conducted in a quiet and calm manner; we have no grounds for supposing that this will not continue to be the case; and once again we should emphasise that we would have no hesitation in going elsewhere if these conditions did not continue to obtain.

- 43 Next, the submission is made that the soldiers will suffer practical prejudice in the conduct of the proceedings if they are required to give oral evidence in the Guildhall. This would appear to be the same point as the one advanced in 1998 and we would give the same answer to it as we gave then in the observations that we have quoted at the beginning of this ruling.
- 44 It would appear that some of the soldiers at least are advancing an argument that their rights under Article 3 of the European Convention on Human Rights would be infringed if they were required to give their oral evidence in the Guildhall.
- 45 This Article provides that no one shall be subjected to torture or to inhuman or degrading treatment or punishment. Since in our view the Article 2 rights of the soldiers would not be infringed, and bearing in mind that we shall only require the soldiers to give oral evidence at the Guildhall if the calm and quiet attending the hearings over the last year continues, we can see no basis for this argument.
- 46 At this point we should note that we asked the interested parties for their submissions on the use of a video link, having provided them with a demonstration of its present capabilities. There was no enthusiasm for adopting this means of taking the oral evidence of the soldiers, though it was accepted that there are likely to be cases where we would have to use this method, for example where witnesses were too ill to travel. We too would regard the use of a video link as a last resort.
- 47 In conclusion therefore, in the light of the information presently available to us, we consider that none of the arguments put forward by those acting on behalf of the soldiers is sufficient to provide a compelling reason for not hearing the oral evidence of the soldiers at the Guildhall, which we regard as the proper place for this Inquiry. We accordingly rule that this is where that evidence should be given.

Meeting on Monday 18 June 2001

Present:

Bloody Sunday Tribunal

Christopher Clarke QC, Counsel to the Inquiry

Alan Roxburgh, Junior Counsel to the Inquiry

John Tate, Solicitor to the Inquiry

Adrian Shaw, Secretary to the Inquiry

The Security Agencies:

Representatives from the Ministry of Defence including:

Mr W Byatt

Army personnel from Northern Ireland

Representatives from the Royal Ulster Constabulary

Representatives from the Metropolitan Police

Representatives from the Security Service

- 1 The meeting was opened by Lord Saville who set out the objective of the meeting, which was to ensure that the Tribunal is as properly and fully informed as possible about the security position at the possible locations for the hearing of the soldiers' evidence. He said that the Tribunal had a duty to try and treat everyone connected with the Inquiry with fairness and justice. This arose from a number of reasons:
 - a) The Tribunal, as a public authority, has a clear duty under the Human Rights Act to ensure when reaching its decision on venue that its decision will not breach the European Convention on Human Rights and the rights afforded to the soldiers by that Convention, or under the Common Law.
 - b) At the same time the Tribunal recognise that the families say that this is an Inquiry into events where British troops have shot dead British citizens on the streets of a

British city and that there is one natural and proper place for an Inquiry and that is where those events happened.

- c) The Tribunal needs to be satisfied that the security agencies have fully addressed their collective minds to all relevant considerations when considering the issue of the appropriateness of the two possible venues and in providing the Tribunal with the advice that has been provided to the Tribunal to date in the various threat assessments, the MoD's written submissions on venue, the arguments advanced before the Tribunal by Ian Burnett QC, and in the MoD letters of 24 and 31 May 2001.

2 The meeting considered three topics:

- a) the relevant functions of the agencies in Britain and Northern Ireland and the division of responsibilities between them for ensuring the safety of the soldiers if they give their evidence in either Londonderry or in Britain;
- b) ensuring that the Tribunal understood the language used in the threat assessments;
- c) to permit the Tribunal to draw out, if possible, a comparison between the relative safety of Londonderry and the relative safety of Britain as venues for hearing the evidence of the soldiers.

Functions and division of responsibilities

Northern Ireland

- 3** In Northern Ireland generally and in Londonderry in particular it would be the responsibility of the RUC to create a safe environment for the hearing of the evidence. This responsibility would begin the moment the soldiers arrived in the Province. The RUC would have responsibility for ensuring the routes for bringing the witnesses to the Guildhall were secure, for the analysis of intelligence information about possible terrorist activity or civil disorder. The RUC responsibility for ensuring a safe environment would, from the force's point of view, require uniformed and armed RUC officers to be present in the Guildhall. Whether and where the RUC would be deployed in the Guildhall would depend on prevailing circumstances. As necessary it would liaise with the Garda and the Army.
- 4** The Royal Military Police would have responsibility for the close protection of the witnesses. This would involve calling them forward when the Tribunal required them to give evidence and to bring the witnesses to the Guildhall in appropriate vehicles. None

of this would be different to the usual practice of the RMP of bringing military witnesses, or indeed MoD civil servants, to ordinary courts in Northern Ireland. The RMP would liaise with the RUC on routes to be used but primary responsibility for this would rest with the RUC. The RMP would operate within the security envelope created by the RUC but that responsibility would cease at the doors of the court where the RUC would assume primary responsibility, but who might require the support of the RMP in the Guildhall.

Britain

- 5 Policing in Britain is manifestly different to that which occurs in Northern Ireland. The Military do not provide any direct support to the police in Great Britain. Accountability generally for the protection of witnesses and others in Britain is vested in the Chief Constable or the police chief in the area where a witness is physically located at the time when the threat is present. Therefore if a witness lived in the North of England and the evidence was to be heard in London the local Chief Constable would be responsible for the security of the individual in his home area while the Metropolitan Police would be responsible for the security while in London.
- 6 Where close personal protection is required for particular individuals then that is the responsibility of the Metropolitan Police, wherever it is required. Where there is no requirement for close personal protection, and if the venue were to be in London, there would be liaison between the Metropolitan Police and the appropriate constabulary where the witness lived. In determining whether close personal protection was required for a particular witness there would be liaison between the Metropolitan Police, the local Police Force and the Ministry of Defence and the Home Office. The Security Service would provide threat assessments. It would be a matter for the Metropolitan Police to analyse vulnerability, based on the information provided to it, and to decide whether close protection was required or what other measures should be taken.

Threat assessments

- 7 The issue of whether the assessments were simply assessments of threat or whether they contained any element of vulnerability was considered. The Security Service is responsible for assessing the threat from terrorism to UK interests worldwide with the exception of the Irish related terrorist threat in Northern Ireland, which is the responsibility of the RUC. In relation to this Inquiry there is a strict delineation between the Security Service, which has responsibility for assessing threat in Great Britain, and the RUC, which has responsibility for assessing threat in Northern Ireland.

- 8 The preparation of the assessments were not completed by the two services in complete isolation from each other. The services discuss with each other the general level of intelligence about terrorist threat.

Security Service

- 9 In the Security Service assessment of 18 May 2000 the words, *“if the hearings at which these soldiers and ex-soldiers appear are held on the mainland, the terrorist groups will be deprived of the ease of operation which they enjoy on their home ground in Northern Ireland. In consequence, the generally more difficult operating conditions on the mainland are likely to give rise to the perception that a successful terrorist attack will be harder to achieve”* are used. The Security Service advised that the word “perception” meant that terrorists are likely to think that it is more difficult to operate on the mainland than in Northern Ireland. The words quoted were not intended to convey anything about vulnerability but simply the Security Service’s view of the capacity of terrorists to operate in Great Britain as opposed to Northern Ireland.
- 10 This observation applied equally to the Security Service assessment of 6 April 2001. Both assessments are purely assessments of threat and contain no element of assessment of vulnerability.

RUC

- 11 The RUC assessments of 22 May 2000 and 9 April 2001 are pure threat assessments. The assessments are made to local operational commanders who apply the assessments to their own local environment. It was confirmed with the RUC that the reference to an assessment of April 1999 in the assessment of 9 April 2001 was an error and that the reference should have been to the assessment of 22 May 2000. In the assessment of 22 May 2000 there is reference to segregation. This was said in the context of possible public disorder. In the view of the RUC if such disorder seemed likely to occur segregation of crowds and soldiers might be required but could be achieved. The RUC would want to be able to advise the Inquiry on the desirability of adjournment of its proceedings or on moving a particular witness to a later date, depending on circumstances. The Tribunal indicated that it would be receptive to any such advice from the RUC or the Metropolitan Police on matters relating to the safety of a witness and to the public. The RUC said that it looked on the Bloody Sunday Trust and the families as a vehicle/partner in trying to resolve contentious issues and that is why an adjournment might be necessary because it would need time to resolve issues. The RUC considered

that the strong desire on the part of the families and the nationalist community in Londonderry for the Inquiry to be held in the City militated against the risk of serious public disorder and/or dissident republican terrorist attack because of the Tribunal's clearly stated position that it would move out of Londonderry if such disorder or attack occurred. They considered that factor was an important factor in assessing the possibility of serious public disorder or attack although they also advised that it remained possible that there were republican or loyalist groups that might find it expedient to disrupt or attack the Inquiry. The Security Service added that it was very difficult to predict what dissident republicans would do.

- 12 Each of the assessments refers to a moderate level of threat. The Security Service employs bands of threat of which moderate is one, being fourth from the highest level of threat. Within each band there may be gradations of threat. In contrast the RUC does not, in the ordinary way produce assessments with grades of threat. In Northern Ireland threat is very specific to time and place and threats can be very different as between times and places. They try to avoid using descriptors. Instead they consider operations in terms of intent and capacity of the organisation. The assessment is provided to local commanders for them to decide on the basis of local vulnerabilities precisely what the total risk is. In this case the descriptor moderate was used in order to assist the Inquiry in drawing comparisons between Londonderry and Britain. Although the threat was moderate in both the Security Service assessments and the RUC assessments the Security Service would judge in its terms that the RUC assessments, while in the same band as its own, were somewhat higher than its assessment. However, the RUC assessment of the threat to the Guildhall, as a venue for the Inquiry, was assessed as low.

Security in London

- 13 The Tribunal asked about the possibility of a threat to London should it decide to hear the soldiers' evidence in Great Britain. Overall the level of threat in Great Britain is currently assessed to be high because it is a high priority target for dissident republican terrorists. If the Tribunal moved its proceedings to London the same high overall level of threat would prevail. If a group decided that the move to London was inimical to their interests then the move might provide a greater incentive to try and mount an attack in London. Such an attack might not be on the Inquiry itself but be timed to coincide with the Inquiry. However, recent attacks in London have been on symbolic targets and if the Inquiry were to move to London it might be regarded as a symbolic target. Against that the Security Service's assessment of a threat to a London venue for the Inquiry is that it is low.

Risk

Londonderry

- 14 There is an increasing dissident republican threat in terms of capacity and intent. The level of threat is likely rise and fall during the time when the soldiers gave their evidence. In the ordinary way the RUC will cope with the threat but may ask for military support which might involve deploying troops on the west side of the Foyle. The RUC and the Army would have to bear in mind the range of weapons available to dissident terrorists when deciding how to deploy forces available to them so as to create a robust sterile footprint. The Army is regarded as a legitimate target and the terrorists might chose to attack possible places where the witnesses might be held or the soldiers or police officers who were engaged in providing protection for the former soldiers. It was the assessment of the MoD representatives that in terms of vulnerability, there is significant vulnerability to witnesses but, more possibly, to those seeking to safeguard the witnesses.

London

- 15 No part of Great Britain has experienced the level and frequency of violence that has been directed at Northern Ireland. However, the presence of the Tribunal in London could bring a target to London. In the opinion of the Metropolitan Police the symbolic nature of its presence in Britain would introduce a collateral threat that does not currently pertain and bring with it a heightened collateral threat to London. There is no current intelligence to say that the threat would escalate but there is certainly the potential for escalation if the Inquiry was in London. There would be a need in London to create the same robust sterile footprint that would be required in Londonderry. That would be important given the international resonance that an attack in London would have.

Comparisons

- 16 The letter from the MoD dated 24 May 2001 uses the words at the foot of the first page, “sufficiently safe”. Mr Byatt said that what they were trying to convey with those words was that Londonderry was more dangerous to the soldiers than a venue in Britain was likely to be. He said that the MoD was not trying to make value judgements or calculate how much more dangerous one venue would be against another but simply trying to indicate its view that Londonderry would be considerably more dangerous than Great Britain. Lord Saville said that the use of the word “considerably” did introduce a value

judgement and that, *“safe, as I understand it, is based on the formula of threat plus vulnerability equals risk. As one place is riskier than another, on that basis, one would then say “its not as safe as the other”.*” Mr Byatt agreed that his letter was not intended to say more than that.

- 17 Both the RUC and the Metropolitan Police said that if either were given the task of providing a safe venue then they would rise to the challenge and provide a secure environment. How they would do it may well differ. The Metropolitan Police agreed with the proposition that a secure environment meant the sort of environment that they would provide on a daily basis to witnesses giving evidence in other cases. In the case of the venue being in London the maintenance of a sterile area could involve road closures with an inevitable impact on the community. The creation of a secure environment would be likely to have a huge impact on the community. The complexities of mounting an operation in London to secure the venue and to bring the witnesses to that venue were discussed.
- 18 In relation to Northern Ireland the RMP said that it could meet the commitment of providing protection for the witnesses to the standard of protection provided for persons giving evidence in the courts in Northern Ireland. The Army representative observed that Londonderry was inherently less safe. However, the Army’s job was to help the police minimise the risk when it is asked to do so. In the terms of securing the safety of the soldier witnesses in Londonderry the Army could do that if it was asked to assist by the police but in doing so it would be exposing serving soldiers to a risk that they would not be exposed to if they were not asked to deploy.

Third venue

- 19 The issue of a venue in a third location other than London or Londonderry was considered. The advice of the Security Service was that if a venue in some other British city was chosen then from the threat point of view it was difficult to say that such other city would be under less threat than London. If the Inquiry moved to such a third city and if dissident republicans wanted to take action as a consequence they could target anywhere in Great Britain, although London would remain a prime target because of the political impact of such an attack. In terms of policing there would not be a great distinction between operations in London and provincial operations. Although the Metropolitan Police could not speak for forces outside London the efforts, if somewhere else was chosen, were likely to be similar and the Association of Chief Police Officers (‘ACPO’) would play a part in co-ordinating the activity and there would be co-operation

between forces. There was no distinction to be drawn between a venue in England, Scotland or Wales because a move to Great Britain by the Inquiry would have a very high profile.

London versus Londonderry

- 20** Lord Saville asked whether, in talking about London versus Londonderry, with the threat in both places being comparable, he was correct in saying that the Metropolitan Police in London and the RUC and the RMP in Londonderry and Northern Ireland believed that they could provide in their respective jurisdictions an acceptable level of security for the Tribunal, the venue, the witnesses and the public just as they have in both places for ordinary trials, accepting that in Northern Ireland a more extensive and different protection would be required.
- 21** The response of the security agencies was that to attempt to simplify the matter of the issue of risk at the two venues they looked at the matter from three points of view:
- a. what are the overall risks to the venue;
 - b. what are the risks to the soldier witnesses involved in giving evidence; and
 - c. collateral risks.
- 22** They were agreed that the risk to a venue in either London or Londonderry was more or less equivalent. The risk to soldier witnesses is higher in Londonderry. The collateral risk in both places is slightly different in that in Londonderry the main risk would be the risk to the security forces protecting the witnesses while in London the risk would be a dissident republican attack timed to coincide with the Inquiry's work. Such an attack may not be a direct attack on the Inquiry. The agencies were talking in absolute terms of the risks on the mainland and in Northern Ireland. While they could guarantee levels of effort put in to reduce risk they could not guarantee the outcome wherever the venue. A risk reduction exercise, be it in Northern Ireland or be it in Britain, is likely to be effective in reducing risk but it is unlikely to eliminate the relative risk. The risk at the end would be higher in Northern Ireland than in Britain.
- 23** Lord Saville asked whether, with its experience over 30 years of providing protection in high profile criminal and other similar cases, was the RUC able to afford the same level of protection to soldiers giving evidence in the Guildhall to the Inquiry as it did to people giving evidence in other high profile cases in Northern Ireland. The RUC said that operationally it did have the capacity and it would be achievable. The RUC was

concerned about the time span of the evidence but said that with planning, subject to considerations of adjournments, flexibility, etc, it could be done. With the appropriate effort the RUC considered that they could provide an acceptable level of security for the soldiers in Londonderry, although the RUC would also have to deal with the collateral risk, not directly related to the witnesses, which it would do.

- 24 With a view to summing up the conclusions that appeared to have been reached Lord Saville said that it appeared that the agencies all took the view that the situation in Northern Ireland was one of greater risk than London but whether it be London or the Guildhall the people responsible for providing security take the view that they that they would be able to provide an acceptable degree of security, by which it is meant the sort of security that has been provided to witnesses in Northern Ireland over 30 years and in London over the same period. There was no disagreement with that summary.
- 25 It was agreed that while it was riskier in Northern Ireland, with the proper degree of precautions an acceptable degree of security could be provided there. Putting it in those terms Lord Saville asked whether it was fair to say that the letter of 24 May 2001 did not in fact take account of the level of security that would be put in place. Mr Byatt agreed that that was fair comment and that when the letter was written it was not intended to be an exhaustive analysis of what had to be done to make the levels of risk more equal. The MoD thought it dangerous to make something like a mathematical calculation of what the relative would be because a determined terrorist organisation could suddenly blow all calculations apart. All the MoD sought to do was to provide a broad brush picture of which place, in its view, would be less safe.

A2.20: Ruling (23rd January 2002): venue for soldiers' oral evidence

Hearing transcript – 23rd January 2002, pp155–156

LORD SAVILLE: In December last year the Court of Appeal ruled that the evidence of the soldier witnesses should not be taken in this city on the grounds that these witnesses have reasonable fears for their safety were they to come here for this purpose.

Following this ruling, we informed the interested parties that we were minded to take the evidence here by way of videolink. The reason for this suggestion was that we remained of the view that the proper place for this Inquiry is in the city where the events of Bloody Sunday took place. However, we invited the interested parties to make written submissions on the matter and, having read these and taken the opportunity to consider the matter further, we have concluded that the better course is to move to Great Britain to conduct this part of the Inquiry.

There we will also take any other evidence that, on the basis of the ruling or for other compelling reasons, should be heard there rather than here. Of course, as we mentioned in our previous ruling, it remains likely there will be special cases where the evidence will have to be taken by videolink alone.

We have put in hand steps to obtain suitable premises and to make appropriate arrangements for this part of the hearing, which we plan to include reasonable facilities for family members to attend if they are able and wish to do so.

However, we shall also provide a live videolink from the Inquiry to this city for people to watch the proceedings from here. We wish to maintain the present facilities in this city while this part of the Inquiry takes place elsewhere, so that we can return without delay to complete here as much of our work as possible.

On our present estimates we hope to be ready to make this move some time in the summer. As soon as possible we shall announce the specific arrangements that we have made and a revised timetable for the rest of the hearings.

A2.21: Ruling (29th January 2002): procedure for screened witnesses

Hearing transcript – 29th January 2002, p100

LORD SAVILLE: [C]an I lay out the procedures for next week when we move into screened witnesses: we would ask the lawyers, by which I mean only qualified barristers and solicitors, to be in this hall, please, by 9.15am.

The witness will then be brought into his screened position, after which the public and the families can take their seats. When the witness is finished the public and the family galleries will be cleared and the witness will then leave the witness box. We envisage dealing in this way with every witness. It will mean that between witnesses there will be a gap of some minutes while we reorganise ourselves.

A2.22: Ruling (7th February 2002): screening of RUC officers (upheld – items 49 and 50 below)

Hearing transcript – 7th February 2002, pp72–76

LORD SAVILLE: We have today listened to an application made by Mr Hanna QC on behalf of 20 serving and former police officers, that these officers should be screened when they give their evidence to the Inquiry from all except the qualified lawyers acting on behalf of the interested parties and, of course, the Tribunal, its Counsel and staff.

The basis for the application is that, in the light of the principles set out in paragraph 31 of the recent Court of Appeal decision dealing with venue, these individual applicants have reasonable and genuine fears for their personal safety were they to appear in public at the Guildhall to give their evidence, that these fears would be alleviated if screening were allowed and that when balanced against the adverse consequences to the Inquiry of listening to the evidence other than in full public view, common sense and humanity dictated that screening should be allowed.

As long ago as May 1999, and again in June 2000, we dealt with other applications by police officers for screening. Indeed, at this early stage in the Inquiry two of the present applicants made, but then later withdrew, similar applications. The present applications were made only a few days ago.

Those opposing the application submitted that the delay demonstrated, or at least went a very long way towards demonstrating, that in truth the applicants could not hold genuine or reasonable fears for their safety in the absence of screening.

In response to this it was at one stage, so it appeared to us, to be suggested that the Inquiry itself was somehow at fault in failing to give the applicants a proper opportunity to apply at an earlier stage for protective measures, including not just screening, but also anonymity, which it was suggested (leaving aside of course the case of the two who did actually make earlier applications) help to explain the delay.

There is no substance in this criticism of the Inquiry. As Mr Clarke explained this morning, the Inquiry did not have the addresses of serving and former police officers and, accordingly, had to deal (and did deal) with their evidence, the prospect of the officers giving evidence through the Police Service itself.

It seems, though we have not heard from the Police Service on this, that there may have been some breakdown in communication between the Service itself and its former and serving officers. Be that as it may, we are not persuaded that the delay in making the applications demonstrates, or goes towards demonstrating, that the fears now expressed are neither genuine nor reasonable.

We regret that the applications were made late, as they have dislocated the Inquiry's timetable and thus increased the length of what is already a very long Inquiry. But even if it could be said that the individuals could or should have applied sooner or, in the case of the two who did originally apply, to have renewed their applications sooner, this to our minds does not show that the fears of the applicants are without foundation.

The applicants, unlike the soldiers, do not have the protection of anonymity. Again, unlike all or virtually all the soldiers, they live in Northern Ireland where some are still serving police officers; hundreds of their colleagues have died from terrorist activity over the last 30 years. Thankfully, the terrorist threat at present appears to be reduced from that which existed before, but that it still exists cannot be denied, as is apparent from the information put before the Inquiry today and the future, of course, is unknown.

The fear that the police officers have stems not so much from the evidence they can give about Bloody Sunday, or indeed from their activities on that day, but from the opportunity, particularly since their names are known and since they live and some work here, that would be afforded to dissident groups to identify them more closely were they not to be screened.

We, in short, accept that the applicants do have reasonable and genuine fears for their safety, and we further accept that these fears could be alleviated to a significant degree by screening. There remains, therefore, the question of balancing these considerations against the adverse consequences to the Inquiry of allowing screening to take place.

We do not accept that screening is something of little real importance. This is a public inquiry and the public should be able to see how those who give evidence before the Inquiry conduct themselves. It is true that the legal representatives of the families will be able to see the witnesses, as of course will the Tribunal itself, but to our mind screening remains a significant inroad on the public nature of the proceedings.

Having said this, though, we are not persuaded that the public confidence in this Inquiry will be undermined to such a degree that the applicants' genuine and reasonable fears must be overborne.

Once again, we bear in mind that the applicants are publicly named individuals, but we accordingly conclude that the application should be granted. It was suggested during the argument that a possible middle course would be to allow the families of those who died or were wounded to see the witnesses excluding the rest of the public, but to our minds this is not really a practical suggestion.

Finally, we should record that we have looked at the confidential material relating to the particular circumstances of the individual applicants, but our decision is based upon the materials and submissions made available to all.

In those circumstances, our plan for next week – subject to correction or further elucidation by Mr Clarke – is on Monday to hear from some of those officers who have chosen not to make the application, and then for the rest of the week to deal with officers who will be screened.

A2.23: Ruling (24th April 2002): legal representation for six former members of the Command Staff of the Official IRA

Hearing transcript – 24th April 2002, pp12–14

LORD SAVILLE: We have before us this morning an application presented by Mr O'Donovan on behalf of six former members of the command staff of the Official IRA who were to a greater or lesser degree involved in the events of Bloody Sunday.

The application is for full representation, to include representation and attendance by a solicitor and two counsel before the Tribunal and the provision of access to the full statements and exhibits to allow a quality of representation.

In the course of the written submissions, paragraph 3.3(2), it is said that the applicants are particularly concerned at allegations that they and other members of the Official IRA were engaged in pro-active activity on Bloody Sunday and then a list is set out of the suggested possible activities.

As Mr Toohey pointed out during the course of the submissions this morning, these are individual applications by the six former members of the OIRA; this is not an application by the Official IRA itself nor, at present at least, by any other than the six people concerned.

In those circumstances, the way we approach the matter is to ask whether justice and fairness dictates, in the case of any of the six, whether they should be granted the representation rights that they seek.

We are not persuaded that justice and fairness dictate that course, at least at present. We have made clear, through rulings and directions of the Tribunal, that if allegations are to be made against individuals, they must be made well in advance of the individual giving evidence so that that individual can be properly prepared to deal with the allegation.

No such allegations have presently been made against these applicants.

In addition, it seems to us correct that when these applicants give evidence, they should be represented by counsel and solicitors so that their interests can be protected at that time.

In those circumstances, we reject the application, but we should make clear that we are always ready to review matters if circumstances change. At the present, as I said, it does not seem to us that full representation is required in the interests of justice and fairness, but circumstances may change and, if they do, then of course we shall look at the matter again.

A2.24: Ruling (2nd May 2002): two journalists ordered to identify sources and ITN to produce relevant materials

Hearing transcript – 2nd May 2002, pp28–40

LORD SAVILLE: In August 1999 the Tribunal issued a witness summons requiring ITN to produce various materials relating to certain Channel 4 News broadcasts that were concerned with the events of Bloody Sunday.

In September 1999 the Tribunal heard an application to set aside this summons. The point at issue was whether or not, under section 10 of the Contempt of Court Act 1981, ITN were protected from revealing the sources from which much of the news stories were made. The sources in question were five soldiers. Section 10 of the Contempt of Court Act 1981, provides as follows:

“No court may require a person to disclose, nor is any person guilty of contempt of court for refusing to disclose, the source of information contained in a publication for which he is responsible unless it be established to the satisfaction of the court that disclosure is necessary in the interests of justice or national security or for the prevention of disorder or crime.”

In October 1999 the Tribunal, in a written ruling, concluded that, for the reasons it gave, disclosure of the identity of four of the five soldiers was, to quote the words of section 10, *“necessary in the interests of justice”*.

However, at that time the Tribunal also concluded that it was not appropriate there and then to make an order against ITN for disclosure since there was a prospect that either the sources themselves would disclose their identities or that those sources would be disclosed in the course of the Inquiry taking written evidence from the soldiers, a task which at that time was far from complete.

Since our ruling of October 1999, matters have moved on. The Inquiry has now largely completed the process of taking written evidence from the soldiers. This has not disclosed the identity of the sources and it is unlikely that the rest of this exercise will produce a different result.

ITN made attempts to request the soldiers to waive the undertakings of confidentiality given to them, but these attempts resulted in either a refusal to do so or a failure even to be able to contact the soldier in question.

However, the Inquiry itself was able to discover that the soldier identified by ITN as B was in fact the soldier given by the Inquiry the cipher 027 whose identity is of course known to the Tribunal, and to obtain from him such a waiver. There is therefore no need to consider his case further, since ITN and the journalists concerned have expressed their willingness to supply the Inquiry with all their material relating to that soldier.

This week we heard oral evidence from the two journalists who were responsible for interviewing the five soldiers. They produced their notebooks, though these were redacted by them so as to avoid any risk of revealing the identity of the four remaining soldiers.

It is apparent that the effect of the redactions is to conceal things said to have been said by the soldiers which, on any view, are relevant to an inquiry into the events of Bloody Sunday.

It is also apparent from the unredacted portions of the notebooks that, contrary to what we were informed in October 1999, what Soldier D said to the journalists was not, as we then put it "*wholly unspecific*", but in fact referred to specific, relevant events which he said had occurred on Bloody Sunday.

It is a matter of regret that until very recently no attempt appears to have been made to produce to us all relevant material in respect of which no question of revealing sources arises.

For, quite apart from Soldier D, it is apparent from the redacted notebooks that there exists a substantial quantity of such material about which the Tribunal was unaware when it considered the matter in 1999.

In addition to the foregoing, since our previous ruling the Human Rights Act 1998 has come into force.

Article 10 of the Convention incorporated into our law under that Act provides as follows:

"1. Everyone has the right to freedom of expression. This right shall include freedom to hold opinions and to receive and impart information and ideas without interference by public authority and regardless of frontiers. This article shall not prevent states from requiring the licensing of broadcasting television or cinema enterprises.

2. *The exercise of these freedoms, since it carries with it duties and responsibilities, may be subject to such formalities, conditions, restrictions or penalties as are prescribed by law and are necessary in a democratic society in the interests of national security, territorial integrity or public safety, for the prevention of disorder or crime, for the protection of health or morals, for the protection of the reputation or rights of others, for preventing the disclosure of information received in confidence or for maintaining the authority and impartiality of the judiciary.*”

This article, and indeed section 12 of the Human Rights Act, is of course concerned, among other things, with the subject matter of section 10 of the Contempt of Court Act. Mr Caldecott, Queen’s Counsel on behalf of ITN, has submitted to us that now Article 10 is part of our law, there is “a new landscape” and “... any curtailment of freedom of expression must be convincingly established by a compelling countervailing consideration and the means employed must be proportionate to the end sought to be achieved”. See *Reynolds v Times Newspapers*, 2001, 2 Appeal Cases 127 at pages 200–201 and 207–208.

In our view, however, in the context of the particular legal principles that we have to apply, Article 10 does not lead the Tribunal to alter the conclusion it reached in 1999. Article 10, like section 10, is made subject to qualifications and the language used in cases such as *Reynolds v Times Newspapers*, that there must be a compelling countervailing consideration, seems to us to be synonymous with the language used by the authorities upon which the Tribunal relied in 1999, namely that the interests of justice must be of such preponderating importance in the individual case that the opening words of section 10 really need to be overridden.

Recent cases such as the *Financial Times v Interbrew* and *Ashworth Hospital v MGN Limited* suggest helpful means of seeking to resolve the problem. In particular the Master of the Rolls’ three-stage test and Lord Justice Sedley’s observation that there must be an overriding public interest amounting to a pressing social need for confidentiality to give way.

But as to our eyes is apparent from the previous ruling, the interests of justice are engaged; disclosure to the Inquiry is necessary and proportionate in order to achieve the relevant ends of justice and the pressing social need for disclosure outweighs the protection of journalistic confidential sources.

In our view it is important to bear in mind that Article 10 is not the only part of the “new landscape” brought about by the Human Rights Act. Under Article 2 there exists what can be described as a procedural duty to carry out a full and proper investigation in cases where a death or deaths have resulted from state activities.

As a Tribunal we are, under section 6, obliged to act in conformity with Article 2 as we are obliged to act in conformity with Article 10, which means, among other things, that we have a Convention duty to carry out as full and proper an inquiry as we can.

Mr Caldecott invited us to depart from the previous ruling of the Tribunal. He sought to criticise the reasoning in that previous ruling on the grounds that the Tribunal had erred in simply stating that it had taken into account the potential “chilling effect” of making orders for the disclosure of sources, the effect of which may be to cause those sources to dry up.

In his submission we should have embarked on what he described as “*a full analysis*” of this chilling effect in the circumstances of this case.

As will be seen from other parts of that ruling, it can hardly be suggested that the Tribunal had misunderstood the expression “chilling effect”, which is of course shorthand for the proposition that the disclosure to the media of wrong-doing, a matter of the highest importance, particularly in the case of public wrong-doing, would be discouraged to a significant extent unless those coming forward could be assured of confidentiality.

Mr Caldecott suggested that a matter of great significance was that the soldiers in question would not have come forward at all but for the undertakings of confidentiality and the fact that they did was a substantial contributing factor to the setting up of the Inquiry itself.

We are not persuaded that the fact that the broadcasts might not have been made but for the undertakings of confidentiality does more than give at best a hypothetical example of what might have been the chilling effect, an effect which the Tribunal made clear in its previous ruling it had taken into account in reaching its conclusion. Mr Caldecott further suggested that the Tribunal failed to take into account the overall chilling effect of an order for disclosure, ignored the evidence adduced by ITN as to such an effect and ignored or underplayed the fundamental role of the media in a modern democracy in exposing state-related wrong-doing.

The fact that the Tribunal did not set out in detail these and the other matters to which Mr Caldecott drew attention in September 1999 does not establish that the Tribunal failed as suggested, as a reading of the ruling as a whole to our minds clearly demonstrates.

In truth what Mr Caldecott really seemed to be suggesting was that the Tribunal erred in failing to give the chilling effect such weight that the interests of justice could not be regarded of such preponderating importance that disclosure should be made.

We are not persuaded that the Tribunal erred in this regard. On the contrary, it seems to us that developments since the ruling in 1999 reinforce the correctness of that ruling and the reasoning of the Tribunal, but apart from that we can assure Mr Caldecott that we have carefully considered all the material before the Tribunal in 1999 and all the further material relied upon him in the course of his submissions this week.

The development since the ruling of 1999 we have already touched upon in the course of this ruling to a degree. In the first place the Tribunal now has a statutory duty to carry out a full and proper inquiry under Article 2 of the Convention on Human Rights. This is, of course, in addition to the fact that both Houses of Parliament have resolved that there should be a new public inquiry into the events of Bloody Sunday, specifically to take account of any new information relating to the events of that day.

In the second place, the material now disclosed to us shows that the soldiers in question have made statements to ITN of potentially even greater importance than the Tribunal appreciated in 1999. Soldier A appears, on one view at least, to be saying that shots by a soldier from the city walls may have caused injuries or deaths, perhaps even the deaths of some of those who fell at the Rossville Street barricade.

Soldier C gave details of his close proximity to the paratroopers who opened fire. Soldier D gave details of incoming fire in justifying the action the paratroopers took. In our judgment, therefore, his position is now much the same as that of the other three soldiers, since the reason for accepting him in October 1999 cannot be sustained. Soldier E also gave details of his position and movements on the day. These details are tantalisingly incomplete but they demonstrate, in our judgment, that it is self-evident that, having regard to the conflicting evidence that we have heard, and will hear, all these soldiers have given accounts which it is vital for the Inquiry to investigate fully but which it cannot do without knowing the identity of the soldiers in question.

In the third place, none of the written statements we have received from soldiers to date assists in identifying the four soldiers concerned. Thus either the soldiers have given incomplete or indeed inconsistent statements to the Inquiry or, which is perhaps the more likely case, have so far failed to come forward to give evidence.

There is nothing to indicate that any of these four are among the soldiers who have been traced by the Inquiry but have yet to be interviewed, indeed, Mr Clarke informed us that this is also unlikely to be the case. There remains the suggestion that it would still be premature to make an order, since the soldiers may voluntarily come forward when the other soldiers give oral evidence or that at some later unspecified stage, it may be possible to identify them by other means.

On our present plans the soldiers who have given statements will start giving oral evidence in the early autumn, now only a few months away. There seems to us to be no real prospect or likelihood that we shall be able to identify soldiers A, C, D and E by other means.

To continue to wait on the off-chance that these soldiers may change their minds and come forward, especially in view of what has happened to date, or to speculate that undefined circumstances may arise which enable them to be identified, seems to us to serve no useful purpose and would, on the contrary, be calculated to cause unnecessary delay and uncertainty contrary to our duty to carry out a full and proper inquiry.

What we presently know about the accounts these soldiers have given is, as Mr Clarke observed in the course of his submissions, incomplete and untested and is thus, as it stands, of little or no value.

There are two further matters: firstly, we would observe that in our view the objections to revealing the identities of the four soldiers pay insufficient regard to the unique nature of the present circumstances. This is the second Inquiry into Bloody Sunday, set up by Parliament as a matter of urgent public importance for the express purpose of seeking the truth about that day in the light of grave doubts expressed over the first Inquiry and what appeared to be new information about the events of that day.

The Human Rights Act itself imposes a duty to carry out a full and proper Inquiry. The soldiers have the benefit of anonymity and of giving their evidence in London, so that the question is whether disclosure should be made to the Inquiry, not whether disclosure should be made to the public at large.

These unique circumstances are so different from the general run of cases where the question of revealing sources arises, that it is difficult to accept that an order that the soldiers in question be identified to the Inquiry will have the devastating effect on future disclosure of public or private wrong-doing suggested by Mr Caldecott.

Secondly, we should record that we have considered and that we accept and adopt certain other criticisms made by Mr Christopher Clarke, our Counsel, of the submissions of Mr Caldecott.

In these circumstances, it is our view that the two journalists concerned should be ordered to identify to the Inquiry the soldiers in question and that they and ITN should be ordered to produce to the Inquiry all relevant materials in their possession which they are presently withholding.

Both the journalists and ITN doubtless appreciate that should they fail to comply with these orders, the Tribunal will be left with no option but to certify to the High Court that, in the view of the Tribunal, that failure amounts to a contempt of the Tribunal.

We would now ask that the two journalists be recalled so that Counsel to the Inquiry can ask them the appropriate questions and, if they continue to decline to answer, for the Tribunal to order them to do so for the reasons that we have given.

So far as ITN are concerned, we ask our Counsel to suggest what order we should make in the light of this ruling.

A2.25: Ruling (27th May 2002): a person with the cipher “Infliction” will not be called to give evidence

Hearing transcript – 27th May 2002, p2

LORD SAVILLE: [I] think it is appropriate at this moment to say we are satisfied that to call or indeed to make any attempt to call the individual known as “Infliction”, who is overseas, would be in breach of the rights of that individual under Article 2 of the Convention on Human Rights.

Accordingly, we shall proceed upon the basis that “Infliction” will not be called to give evidence at this Inquiry.

A2.26: Ruling (29th May 2002): Dr John Martin to testify under certain conditions

- 1 Dr John Martin has applied for an order that he be screened while giving evidence to the Inquiry. We refer to the precise terms of the order sought later in these reasons.
- 2 Dr Martin is a retired forensic scientist. At the time of Bloody Sunday he was a member of staff of the Department of Industrial and Forensic Science. In that capacity he examined weapons used by soldiers on that day and bullets that had been recovered. He expressed views on those matters and on related matters including the significance of lead on the hands and clothing of some of the deceased. He gave evidence to the Widgery Tribunal unscreened; it is enough to say that some of his findings have been challenged by other forensic scientists and his statement to this Inquiry has been the subject of controversy.
- 3 On 21 April 2000 the Security Branch of the Royal Ulster Constabulary (RUC) issued a threat assessment on Dr Martin which assessed him *“as being at a significant level of threat”*.
- 4 On 3 April 2002, at a time when Dr Martin was scheduled to give evidence, a further threat assessment was issued which assessed him currently *“as being at a moderate level of threat with potential to increase”*.
- 5 Dr Martin contended that if he gave evidence at the Inquiry unscreened he would be *“exposed to a significantly greater level of risk to his personal safety than would otherwise be the case”*. This fear was said to stem from a number of factors, in particular the controversy surrounding the events of Bloody Sunday, the intense media coverage of the Inquiry itself and the threat assessment which, in context, must be the assessment of 3 April 2002.
- 6 The hearing of this application took place at a time when the Tribunal had ruled that a number of RUC officers should give their evidence screened. That ruling was challenged on judicial review. The Tribunal ruling was upheld by Kerr J on 19 February 2002 and on 8 May the Court of Appeal in Northern Ireland dismissed an appeal from the judgment of Kerr J.
- 7 In argument counsel for Dr Martin was asked by the Tribunal why, if Dr Martin were to give evidence unscreened, that would increase the risk to him and thereby infringe the rights to which he was entitled by reason of Article 2 of the European Convention on

Human Rights, now part of the domestic law of the United Kingdom. Dr Martin had not sought anonymity and his relevant conclusions as a forensic scientist were well-known by reason of media reporting. The Tribunal stated that it was prepared to make the necessary security arrangements in order to ensure that he was not photographed coming to or leaving the Guildhall and that it would consult the Security Services and make appropriate arrangements so that he could come to and go from the hearing without being harassed or indeed in public view. Furthermore photography was not permitted in the Guildhall; the Rialto Cinema, in which the hearings of the Inquiry had been available to the public, was no longer operating.

- 8 Counsel's response was that Dr Martin was in exactly the same position as those police officers who had been permitted to give evidence screened. The Tribunal pointed out that there was indeed a difference, not least because a very large number of police officers had over the years been killed or injured in the course of their duties. Counsel did not accept that the fears held by his client could be alleviated completely by any steps the Tribunal might take short of screening.
- 9 Following the conclusion of argument the Tribunal wrote to the Police Service for Northern Ireland, referring to the threat assessment of 3 April 2002 and addressing the following question to the Police Service:

"The Tribunal is proceeding on the assumption that his address is not known to those who might constitute the threat to Dr. Martin because, if it were known, it would seem to follow that screening would do nothing to enhance his security. On that assumption and on the basis that steps are taken to ensure that he cannot be traced from or to the Inquiry and that photographs are not taken of him either in the street or when giving evidence I should be grateful if you would say whether or not the absence of screening might have the effect of increasing significantly his vulnerability to the threat. If you take the view that the absence of screening would have the effect of significantly enhancing that vulnerability I should be grateful if you would say why."

- 10 By letter dated 3 May 2002 the Police Service replied in the following terms:

"It is the assessment of Security Branch that the absence of screening in this case will not significantly increase the subject's vulnerability."

- 11 The approach to be adopted when Article 2 is invoked was expressed by Lord Phillips, MR in *Lord Saville of Newdigate and Others v Widgery Soldiers and Others* (19 December 2001) in the following terms:

“31. We consider that the appropriate course is to consider first the nature of the subjective fears that the soldier witnesses are likely to experience if called to give evidence in the Guildhall, to consider the extent to which those fears are objectively justified and then to consider the extent to which those fears, and the grounds giving rise to them, will be alleviated if the soldiers give their evidence somewhere in Great Britain rather than in Londonderry. That alleviation then has to be balanced against the adverse consequences to the Inquiry of the move of venue, applying common sense and humanity. The result of the balancing exercise will determine the appropriate decision. This course will, we believe, accommodate both the requirements of Article 2 and the common law requirement that the procedure should be fair.”

- 12 That test was applied by the Court of Appeal in Northern Ireland when dismissing the appeal from the judgment of Kerr J to which we referred earlier. We approach the disposition of this application in the light of that paragraph, having in mind that the important consideration in this case is whether the giving of evidence by Dr Martin unscreened will in any significant way increase any risk to which he is presently subject. We use the term “significant” not to increase any burden already placed on Dr Martin in making this application but simply to exclude anything of no significance. Against that background the Tribunal considers that whatever subjective fears Dr Martin may have had if called to give evidence unscreened instead of screened, those fears are not objectively justified because there will be no significant increase in his vulnerability. Furthermore the steps which the Tribunal indicated at the outset of the hearing it would take will alleviate to any necessary extent any such fears.
- 13 By way of response Dr Martin’s solicitor said in a written submission:

“If the risk is increased by the giving of evidence then the first decision that has to be made is whether the witness should be called to give evidence at all.”

- 14 However, it was not submitted at any stage of the hearing that the risk to Dr Martin was such that he should not be called to give evidence. Nor had the assessment of 21 April 2000 prompted any such application. Thus it can hardly be suggested now that Dr Martin fears giving evidence at all (screened or unscreened), for were that the case, his

application would have been to that effect, rather than the screening application that was in fact made. As it is, the debate is whether screening is required in order to safeguard Dr Martin – and the latest assessment is to the effect that giving evidence unscreened would not significantly increase the risk to him.

- 15 Attention should be drawn to the precise order sought by Dr Martin in his application. It reads:

“a) that arrangements be made to enable him to give his evidence in circumstances where he will be fully screened from the view of the families of the deceased, the public, and representatives of the media, and so that he will only be visible to the members of the Inquiry, to those members of its staff who have a legitimate reason to be present, and to the qualified legal representatives of persons who have been afforded representation by the Inquiry;

b) that no video transmission (‘live’ or recorded) showing his face or physical features shall be displayed on any screen (including screens in the Guildhall, the Rialto Cinema and the premises of the Bloody Sunday Trust) during the time when he is giving his evidence or at any time thereafter;

c) that during the taking of his evidence no video recording be made which records his face or physical features;

d) that effective arrangements be made to protect him from public view while in the Guildhall and its precincts before and after giving evidence;

e) that arrangements be made to enable him to enter and leave the Guildhall before and after giving evidence in circumstances which afford him effective protection from public view, effective protection from harassment, and reasonable respect for his dignity and right to privacy.”

- 16 The directions which the Tribunal said it would make will sufficiently meet what is sought in paragraphs (c), (d) and (e). As to (b), the Tribunal will order that no video transmission (live or recorded) showing Dr Martin’s face or physical features shall be displayed on any screen other than screens in the Guildhall chamber. It is in respect of screening from the view of the families of the deceased, the public, and representatives of the media that the application will fail. For the reasons already given, the circumstances do not warrant a departure from the approach taken by the Tribunal during the course of this Inquiry, namely that its hearings should be open to the public and that screening constitutes a

significant inroad on the public nature of the proceedings, its use being a wholly exceptional measure.

- 17** Subject to the measures that the Tribunal will put in place, this application will be dismissed.

A2.27: Ruling (19th September 2002): application by Sir Edward Heath, Lord Carrington and Sir Geoffrey Johnson-Smith to give their evidence in London

Hearing transcript – 19th September 2002, pp1–4

LORD SAVILLE: Ms McGahey, before we resume Mr Wallace, we can give our rulings on the venue application made yesterday afternoon. Last June we began hearing an application made on behalf of Sir Edward Heath, Lord Carrington and Sir Geoffrey Johnson-Smith, that they should give their evidence in London rather than at the Guildhall. Among the grounds put forward in support of this application was the submission that the risk to these individuals giving evidence was greater here than in London. However, the Tribunal took the view that the assessments then prepared by the security agencies were not in themselves sufficient to enable the Tribunal to deal properly with the submission and, accordingly, decided to convene a meeting with these agencies in order to obtain further information and advice from them on this topic.

This meeting took place on 6th September. The proceedings were transcribed and the transcript has been supplied to all concerned. The transcript has been redacted so as to exclude security matters that cannot be put into the public domain and certain other matters that do not touch upon the issue of security at all.

We have now heard further submissions on the application.

Mr Mackie, on behalf of the individuals in question, submitted that his clients had genuine fears for their personal safety were they required to give their evidence at the Guildhall, that those fears were objectively justified by the advice the Tribunal was given at the meeting earlier this month, that those fears and the grounds for them would be alleviated if they gave their evidence in London and that balancing that alleviation against the adverse consequences to the Inquiry of the change of venue, common sense and humanity dictated that the application should be granted.

Thus, submitted Mr Mackie, his clients fell squarely within the principles set out by the Court of Appeal when dealing with the question of the venue for the evidence of the soldiers.

We accept that the applicants do hold genuine fears. We further accept that at the end of the meeting the Security Service and the Metropolitan Police expressed the view that those genuine fears were justified. Our understanding of the views expressed by the Police Service of Northern Ireland is that they accepted that the individuals had fears about giving evidence in Northern Ireland rather than London, but felt unable to offer a view as to whether those fears were objectively justified.

In opposition to the application Mr Treacy, on behalf of some of the concerned families, pointed out that the views finally expressed were at variance with earlier views expressed by the same agencies, that they were expressed after these agencies had withdrawn for a short while from the meeting with the Tribunal to discuss the matter among themselves and that the Tribunal were given no explanation for the change in views.

What Mr Treacy says is correct but to our minds this takes the matter no further. The whole point of the meeting was to try to clarify the views of the agencies concerned and the fact that differing views were expressed at an earlier stage does not, to our minds, devalue or undermine the final view expressed to us by two of the agencies which we have no grounds for supposing was other than a genuine expression of opinion and which, accordingly, we accept.

We further accept Mr Mackie's submission that the fears expressed by his clients would be alleviated if they give evidence in London. There remains, therefore, the balancing exercise between the adverse consequence to the Inquiry of hearing these witnesses in London as opposed to what we still believe to be the natural place for this Inquiry, namely the Guildhall.

As to this, we can see no material distinction between these cases and the case of the soldiers and, accordingly, it seems to us we are constrained by the judgment of the Court of Appeal to conclude that the balance falls on the side of alleviating the fears of the applicants. In these circumstances, we allow the application.

It is accordingly not necessary to deal with the other grounds advanced by Mr Mackie.

A2.28: Ruling (19th December 2002): claims for immunity made by the Secretary of State for the Home Department; application to give evidence by a time-delay procedure; applications for anonymity and screening by Security Service officers; venue for Security Service officers

Introduction

- 1 The Tribunal has before it three claims for public interest immunity together with applications for anonymity, screening and a delayed time-procedure for taking the evidence of certain witnesses.
- 2 One claim for immunity is made by the Secretary of State for the Home Department (“the Home Secretary”) by certificate dated 19 October 2000 with an addendum dated 20 November 2000. Another is made by the Secretary of State for Defence (“the Defence Secretary”) by certificate dated 23 November 2000. On 20 May 2002 the Minister of State for the Home Department (“the Minister”) made a claim for immunity in respect of further material. The material for which immunity is claimed is acknowledged by the claimants to be relevant to the Inquiry’s terms of reference. Nevertheless the Tribunal considers that some of the material in question is not relevant and, as appears later in these reasons, may be dealt with accordingly.

Public interest immunity

- 3 Each certificate spells out the concerns said to justify immunity from disclosure of the material in question. Each certificate is accompanied by a confidential schedule in which the material is more specifically identified and the concerns are expressed in greater detail. The material referred to in the confidential schedules has been viewed only by the members of the Tribunal, the then reserve member, Counsel assisting the Inquiry and the Solicitor to the Inquiry.

- 4 Counsel for the various interests represented before the Inquiry raised a number of issues relating to public interest immunity. Some of those issues concerned the powers of the Tribunal, some the procedural steps the Tribunal should take, while others went to the nature of the material and the extent to which it is encompassed by public interest immunity. We shall deal with the principal issues raised.
- 5 First, however, we should explain the time that has elapsed since the first two claims were made in late 2000. The Tribunal heard argument on those claims in December 2000. Early in 2001 it was in a position to make a ruling on each of the claims. Events then occurred that made it necessary to defer a ruling.
- 6 In December 2000 David Shayler, a former officer of the Security Service, wrote to the Inquiry to explain that he was in a position to give evidence which had relevance to the material the subject of the claims. This made it necessary for the Tribunal to pursue a line of inquiry. This made it inappropriate to deliver any ruling until the issues raised by that letter and in a newspaper article written by Mr Shayler had been resolved. The matter was further complicated by the production of a newspaper report of remarks made by a former soldier, given the pseudonym of Martin Ingram. This required further inquiries by the Tribunal. In addition the Tribunal received the certificate by the Home Department dated 20 May 2002, to which reference is made above. The three applications were then listed for further argument. The Tribunal is now able to make a ruling in regard to each of the claims.

Powers of the Tribunal

- 7 The first issue and one with which the Tribunal has already dealt is the powers of the Tribunal so far as a claim for public interest immunity is concerned. In a submission made on behalf of the family of Bernard McGuigan, Alexander and William Nash and Danny Gillespie, Mr Mansfield QC sounded "*a note of caution*" as to whether this Tribunal is empowered to withhold material from disclosure on the basis of public interest immunity. A written submission made on behalf of Michael Quinn was in stronger terms. In effect it contended that the powers of the Tribunal were constrained by the legislation under which it was constituted, that its obligation was to meet its terms of reference and that it could only do so by making public any material relevant to those terms of reference. However, Mr McGonigal, counsel for Mr Quinn, informed the Tribunal that his client "*is no longer maintaining that the Tribunal has no jurisdiction to consider the questions of the public interest immunity, and he is no longer maintaining that the Tribunal should not have sight of the documents in unredacted form*".

The ruling on power

8 On 5 December 2000 the Tribunal delivered a ruling in the following terms:

“We have before us this morning applications by the Home Office and by the Ministry of Defence for Public Interest Immunity in respect of a number of documents. The nature of the application has been opened to us by Counsel to the Inquiry, Mr Christopher Clarke, but when he had finished doing so, it seemed to the Tribunal appropriate to call on Mr Michael Mansfield, who acts on behalf of a number of the interested parties, to make a submission to the Tribunal in relation to paragraph 3 of his skeleton argument. The reason for that is that paragraph 3 raises, as it is put, ‘a note of caution as to whether this Tribunal, constituted under the 1921 Act [a reference to the Tribunals of Inquiry (Evidence) Act 1921], has the authority to allow a PII claim’. It seemed to us it was appropriate to consider that question at the outset so that we could then be in a position to deal with the other matters that arise in the hearing of the PII application, including among other things, the question as to whether or not this Tribunal should sit in private to hear submissions and read the materials in respect of which Public Interest Immunity is sought.

We have considered what Mr Mansfield has to say and he is right to raise a note of caution, but the Tribunal is firmly of the view that under the 1921 Act it does have authority to entertain and rule upon a claim for Public Interest Immunity. The question as to the test to be applied in deciding whether or not Public Interest Immunity should apply seems to us to be something completely different from this first question as to whether or not we have any power at all to entertain any such application.

It seems to us that a reading of Section 1(1) and Section 1(3) of the 1921 Act, together with Section 2(a) of the same Act makes it quite clear that the Tribunal has the same powers, rights and privileges as are vested in the High Court. Those powers, rights and privileges, include of course the right to entertain Public Interest Immunity applications.

Accordingly, we rule that we do have such power and we can now turn to the different question as to the tests to be applied in exercising that power.”

Procedural matters

- 9 As the common law has developed, the doctrine of public interest immunity upholds the necessary power of the courts to compel testimony but at the same time recognises that there may be a public interest, so serious as to justify the non-disclosure of evidence, oral or written. In that regard a court must weigh the competing interests involved in order to determine whether the public interest in non-disclosure should, in the particular circumstances, prevail over the public interest in full disclosure. It is important to stress that while the interests of particular individuals may be involved, the claim for immunity is advanced by the Crown in the interests of the community. Having regard to the provisions of the 1921 Act relating to witnesses and the production of documents, this Tribunal, faced with a public interest immunity claim, must approach the claim in the same way that a court would approach it.
- 10 Special considerations arise where the European Convention on Human Rights (“the Convention”) is concerned, particularly since the Convention became part of the domestic law of the United Kingdom on 2 October 2000 with the passing of the Human Rights Act 1998 (“the HRA”). This is a matter we deal with later in these reasons, having in mind the argument presented by the Northern Ireland Civil Rights Association (“NICRA”) that the HRA has no application to this Inquiry.
- 11 Once it is understood that the Tribunal must consider claims to public interest immunity, questions of a procedural nature arise. Although it was argued, not so much as a question of power as of fairness, that the Tribunal should not examine the material for which immunity is claimed unless it is prepared to make the material available to interested persons, that argument was not really pressed. In the end all counsel accepted that realistically the Tribunal would have to read the material for itself as a first step. Mr Treacy QC did seek to distinguish between material involving the safety of individuals and other material but in the end recognised that the Tribunal could not embark upon its task without at least viewing all the material for which immunity was claimed.
- 12 Some of the submissions contained a rider that legal representatives with a direct interest in the material should themselves have access to it and a further rider that they should be authorised to inform their clients of its contents. The difficulties to which these riders give rise are apparent and they are compounded in that not all the interested parties advanced such a submission. The Tribunal does not consider the riders to be an appropriate course.

- 13 Counsel for the Home Secretary and the Defence Secretary submitted that they should have the opportunity to address the Tribunal in private in respect of the confidential schedules. We are of the view that this is not an appropriate course. If, on reading the material, the Tribunal considers that some matters in the confidential schedules are not clear or require further explanation, it is proper for the Tribunal to so indicate to the legal representatives for the two departments, affording the opportunity for the schedules to be amended or added to. But the schedules, read together with the certificates which refer to them, must speak for themselves.

The certificates

- 14 In order to understand the task that faces the Tribunal in applying the doctrine of public interest immunity to the material in question, it is necessary to say something of the concerns expressed in the certificates. It is also necessary to bear in mind that in some cases the withholding of a document in its entirety is sought. In other cases the certificate claims immunity only for parts of a document and there is no objection to disclosure of the document in a redacted form.
- 15 The certificate by the Home Secretary dated 19 October 2000 identifies the material for which immunity is claimed as:

“(a) Documents and a tape recording of a debrief containing intelligence provided by INFLICTION, a Security Service agent resettled outside of the United Kingdom.

(b) Documents related to Observer B, previously a Security Service agent.

(c) Information relating to the identities of Security Service Officer A, and ex-Security Service Officers C, David, James and Julian.”

The documents and information referred to in the certificate are elaborated in considerable detail in the confidential schedule which the Tribunal has read together with the documents which it identifies. (This is true of each certificate.)

- 16 The reasons expressed in the certificate relate to information, the disclosure of which would endanger or risk endangering present and former members of the Security Service and persons who provided information to the Service; current and future operations of the Security Service, at risk if the material is disclosed; and, speaking generally, the impairment of the efficiency of the Security Service that would result if the information is disclosed.

- 17 The addendum dated 20 November 2000 in effect adds Officer B to the names in paragraph 5(c) of the certificate dated 19 October 2000 and seeks a similar limitation in his case and on similar grounds.
- 18 The certificate by the Defence Secretary dated 23 November 2000 refers to the certificate by the Home Secretary and, in respect of the matters to which that certificate relates, claims immunity for an intelligence report bearing on one of those matters.
- 19 The claim made by the Defence Secretary is that if the intelligence report were disclosed “*it would be possible for terrorists to identify the intelligence source and take counter-measures that would render it useless*”. This would “*seriously jeopardise the intelligence source and ... risk serious damage to national security*”.
- 20 The certificate by the Minister of State for the Home Department dated 20 May 2002 refers to the earlier certificate and addendum by the Home Secretary, relies upon those documents and then makes a claim for immunity “*for certain parts of further material relating to the work of the Security Service in respect of which disclosure may be required or oral evidence may be sought*”. That material relates to “Infliction”.

Weighing the public interest

- 21 The task of weighing the public interest in the disclosure of material relevant to the Tribunal’s terms of reference against any real harm likely to be caused to other public interests by such disclosure is rarely an easy one. It requires the identification with some precision of the interest served by disclosure and of the particular harm that may be done to other interests if disclosure is ordered. Furthermore, in giving its ruling and the reasons therefor, while the Tribunal must have regard to the material identified in the schedules, it can only refer to that material in a general way.
- 22 The Tribunal has from the outset made clear its intention to put all relevant material in the public domain unless persuaded that, for compelling reasons, it would be in the public interest to take a different course. The importance of hearing the evidence in public hardly needs to be stressed in the circumstances of the present Inquiry. Indeed the Tribunals of Inquiry (Evidence) Act 1921, in Section 2(a), precludes the Tribunal from refusing to allow the public to be present at its proceedings. But it does so with a very important qualification: “*unless in the opinion of the Tribunal it is in the public interest expedient so to do for reasons connected with the subject matter of the inquiry or the nature of the evidence to be given*”.

The Human Rights Act

23 In the present case the debate focused very much on the implications of the Convention and the HRA in weighing the competing public interests. The HRA Section 1 defines the Convention rights by reference to certain articles of the Convention and of particular protocols.

24 The articles which featured most in the argument before the Tribunal were Articles 2, 3 and 6. This was on the basis that the Tribunal must give effect to the obligation cast on state authorities not to breach the rights conferred on individuals by those articles and, additionally, to take positive steps to safeguard those rights from the actions of others. Section 6(1) of the HRA provides:

“It is unlawful for a public authority to act in a way which is incompatible with a Convention right.”

25 In the oral and written submissions originally made to the Tribunal on public interest immunity, no challenge was made to the relevance of the HRA in weighing the competing public interests. Indeed it was accepted that the Act was relevant. What was in issue was the meaning and scope of particular articles. However, in a written submission made later by NICRA a positive challenge was made to the application of the HRA to any decision made by the Tribunal on public interest immunity. A similar challenge was made by NICRA before the Court of Appeal (England and Wales) in *Lord Saville v Widgery Soldiers* (19 December 2001) and was rejected by that Court, essentially for the following reason:

“The Tribunal is undoubtedly a public authority within section 6(3) of the 1998 Act, being a court or tribunal whose functions are of a public nature.”

26 The answer to NICRA’s challenge in the present proceedings lies not so much in the construction of the HRA as in an understanding of the 1921 Act. Section 1 of that Act, in particular sub-sections (1) and (3), clearly place the Tribunal in the same position as the High Court as far as the attendance of witnesses, the production of documents and the immunities and privileges of witnesses are concerned. Public interest immunity is an aspect of those matters and, to that extent, the Tribunal is in the same position as the High Court. Because Section 6(1) of the HRA precludes the High Court (and any court) from acting in a way incompatible with a Convention right, this Tribunal is equally precluded.

The Convention articles

27 Article 2 reads in part:

“1. Everyone’s right to life shall be protected by law. No one shall be deprived of his life intentionally.”

Article 3 reads:

“No one shall be subjected to torture or to inhuman or degrading treatment or punishment.”

Article 6 reads in part:

“1. In the determination of his civil rights and obligations or of any criminal charge against him, everyone is entitled to a fair and public hearing within a reasonable time by an independent and impartial tribunal established by law.”

28 Unless an article itself qualifies a right, as in the case of Articles 8, 9, 10 and 11, the articles “*brook no interference with the rights enshrined within them*”. Lord Phillips MR in *R v Secretary of State for the Home Department ex P Mahmood* (8 December 2000) at para. 39. Articles 2 and 6 are not qualified in any sense relevant to the present debate; Article 3 is unqualified. However this does not mean that the language employed in the articles may not give rise to debate; “fair hearing” is one example: see *Procurator Fiscal v Brown* (Privy Council on appeal from High Court of Justiciary, 5 December 2000) where limitations on access to the courts is discussed.

Articles 2 and 3

29 Not surprisingly, it has been said by the European Court of Human Rights (“the European Court”) that “*Article 2 ranks as one of the most fundamental provisions in the Convention*” (*McCann & Ors v UK* (1996) 21 EHRR 97).

30 While Article 2 confers a substantive right and imposes a substantive obligation, it also has a procedural aspect. The substantive right appears clearly enough from the language of Article 2. It is a right to life which is protected against the actions of the State or an individual. It enjoins the State not only to refrain from taking life “intentionally” but, further, to take appropriate steps to safeguard it. It implies:

“a positive obligation on the authorities to take preventive operational measures to protect an individual whose life is at risk from the criminal acts of another individual”.
(*Osman v UK* (1998) 29 EHRR 245 paras. 115–116.)

In *Lord Saville v Widgery Soldiers* (Court of Appeal, 19 December 2001), Lord Phillips MR, delivering the judgment of the Court, spoke of “*the real and immediate risk to life*” referred to in *Osman* as “*well above the threshold that will engage Article 2 when the risk is attendant upon some action that an authority is contemplating putting into effect itself*” (par. 28).

- 31 Section 6(1) of the HRA precludes the Tribunal from acting in a way incompatible with the right conferred by Article 2.
- 32 Article 3 generates similar principles where there is a risk of torture or punishment.
- 33 Mr Treacy QC submitted that the procedural implications of Article 2 require that where there is an inquiry into a death to which the article relates the Tribunal must ensure that all relevant information is made available to those affected by the inquiry. The procedural aspect manifests itself, the submission contended, by granting standing to the spouse or a close relative of the deceased and providing to them all information relevant to the investigation.
- 34 Article 2 has implications for the Inquiry in two ways. If the disclosure of particular material presents a risk to the life of someone now or formerly in the Security Service or to someone who is or was a source of information regarding terrorist activities, Article 2 places a positive obligation on a court or tribunal not to place that person’s life at risk. That obligation extends to the families of intelligence officers and informants.
- 35 The procedural aspect of Article 2 obliges a court or tribunal to ensure that the standing of a relative of a deceased killed by an arm of the State is not thwarted by its actions. Standing includes access to relevant information. However, that right cannot prevail against any substantive right conferred by Article 2. If the evidence falls short of establishing a risk to the life of a member of the Security Service or to an informant (or their families), the Tribunal can and should give effect to the procedural aspect of the article unless some other article is in tension with it.
- 36 We do not understand Mr Treacy to contest that a substantive right under the Convention will prevail over a procedural safeguard. Rather, his submission was that in the case of members of the Security Service and informants there was an obligation on the State and

to some extent on the Tribunal itself to eliminate or at any rate minimise the risk. A witness protection programme was mentioned as one means. The existence of such means may well be relevant to whether there is a risk to life. But there can be no doubt that as a matter of principle substantive rights will prevail over procedural rights.

Article 6

37 The place of Article 6 in the argument is rather more complex. As we understood Mr Treacy's submission, the article is relevant in the following way:

1. Article 6 asserts the right to a fair and public hearing in the determination of the civil rights and obligations of a person or of a criminal charge against a person.
2. In the case of a criminal trial evidence may not be withheld from the defence if to do so will prevent the accused from receiving a fair trial.
3. The right to a fair and public hearing is an incident of an inquiry into the deprivation of life contrary to Article 2.
4. The right identified in Article 2 is absolute and non-derogable.
5. It follows that public interest immunity cannot justify the withholding of relevant information where to do so will interfere with the substantive or procedural rights conferred by Article 2.
6. This Inquiry concerns the deprivation of life in circumstances which offend Article 2. A spouse or a close relative of a person who was deprived of life in those circumstances is entitled, by reason of Article 6, to a fair and public hearing. Public interest immunity cannot stand in the way of that entitlement.

38 In the view of the Tribunal the submission cannot be sustained in that form. Article 6 does not, in the circumstances of this Inquiry, advance the position of the families of those who were killed. Article 2, in its procedural aspect, gives to those families the entitlement to an open inquiry into the deaths that occurred. That entitlement is necessarily qualified by the need to take into account public interest immunity, especially where the disclosure of information would place at risk the life of another. This is simply to say again that the procedural aspects of Article 2 cannot override its substantive aspects.

39 It follows that if, in the view of the Tribunal, the disclosure of information would cause a risk to the life of a Security Service officer or an informant, past or present, the right to life protected by Article 2 must prevail over procedural rights conferred by the Convention,

expressly or by implication. As appears from earlier paragraphs the right to life to be protected extends to families.

- 40 In that particular situation, where there is a risk to life, there is in truth no balancing exercise to be performed. By reason of Section 6(1) of the HRA there is a statutory obligation on the Tribunal not to act in a way which is incompatible with the right conferred by the Convention. If there is no risk to life by the disclosure of information, the Tribunal may have regard to public interest immunity. Indeed it is bound to carry out the balancing exercise traditionally performed by the courts.
- 41 Article 6 contains no express right of access to a court or tribunal. Nevertheless such access is a necessary incident for the protection of the procedural guarantees which the article contains. See *Golder v United Kingdom* (1979) EHRR 524 paragraph 35. Because the right of access is not defined, the European Court has referred on several occasions to limitations on access permitted by implication. The authorities are noted by Lord Bingham of Cornhill in *Procurator Fiscal v Brown*, pages 11-12. However, a limitation must not destroy the very essence of the right.
- 42 In so far as a criminal trial is prayed in aid by way of analogy, whether by the families or the soldiers:
- “The jurisprudence of the European Court very clearly establishes that while the overall fairness of a criminal trial cannot be compromised, the constituent rights comprised, whether expressly or implicitly, within Article 6 are not themselves absolute. Limited qualification of these rights is acceptable if reasonably directed by national authorities towards a clear and proper public objective and if representing no greater qualification than the situation calls for.” (Lord Bingham in *Procurator Fiscal v Brown*, page 27.)
- 43 There is, in any event, a more fundamental difficulty facing those who would invoke Article 6. The entitlement to “*a fair and public hearing*” operates in the determination of the civil rights and obligations or of any criminal charge against a person. The Tribunal is not determining a criminal charge against anyone. Nor is it determining the civil rights and obligations of anyone; its charter is to inquire into “*the events on Sunday, 30 January 1972 which led to loss of life in connection with the procession in Londonderry on that day, taking account of any new information relevant to events on that day*”. It is true that the Tribunal’s report will inevitably deal with the conduct of many persons on Bloody

Sunday, civilian and military, but it will not determine their rights and obligations. The distinction was drawn in *Fayed v UK* (1994) 18 EHRR 393 and is a bar to reliance upon Article 6 in these proceedings.

Public interest immunity – the soldiers

- 44 The position of those soldiers who argue against any immunity for the material covered by the certificates and schedules requires consideration in light of the matters discussed so far in these reasons.
- 45 The families of the deceased seek full disclosure of all material that throws light on the conduct of the soldiers on 30 January 1972, including any decisions taken by senior officers and others in a position of political or executive authority which relate to that conduct. The soldiers, on the other hand, are concerned to have access to information bearing upon any participation by members of the IRA or any other organisation or by any individuals, not so far identified, in the events of that day.
- 46 In the present context the soldiers do not assert any right under Articles 2 or 3. No soldier has been charged with an offence by reason of his conduct on 30 January nor, having regard to the Attorney General's assurance in 1999, will any be so charged by reason of any evidence he may give to the Inquiry or any written statement made preparatory to giving evidence.
- 47 It might be argued that Article 6's requirement of a fair and public hearing entitles the soldiers to access to all relevant information, at any rate where the life of another is not at risk. But that argument meets the fundamental difficulty to which we refer in paragraph 43 of these reasons. Mr Lloyd Jones QC, appearing on behalf of the clients of Mr Anthony Lawton, preferred to place reliance on the analogy of criminal proceedings. This was on the basis that serious allegations had been made by some counsel in the course of opening, indeed allegations of murder and that the killing of civilians took place in the course of a planned operation. On that footing, it was said, material which might be of assistance to the soldiers in meeting those allegations should be disclosed to them.
- 48 If the criminal trial analogy is apt then, it was argued, the term balancing exercise is not appropriate. Public interest immunity cannot operate where a miscarriage of justice might ensue from the withholding of documents. Another way of putting might be in the language of Taylor LCJ in *R v Keane* (1994) 1 WLR 746 at 751:

“If the disputed material may prove the defendant’s innocence or avoid a miscarriage of justice, then the balance comes down resoundingly in favour of disclosing it.”

- 49 However, Mr Lloyd Jones’ submission was in stronger terms that rejected the idea of a balancing exercise. The correct approach, he argued, was that set out in par. K6.14 of the Report of the Inquiry into the Export of Defence Equipment and Dual-Use goods to Iraq and Related Prosecutions (the Scott Report) where it was said that where there are documents which might have been of assistance to the defence, it is not possible to have public interest factors in favour of non-disclosure which are of such weight as to tip the scale against disclosure of such documents.
- 50 Nevertheless, Mr Lloyd Jones accepted that in the present situation these principles may have to yield if the disclosure of material would expose an individual to the risk of death. Clearly that must be so and Mr Lloyd Jones did not contend for the disclosure of such material. Nevertheless, he emphasised what he said was the unfairness to interested parties who face the gravest allegations and non-disclosure should be permitted only where it was unavoidable.

The material

- 51 A detailed review of the material for which immunity is claimed is restricted by the contents of the confidential schedules. However, it is necessary to say something of the circumstances giving rise to the application.
- 52 “Infliction” is the code name given to a former Security Service agent. The Security Service has disclosed to the Inquiry a number of documents produced following debriefings of Infliction in 1984, as well as a tape recording identified by Officer B as a recording of part of his debriefing of Infliction. According to these documents, Infliction made certain claims about Martin McGuinness, who was on 30 January 1972 a high-ranking officer of the Provisional IRA in Londonderry, in particular that Mr McGuinness had admitted to Infliction that he had fired a single shot from the Rossville Flats that had “*precipitated the Bloody Sunday episode*”. These documents give rise to questions as to whether Mr McGuinness did fire such a shot and, if he did, in what circumstances and with what consequences.

Mr McGuinness is scheduled to give evidence to the Inquiry. In his written statement to the Inquiry he has denied making any such admission to Infliction; indeed he goes further

and denies having fired any shot on Bloody Sunday. Thus there is an issue as to whether Mr McGuinness did fire a shot that day.

- 53 On 27 May 2002 the Tribunal ruled that it was satisfied that to call or indeed to make any attempt to call Infliction, who is overseas, would be in breach of his rights under Article 2. Accordingly the Tribunal would proceed upon the basis that Infliction would not be called to give evidence. Whatever weight the Tribunal may attach to the Infliction material is a matter to be determined after hearing argument.
- 54 The Tribunal understands the position in which Mr McGuinness will be placed if he is unable to confront Infliction. At the same time it has a duty to investigate the events of Bloody Sunday, a duty which in its view precludes it from simply ignoring the Infliction material. The weight to be attached to the material will be assessed on the totality of the evidence, including that of Mr McGuinness and of the witnesses whose evidence bears upon the credibility of Infliction. We use the term credibility to embrace the general reliability of Infliction in his dealings with the Service. This somewhat extended concept of credibility is, we believe, warranted in the circumstances, in particular the inability of the Tribunal and the interested parties to see and to question Infliction.
- 55 The Tribunal needs little persuasion that material identifying or having the potential to identify former Security Service agents is likely to endanger their lives if their work has involved contact with any terrorist organisation. Some documents relate to a former agent, identified only as Observer B. The Tribunal was recently informed of Observer B's death. He is therefore no longer at risk but his family, friends and associates may be. Furthermore, the documents relating to Observer B contain references to former members of the Security Service and sources of information who might be at risk if they were to be identified.
- 56 In connection with Infliction the Inquiry may call as witnesses some or all of David Shayler and the current and former officers identified as A to C, E to G, and I to L. Insofar as evidence relates to Mr Shayler, there is no problem in regard to his identity but there is of course in relation to the officers themselves.
- 57 The Inquiry may also require the attendance as witnesses of former Security Service Officers David and Julian and also Officer M. James, a former officer, is now deceased. Their evidence relates to Observer B so the problems of identity relate not only to the witnesses but to Observer B.

- 58 A consideration of the certificates, of the confidential schedules and of the material itself which the Tribunal has inspected leaves us in no doubt that disclosure of certain documents in unredacted form would constitute a risk to the life of a number of officers, current and former, and agents or informants. It does not follow that in every case disclosure should be withheld. In some cases the redaction of names and other identifying information may remove the threat.
- 59 The claim for immunity based upon impairment of the efficiency of the Security Service is more difficult. Certainly a report which would make it possible for terrorists to identify intelligence sources or operational structures and take counter-measures has important national security implications which may readily bring the balance down against disclosure. On the other hand, information relating to office organisation and administration may have no particular national security implications, in which event, if relevant to Infliction, it will warrant disclosure. After all, the certificates themselves acknowledge the Attorney-General's Written Parliamentary Answer on 11 July 1997, given in general terms, that immunity will not be asserted by the Government "*unless the relevant Minister believes that disclosure of a document or piece of information will cause real harm to the public interest*". Of course, as foreshadowed at the outset of these reasons, that sort of information may have no relevance to the Inquiry.

The material to be disclosed

- 60 The documents inspected are held by the Security Service in files. However, it is more useful to identify the documents by reference to the terminology used in the applications themselves. Speaking generally the material for which immunity is granted attracts the operation of Article 2, whether by reference to a document in its entirety or in an unredacted form. The right to life to be protected is that of officers, former and current, and also of agents or informants, together with families. Some material has national security implications. The efficiency of the Security Service does not necessarily attract public interest immunity but in many instances the details for which immunity is claimed are in truth irrelevant and on that basis alone need not be disclosed.

Certificate by Home Secretary dated 19th October 2000 and Schedule thereto

This certificate relates to documents contained in an attached Bundle A.

(a) Bundle A, section A

This is material relating to Infliction. The documents in section A of Bundle A are:

- (i) unredacted versions of the documents that appear in redacted form in the Inquiry's bundles at G109.666–672, KA2.15–19 and KC1.3–5;
- (ii) the tape recording of which redacted transcripts appear at KB3.3–5, KC1.3–5 and KC1.7–9;
- (iii) the witness statements of Officers A and C of which copies appear at KA2.1–19 and KC1.1–9; and
- (iv) three further documents for the entirety of which public interest immunity is claimed.

In the unredacted version of G109.670–672, the words "*Source description:*" and "*Reliability not fully assessed*" appear on the second page above "*Date of information: April 1984*". It is now accepted that these words can be disclosed, though not the words that appear between them in the original.

Subject to the preceding paragraph this claim for immunity is upheld.

(b) Bundle A, section B

This is material relating to Observer B. All the documents in section B of Bundle A appear in redacted form in the Inquiry's bundles at G123.812–831.

Some of the redactions of these documents have been made on the application of Observer B and were the subject of a ruling of the Tribunal made on Day 35 at pages 17–21. The present ruling is confined to the redactions for which the Security Service has applied.

In the unredacted version of G123.818, the name "*James*" appears in the middle of the portion of text between "*Following for*" and "*from Director of Intelligence Northern Ireland*". It is now accepted that this name can be disclosed though not the text that appears either side of it.

This claim for immunity is also upheld subject to the preceding paragraph and subject also to the insertion of certain ciphers in the documents at G123.814 and G123.818. The documents containing these ciphers will be distributed as soon as possible after this ruling is published.

(c) Bundle A, section C

The documents in section C of Bundle A are the witness statements of David, James and Julian that appear in the Inquiry's bundles at KD2.1–2, KJ2.1–2 and KJ4.1–2. Under the present application no issue of redaction arises in relation to these statements separate from the claim for anonymity in respect of the surnames of David, James and Julian. The redactions to the statements of James and Julian have been made by the Inquiry to protect the anonymity of Observer B and others named in his witness statement. Section C of Bundle A also includes the annexes to the statements of James and Julian, which are missing from the copies of those statements in the Inquiry's bundles. However these annexes consist only of the documents that appear in section B of Bundle A, and so no further issue concerning their redaction arises under this heading.

Addendum to the Certificate of 19 October 2000, dated 20 November 2000 and including the Addendum to the Schedule to that Certificate

Material relating to the identity of ex-Security Service Officer B should not be disclosed. There are no underlying documents for which public interest immunity is claimed.

Certificate by Defence Secretary dated 23 November 2000 and Schedule thereto

The intelligence report should not be disclosed because disclosure would put the source at risk.

Certificate dated 20 May 2002 and Schedule thereto

This certificate relates to documents contained in another bundle identified as Bundle A. The statement provided by Mr Shayler should only be disclosed in the redacted form in which it appears in the Inquiry's bundles at KS2.1–5. This is to protect the identities of Officers E to L and also some details of Security Service working practices. The bundle

also includes other documents relating to Infliction which should not be disclosed as bearing on his identity.

Because there are two errors in the ciphers substituted in Mr Shayler's statement, a fresh copy of the statement with the correct ciphers will be distributed as soon as possible after this ruling is published.

- 61 It follows from what has been said in the preceding paragraphs of this ruling that the Schedules themselves should not be disclosed. It also follows that if any of those mentioned in those paragraphs give evidence they should not be asked about information protected by redaction or non-disclosure of documents, in particular about any matter that might tend to reveal the identity or whereabouts of Infliction.

Time-delay procedure application

- 62 The Security Service applies for an order that Officer A, former Officer B and David Shayler may give their evidence by the time-delay procedure described in the application. The object is to avoid any inadvertent disclosure by those persons who, counsel for the Service told the Tribunal, "*have some knowledge about 'Infliction' or his whereabouts*" (Day 214). However it should be noted that in a signed statement to the Inquiry Mr Shayler says: "*I have no idea of the identity of Infliction.*"
- 63 The application describes the procedure in considerable detail. It is unnecessary to repeat all that detail but in essence what is proposed is that interested parties give a list of questions to Counsel to the Inquiry, that counsel will question the witness in the presence of the Tribunal and persons associated with its administration and in the presence of counsel representing the Security Service and persons associated with the Service, but not in the presence of the public or even of the legal representatives of the interested parties. At the conclusion of the evidence, the Service should have sufficient time to examine the transcript, argue for redaction where thought necessary and where that argument is rejected have sufficient time to seek judicial review of the Tribunal's decision.
- 64 The disadvantages of the course proposed are obvious. It would impede the conduct of the Inquiry by imposing serious time constraints. The interested parties and their legal representatives would be excluded from the particular hearings and would not be able to question the witnesses directly. The justification offered for the course proposed is that it is the only way in which the identity of Infliction can be adequately protected.

65 The Tribunal has recognised its concern to protect the identity of Infliction by its decision in regard to the public interest immunity claims. No questions may be asked of a witness which might lead to the identification or whereabouts of Infliction. It is no doubt possible that something may be said inadvertently which bears on these matters but such a possibility exists in the case of any witness who has been granted anonymity, including those many soldiers who will give evidence anonymously. Of course the risks disclosure may bring will vary from person to person. However any questions asked of these witnesses will be controlled by the Tribunal to avoid any risk of inadvertent disclosure. As part of that control counsel for the Security Service may intervene to express concern at any question asked and indeed before any answer is made to a question. Given the limited ambit of questioning on matters of credibility and the obvious concern there will be to protect Infliction's identity, the Tribunal is not persuaded that there is a significant likelihood of disclosure such as to warrant the course proposed. This application is refused.

Anonymity, screening, venue

66 The applications for anonymity, screening and venue embrace more persons than those for whom the time-delay procedure is sought. Clearly Mr Shayler is not concerned with anonymity or screening since his own actions have made these procedures superfluous. However, applications are made on behalf of the Security Service Officers A to C, E to G and I to M and, except in respect of their first names, David, James and Julian.

67 The basis of each application is the same, namely the threat to life of Security Service personnel who are or who have been engaged in anti-terrorist activities in Northern Ireland and the United Kingdom. These matters are elaborated upon in the confidential schedules and are persuasive. The Tribunal has not been furnished with threat assessments in the ordinary way as is its practice in the case of screening applications. However the schedules to the certificates dated 19 October 2000 and 20 May 2002 do contain threat assessments. In any event the threat is self-evident, given the activities of the persons in question.

68 Where the principles to be applied in the case of anonymity, screening and venue have been examined in rulings of the Tribunal and of the Court of Appeal, there is a feature which bears upon the Tribunal's emphasis on the need for open, public hearings. Those on whose behalf the application is made were not present on Bloody Sunday nor has anything been said to suggest that they can throw any light on the events of that day.

Certainly the evidence of David, James and Julian relates to their activities in 1972, unlike Officers A to L whose involvement is more recent. Officers E to G and I to L deal with the reliability or credibility of Infliction. Their particular identities are of no special significance to the events of the day; their own credibility can be tested sufficiently without knowing their names.

- 69 The reasoning of the Court of Appeal in *R v Saville* (28 July 1999) in regard to the anonymity of soldiers and the undoubted risk to the safety of the applicants if their names are known lead inevitably to a grant of anonymity in the case of these applicants.
- 70 As to screening, the Tribunal has discussed the relevant principles in its ruling on Dr Martin's application (29 May 2002). That ruling was made consequent upon an earlier ruling that certain RUC officers should give their evidence screened. That ruling was upheld by Kerr J and an appeal from that judgment was dismissed by the Court of Appeal in Northern Ireland.
- 71 The Tribunal's approach has been to ask whether the giving of evidence by a witness unscreened will in any significant way increase any risk to which he is presumably subject. Those responsible for threat assessments have been asked to direct their attention to that question. In the case of the RUC officers and Dr Martin there was no anonymity. In the former case screening was granted, in the latter it was not.
- 72 In the present case the Tribunal is dealing with persons whose identity is presently unknown to those participating in the Inquiry and to the public. This is not a situation in which it can be said that there is no difference to their safety whether they give evidence screened or unscreened. Giving evidence unscreened may provide some clues to their identity which do not arise from any participation in the events of Bloody Sunday and therefore constitutes an avoidable risk. The protection of Article 2 is paramount and the Tribunal rules that they may give their evidence screened.
- 73 As to venue, the Tribunal looks to the judgment of the Court of Appeal in *Lord Saville v Widgery Soldiers* (19 December 2001). It is unnecessary to repeat par. 31 of the judgment of the Master of the Rolls; it has been referred to by the Tribunal in several of its rulings. At the risk of repetition, the position of these applicants is unusual. Having regard to the confidential schedules, the Tribunal is satisfied that the applicants have genuine fears for their safety if they give evidence in Londonderry, that those fears are objectively justified and that those fears will be alleviated if they give their evidence in London. Accordingly the Tribunal rules that they may give their evidence in London.

A2.29: Ruling (14th April 2003): applications for anonymity, screening and redactions of documents and other material made on behalf of the Government and government agencies

- 1 We have before us a number of applications which relate to evidence and documents emanating from the security services and those who work or worked for those services. The applications are supported by a Certificate dated 27th March 2003 and signed by the Home Secretary, and (in respect of some of the documentary material) by a Certificate dated 2nd April 2003 signed by the Minister of State at the Northern Ireland Office. Each Certificate is accompanied by a confidential schedule which gives further details supporting the applications, but which has only been disclosed to the members of the Tribunal, the Solicitor to the Inquiry and Counsel to the Inquiry on the grounds that to publish its contents more widely would defeat the very purposes for which the applications are made.
- 2 In essence the applications seek by various means to prevent the publication of evidence and documents and to protect the identity of present and former informants and members of the security services. The applications are based on two grounds, namely the danger to the lives of individuals were the material and identities in question to be disclosed more widely than to those who have been shown the confidential schedules and the damage likely to be caused to the working of the security services and thus to national security in the like event.
- 3 So far as the first of these grounds is concerned, an obligation rests on the Tribunal itself to give effect to Article 2 of the European Convention on Human Rights in respect of the right to life, so that the principles that have developed in relation to public interest immunity are not directly relevant. On a number of occasions during the course of this Inquiry we have had to consider this right and the principles that we do have to apply are now set out in judgments of the Court of Appeal dealing with anonymity and the venue for hearing certain evidence. As to the second ground, this does depend on the proper application of the law in relation to public interest immunity.

- 4 There is a further consideration, that of relevance. In order to ensure that we have made every reasonable effort to obtain as much information as we can relating to the events of Bloody Sunday, we instructed our Solicitor and Counsel to adopt a very broad definition of relevance in seeking documents and information from the security services. However, it is right that we should consider afresh whether everything that has been supplied to us is indeed relevant to our task. To the extent that we conclude that it is not, then we would accede to a request for it to be withheld, since its publication would serve no useful purpose, and there would be no need to go into the question whether that request was well founded.
- 5 It is convenient first to deal with applications that the identity of the individuals known as Observer "C", Observer "D", Officer "H" and Officer "N" should not be disclosed. Observer "C" and Observer "D" are, as we are informed, dead, but fear is expressed for the safety of their relatives were their identities to become known. Officer "H" and Officer "N" are alive and it is their own safety for which fears have been expressed.
- 6 Applying the principles to which we have referred, in the light of the material that we have seen and considered, we have no doubt that these fears are objectively justified and that our duty under the Human Rights Act requires us to accede to these applications. We should add that the actual names of these individuals are to our minds of minimal if any relevance to the Inquiry.
- 7 Next there are applications that Officer "H" and Officer "N", who have given written statements to the Inquiry, should, if required to give oral evidence, be screened whilst doing so and (in the case of Officer "N") should also give evidence in London rather than at the Guildhall. The basis for these applications is again the rights of these individuals under Article 2 of the Convention. At present we are of the view that no purpose would be served in calling Officer "H" to give oral evidence. It may well be that we shall take the same view of Officer "N", but if we do decide to call him to give oral evidence, then it seems to us that screening and giving evidence in London are measures that should be taken in order properly to protect his right to life. As to screening, we make the same order as we have made in other cases where a screening application has succeeded.
- 8 There are also applications that both an individual known as "David" and Officer "H" should be allowed to give their evidence by video link. So far as Officer "H" is concerned, for the reasons given we need not (at least in this ruling) pursue this question further. "David" lives abroad. He has made it clear that he is unwilling to come to this country to give evidence. We are satisfied that to try and obtain a court order in his country of

residence would be likely to reveal his identity, contrary to his right to life and our earlier ruling that he should be granted anonymity. In those circumstances we are left with the choice of not hearing his oral evidence, or acceding to this application. In our judgment our duty to seek as much information as we can about the events of Bloody Sunday requires us to adopt the latter course.

- 9 We next turn to an application relating to a statement dated 26th February 2003 made by a member of the security services known as Officer "A" and 37 accompanying documents. This statement deals with these documents and other information, all of which go to the question of the reliability of an informer known as "Infliction". In an earlier ruling dated 19th December 2002 we set out the circumstances attending the question of Infliction and his credibility and there is no need to repeat them here. Having read and considered Officer "A's" statement and the accompanying documents we are left in no doubt that to disclose any of this material would be in breach of Infliction's Article 2 rights. We have considered a suggestion made to us in the course of oral submissions that an alternative method of proceeding would be to use ciphers and the like so that at least some of the material could be disclosed, but in our judgment the redactions that would have to be made would be so wide as to render what remained of no use at all.
- 10 There are then a number of applications seeking redactions to certain documents. Very many of the redactions sought are based upon the proposition that disclosure would breach the right to life of individuals. Once again, we have examined the redacted passages and sought to apply the principles to which we have referred. We are satisfied that these redactions are necessary properly to uphold the right in question.
- 11 Other redactions are sought to be justified on what could be described as classic public interest immunity grounds, rather than on any application of the European Convention on Human Rights. However, in a number of cases it seems to us on examination of the material that what has been redacted is of no relevance to the task of the Inquiry, either in the sense of directly throwing light on the events of Bloody Sunday, or in the sense of leading to a line of inquiry that may have this result. In our judgment nothing would be gained in those cases in considering the validity of the public interest immunity applications, for publication of these redactions would serve no useful purpose and can be withheld for that reason.
- 12 There remain a number of cases where the redacted material could be said to be of some relevance. Here the application is based upon the proposition that its disclosure would do real harm to the public interest, in the form of seriously damaging the work of the security

services; and that this public interest is not outweighed by the public interest in the material being made available to all in the course of what we have often emphasised is a public inquiry.

- 13 The harm which it is submitted would follow from publication of this material is said to arise from the fact that the redacted passages reveal information relating to methods, techniques or equipment deployed by the security and intelligence services, to the operations and capabilities of these services and generally of matters that would be of assistance to terrorists and other criminals. We are satisfied that this submission is well founded.
- 14 So far as the other side of the balance is concerned we have, as well as considering the basic need for the Inquiry to be conducted in public to the greatest degree possible, considered the degree of relevance and importance of this part of the material. In our judgment, none of the material for which non-disclosure is sought on public interest immunity grounds (as opposed to grounds based on human rights) can be described as of central or vital importance to the task of seeking to discover what happened on Bloody Sunday, but rather as being at best of only peripheral relevance, for example by adding in a minor way to knowledge of historical background events and the like.
- 15 In our judgment, bearing particularly in mind the damage that would be done to national security on the one hand and the relative unimportance of this material in the context of the task that we have been given, the balance comes down firmly on the side of acceding to the application for non-disclosure of this material, which we accordingly do. In this context we should note an argument that has already been made on an earlier occasion by Mr Lloyd Jones QC on behalf of a number of the soldiers, to the effect that since some of his clients face allegations of murder, the correct course to take is not to conduct this form of balancing exercise, but instead to require disclosure of everything that might be of assistance in rebutting those allegations, save only where non-disclosure was justified on the grounds of the right to life. However, it is not in our view necessary to rule on the validity of this argument, since the material in question is not in our judgment either of such a nature that it could usefully be deployed by way of rebutting the allegations that have been made, or of a kind in respect of which it could be said, in the context of the present Inquiry, to be unfair to the soldiers not to disclose.
- 16 There remains the matter of how to deal with questioning of witnesses so as to avoid or minimise the risk that information that we have ruled should not be disclosed is nevertheless made public. It was at one stage suggested by the security services that a

form of warning should be given both to Counsel and to the witness concerned. As to Counsel, we are confident that all are aware of their duty not to seek to circumvent our rulings by using any means to elicit information that we have decided should not be made public and in our view it is unnecessary to give them any such warning. As to witnesses, it has already become our practice to warn them to be careful not to say anything that could lead to the identification of persons to whom we have granted anonymity and there is no objection to this practice being followed in the present circumstances. In our view, however, it is not possible to construct at this stage any wider form of warning that would be reasonably intelligible to the particular witness, though the position may well change if we adopt, as we do, a suggestion made by Mr Christopher Clarke QC, Counsel to the Inquiry.

- 17 This is that all interested parties who wish to question a witness who might be supposed to have information which we have ruled should not be disclosed should provide to the Inquiry a detailed synopsis of the matters which they wish to canvass with the witness, setting out in addition the reasons why they wish to adopt this course and the facts and matters upon which they rely for the proposition that such matters are of relevance to the subject matter of the Inquiry and therefore need to be explored with the witness. The Tribunal can then consider these synopses. If the Tribunal is persuaded that they do raise matters of relevance, then Counsel to the Inquiry can discuss the synopses with the security services, who would have an opportunity to raise objections on human rights or public interest immunity grounds, which in turn can then be considered by the Tribunal. By this means it should be possible to reduce, though probably not eliminate, the prospect of time consuming delays while questions of relevance and non-disclosure are debated and ruled upon in the course of the oral evidence. It may also be possible after consideration of the synopses, to construct warnings to witnesses which provide them with specific and clear guidance. Finally, it may be the case that after considering the synopses, the best course to take would be to seek a further written statement from the witness in question. We are not persuaded by the submission made on behalf of the families that this course, if taken, would somehow give the witness an unfair advantage by enabling evidence to be tailored and adjusted. We have made clear in the past that with all our witnesses, the approach to take is not one of seeking to ambush the individual, but instead to adopt what we have described as a “cards on the table” approach.

- 18** In view of the fact that the time for listening to the evidence of the witnesses concerned is fast approaching, it is necessary for these synopses to be prepared as soon as possible. We direct that they be delivered to the Inquiry by 28th April 2003 at the very latest.
- 19** Finally, we should note that during the course of the oral submissions, criticism was levied at the security services for their alleged failure to provide the Inquiry with all relevant documents, either at all, or only after what was described as inexcusable delay. We consider it inappropriate to make any comment on these criticisms in the course of the present ruling, but we would like to repeat what we said during the submissions and which we believe and hope is accepted by all interested parties, that Counsel to the Inquiry have worked and continue to work long and hard, to seek to ensure that everything of relevance is brought to light.

A2.30: Ruling (15th April 2003): application for screening and anonymity by Martin Ingram

Introduction

- 1 This is an application by Martin Ingram (a pseudonym), a former serving soldier who is due to give evidence before the Inquiry.
- 2 The applicant seeks “*an order to implement appropriate measures to ensure the screening of his physical appearance and the non disclosure of his true identity when he gives evidence before the Inquiry*”. He asserts that he “*has genuine and reasonable fears as to the potential consequences of disclosure of his personal details and his physical appearance which justify the exceptional measures of screening and non disclosure of his identity*”. He further asserts that the grant of this application “*will not prejudice the fundamental objective of the Inquiry to find the truth about Bloody Sunday*”.
- 3 The applicant relies upon confidential material described as Part B and upon the Certificate of The Right Honourable Geoffrey Hoon MP, Her Majesty’s Secretary of State for Defence, dated 5th March 2003. That certificate has been presented to the Inquiry in support of a claim on behalf of the Crown for public interest immunity and to support the claim for screening and anonymity made on his own behalf by the applicant. It is accompanied by a confidential annex. The certificate further contends that the categories of information set out in its paragraph 16 should not be disclosed in the course of questioning of the applicant. Those categories are as follows:

“(1) the organisation, chain of command, methods of operation, capabilities, training, equipment and techniques of the special units of the armed forces;

(2) the identity and location of the premises of special units of the armed forces; the identities and physical appearance of members and former members of the special units of the armed forces;

(3) any counter-terrorist activities in which Martin Ingram, or any units with which he served, may have been involved, in particular those summarised in the confidential annex to this certificate;

(4) the nature and sources of intelligence information;

(5) any other information which might be useful to terrorist organisations or detrimental to national security.”

- 4 Thus there are in truth two applications before the Inquiry, one by Martin Ingram for screening and anonymity, and the other by the Defence Secretary which supports the claim for screening and anonymity but goes further and seeks to limit the scope of areas of questioning of Martin Ingram. Martin Ingram’s own application contains two witness statements, one dated 26th July 2002 and the other dated 10th February 2003. Those statements have been circulated to the interested parties, though in a redacted form designed to protect rights guaranteed by Article 2 of the European Convention on Human Rights. There is a further statement dated 17th March 2003.
- 5 Although the application by Martin Ingram refers to an individual threat assessment, there is no such assessment in the form required of the relevant authority in some other cases with which the Tribunal has been concerned. He relies upon material in Part B. This material contains information as to Martin Ingram’s personal circumstances and the threat to his safety from certain sources together with information bearing on the special units of the armed forces, intelligence details and counter-terrorist activities. The Tribunal has accepted that course where members of the Security Service are involved. We have followed our usual practice of reading that material for ourselves but not disclosing it to the interested parties. Article 2 of the European Convention on Human Rights dictates such a course notwithstanding the Tribunal’s desire that the Inquiry should be public.

Background

- 6 The background to these proceedings lies in certain claims made about Martin McGuinness who was on 30th January 1972 a high ranking officer of the Provisional IRA in Londonderry, in particular that Mr McGuinness had admitted to a former Security Service agent, to whom the code name “Infliction” has been given, that he had fired a single shot from the Rossville Flats that had “*precipitated the Bloody Sunday episode*”. In a written statement to the Inquiry Mr McGuinness has denied making any such admission to Infliction. Indeed he goes further and denies having fired any shot on Bloody Sunday. As appears from the Tribunal’s ruling of 19th December 2002, the Tribunal earlier decided that to call or indeed to make any attempt to call Infliction, who was overseas, would be in breach of his rights under Article 2. Accordingly the Tribunal

proposed (and continues to propose) that it would proceed upon the basis that Infliction would not be called to give evidence.

- 7 As further appears from the ruling of 19th December 2002, the Tribunal's duty to investigate the events of Bloody Sunday precludes it from simply ignoring the Infliction material and obliges it to weigh that material in the totality of the evidence, including witnesses whose evidence bears upon the credibility of Infliction. In this context the Tribunal has used (and will continue to use) the term credibility to express the general reliability of Infliction in his dealings with the Security Service. The present applicant, Martin Ingram, is, by reason of his service as a former member of one of the Army's special units, someone whose testimony may bear on the credibility to be attached to Infliction's assertion that Mr McGuinness had admitted to him the firing of a shot on Bloody Sunday.

Tribunal's approach

- 8 In its ruling of 19th December 2002 the Tribunal discussed the principles applicable to claims for public interest immunity, the operation of the Human Rights Act 1998, the relevant articles of the European Convention on Human Rights and matters bearing upon anonymity and screening. We do not think it necessary to repeat that discussion. Our task is to apply those principles to the circumstances of the application by Martin Ingram and the public interest immunity claim by the Defence Secretary.

The material

- 9 Martin Ingram's first witness statement deals with his postings in a range of Army intelligence units between 1980 and 1990 or thereabouts. Much of this time was spent in Northern Ireland or in connection with intelligence activities in that country. He describes in some detail the organisation of the special units with which he was associated, the system of storing files and other records including classified documents. He speaks in general terms of the manner in which intelligence was gleaned and of counter-terrorist activities.
- 10 Clearly, the unrestricted dissemination of such matters could be damaging to national security and to the extent that the material may lead to the disclosure of Martin Ingram's identity could constitute a threat to his safety. At the same time it is apparent that Martin Ingram has put a great deal of information in the public domain and that the

Defence Secretary's concern is with categories of information. By way of further illustration, no claim for public interest immunity is made for notes made by Mr McCartney, the solicitor for James Wray who was killed on Bloody Sunday, of a telephone communication with Martin Ingram on 7th April 2000. Those notes contain information about intelligence organisations operating in Northern Ireland.

Infliction

- 11 In the absence of Infliction to give oral testimony, his credibility can only be tested by the evidence of those who knew him in the course of his work or who, in some other way, can throw light on his reliability. Whether Martin Ingram's evidence will assist the Tribunal in resolving this issue remains to be seen. The applicant cannot himself speak directly of the events of Bloody Sunday.

Anonymity

- 12 Martin Ingram's claim for anonymity is based essentially on the threat to his own safety if his identity is revealed. The certificate by the Defence Secretary supports anonymity by reference to the safety of members of special units which, it is said, would be jeopardised if the identity of Martin Ingram were known.
- 13 The written submission made on behalf of the family of James Wray stresses the principle of open justice and the requirement of the Tribunals of Inquiry (Evidence) Act 1921 that proceedings should be conducted in public. Since the inception of this Inquiry, the Tribunal has stressed the principle of open justice. However section 2 of the 1921 Act itself recognises that it may be in the public interest to exclude the public from any of its proceedings.
- 14 Furthermore the European Convention on Human Rights as incorporated in the Human Rights Act 1998 imposes a positive obligation on the Tribunal to give effect to Article 2: *"Everyone's right to life shall be protected by law."*
- 15 Taking into account these considerations, including the exposition by the Court of Appeal in *R v Saville* (28 July 1999), we are satisfied that Martin Ingram's subjective fears are objectively justified and that he should have anonymity in these proceedings. We shall however return to the James Wray submission when considering the scope of questioning of Martin Ingram.

Screening

- 16 As with anonymity, the claim for screening is supported by the Defence Secretary's certificate.
- 17 The essential issue is whether screening is required in order to safeguard Martin Ingram, bearing in mind the Tribunal's statutory obligation not to act in a way which is incompatible with a Convention right. The Tribunal has approached that obligation by asking whether the giving of evidence by a witness unscreened will in any significant way increase any risk to which he is subject.
- 18 The material in Part B contains considerable detail as to the risks to which Martin Ingram would be exposed if his true identity were known. Those risks are enhanced by his personal circumstances.
- 19 The Tribunal has considered whether an order of the sort that was made on Dr Martin's application (ruling 29th May 2002) should be made in this case. That order gave measures of protection against video recording of features but refused screening from the families of the deceased, the public and the media. However in this case an order falling short of screening would not meet the requirements of Article 2. There will therefore be an order in the terms attached.

Scope of questioning

- 20 Earlier in these reasons we set out the categories of information which the Defence Secretary considers should not be disclosed in the course of questioning Martin Ingram. Those categories are couched in broad terms and it is their very broadness which is attacked in the James Wray submission and was criticised during argument.
- 21 Before we take that matter further, we repeat a point made in our ruling of 19th December 2002. It is that where objection is taken to questioning on a particular matter for which public interest immunity is claimed the information sought may simply be irrelevant to the Tribunal's task. In such a case it will be unnecessary to go into the matter any further.
- 22 It is apparent that some questions falling within one or other of the categories would simply be irrelevant. For instance, questions which sought details of the special units in every respect are unlikely to assist the Tribunal in dealing with the events of Bloody Sunday. On the other hand, where the witness statement touches on various matters

which may be relevant and no objection has been taken by the Defence Secretary, it is hard to see why some questioning should not be permitted.

- 23 The James Wray submission implicitly acknowledges these considerations and in par. 5 identifies those aspects of the witness statement on which questioning is sought.

“(a)K1 2.4 para. 8: further particulars of the documents and intelligence information (though not the individual sources) referred to;

(b) K1 2.5 para. 9: the numbers of agents drawn “from all parts of the 32 counties [who] would have been asked to attend” the Bloody Sunday demonstration; the assignments they would have been given; the ciphers, where appropriate, of any who may already be known to the Inquiry;

(c) K1 2.5 para. 10: the practices of FRU and its related agencies with regard to the retention and destruction of relevant intelligence documents;

(d) K1 2.7 para. 17: all relevant details arising from the debriefings of agents 3007 and 3018 (not including their true identities) “which included questions on any information about Bloody Sunday of which they were aware”.”

- 24 The Tribunal’s task is not made easier by the breadth of some of the categories in paragraph 16, nor by the formulation of the matters in the Wray submission. The submission on behalf of the clients of Mr Anthony Lawton expresses concern that on one reading, “*paragraph 16 may prevent the questioning of Martin Ingram about matters similar to those which are addressed by Officer A in his Second and Third statements, such as access to materials and rank in the intelligence hierarchy*”. These matters were not canvassed in any detail in argument before the Tribunal.

- 25 So that the Tribunal can deal with this part of the public interest immunity claim in a meaningful way, we accept in principle the claim in paragraph 16, subject however to the right of any interested party to ask questions of Martin Ingram that are relevant to the subject matter of the Inquiry and that do not offend Article 2 or national security. So that the matter may be more refined, the interested parties should provide to the Inquiry by 28th April 2003 a detailed synopsis of the matters on which they wish to question Martin Ingram, including the reasons for this course and the facts and matters upon which they rely to demonstrate the need to question him.

- 26 The Tribunal will consider each synopsis. If persuaded that it raises matters of relevance, it will give Martin Ingram and those represented by the Defence Secretary an opportunity to object on human rights or public interest immunity grounds.
- 27 As to the matter raised by par. 6 of the Wray submission we refer to par. 60(a) of our ruling of 19th December 2002 where we explained that certain words could now appear in unredacted form. The Tribunal is not persuaded that any further disclosure is appropriate.

Order for screening

- (a) that arrangements be made to enable Martin Ingram to give his evidence in circumstances where he will be fully screened from the view of the families of the deceased, the public, and representatives of the media, and so that he will only be visible to the members of the Inquiry, to its Counsel, to those members of its staff who have a legitimate reason to be present, and to the qualified legal representatives of persons who have been afforded representation by the Inquiry;
- (b) that no video transmission (“live” or recorded) showing his face or physical features shall be displayed on any screen during the time when he is giving his evidence or at any time thereafter;
- (c) that during the taking of his evidence no video recording be made which records his face or physical features;
- (d) that effective arrangements be made to protect him from public view while in the Central Methodist Hall and its precincts before and after giving evidence;
- (e) that arrangements be made to enable him to enter and leave the Hall before and after giving evidence in circumstances which afford him effective protection from public view, effective protection from harassment, and reasonable respect for his dignity and right to privacy.

A2.31: Ruling (12th May 2003): application for anonymity, screening and restrictions on disclosure of sensitive information made by Ministry of Defence in relation to Officer Y and Officer Z

- 1 The Tribunal has received a certificate from the Secretary of State for Defence dated 7th May 2003. This is supplemental to his certificate dated 5th March 2003 which is dealt with in the Tribunal's rulings of 14th April 2003.
- 2 The supplemental certificate is accompanied by a confidential annex which we have read. The application before the Tribunal is made by the Defence Secretary on the grounds of public interest immunity. It arises in connection with the evidence of witnesses referred to as Officer Y and Officer Z who are to give evidence this week. Both witnesses were part of the intelligence operations of the Ministry of Defence.
- 3 The application made by the Defence Secretary seeks in effect anonymity and screening for Officers Y and Z and the non-disclosure of what is described as "*sensitive information in the categories described in paragraph 16 of the main certificate*".
- 4 In its rulings of 14th April 2003 and its earlier ruling of 19th December 2002 the Tribunal discussed at length the principles operating where anonymity and screening are sought and where the non-disclosure of sensitive material is the basis of a PII application. There is no need to repeat what is said there.
- 5 In accordance with those principles, and the orders we have made in comparable situations, the position of Officers Y and Z in military intelligence clearly warrants anonymity and screening in their own interests and more widely in the public interest in so far as the evidence they are able to give relating to military intelligence is concerned. Orders to that effect will not affect the Tribunal's search for the truth. There will be orders for anonymity and screening in each case.
- 6 So far as the disclosure of sensitive material is concerned, the Tribunal repeats the approach taken in the April rulings.

- 7 Accordingly, it requires that any interested party who wishes to ask questions of the witnesses going beyond their present statements should give notice to the Tribunal by 5.00 pm on Tuesday 13th May. The Tribunal will then determine whether such questions should be asked.

A2.32: Ruling (23rd May 2003): anonymity

The Tribunal has from time to time granted anonymity to a number of individuals. The terms in which anonymity has been ordered have varied from case to case. The Tribunal now rules that in any case in which an individual has been granted anonymity, there shall be no publication by any person either of the name of that individual or of any information that may, whether directly or indirectly, lead to his or her identification.

A2.33: Ruling (10th July 2003): questioning of witnesses

We have on a number of occasions made clear to the interested parties that we deprecate repetitive or hostile questioning by successive counsel whose clients have the same interest, since repetitive questioning is likely to waste time and successive hostile questioning may be unfairly oppressive to the witness concerned. Thus, we have made clear that where interested parties have the same interests, there shall be the greatest possible co-operation between their counsel, so that the same topics are not raised with a witness time after time in ways which serve no useful purpose and which may be unfairly oppressive.

We have received an application from those acting on behalf of the family of James Wray expressing concern that they may not have a full and fair opportunity of questioning certain witnesses in relation to what occurred in Glenfada Park, where James Wray was shot, and requesting both that our ruling on successive questioning should be modified and that there should be an alteration in the order in which counsel for the families question the soldier witnesses so that, in some cases, counsel for the Wray family can start the questioning.

To date, the questioning of the soldiers by the families has, with few exceptions, been started by counsel acting for those families represented by Madden & Finucane.

We are not persuaded that there is any need to modify what we have said about the questioning of witnesses or indeed to order any alteration in the order in which counsel for the families question the soldier witnesses.

Clearly, it is neither practicable nor desirable to lay down inflexible rules since the circumstances in which witnesses give evidence and are questioned vary so much. As we have made clear in the past, our ruling is not an end in itself but a means to an end, which is to ensure that everybody is treated fairly. Thus we have allowed, and we will continue to allow, questioning by successive counsel with the same interests, where we consider it appropriate for the witness's evidence to be tested by more than one interested party and where we perceive no unfairness to the witness in allowing that course to be taken.

What we are not disposed to allow, however, is successive questioning that serves no useful purpose or which unnecessarily increases the inevitable stress on the witness. In this regard we must once again emphasise that we expect all concerned to co-operate in making the maximum effort to ensure that the risk of repetitive or oppressive questioning is not created by a failure

properly to co-operate in identifying issues and topics that can appropriately be raised by one party on behalf of all.

In these circumstances we believe that under the present arrangements the Wray family will be given a fair and proper opportunity of questioning the witnesses concerned.

A2.34: Ruling (18th September 2003): applications by Patrick Ward to be screened and to hear his evidence in London

- 1 Patrick Ward has made an application for screening and to give his evidence in London rather than in Londonderry.
- 2 Mr Ward came to the Inquiry's attention upon being mentioned in a recent biography of Martin McGuinness entitled *From Guns to Government* by Liam Clarke and Kathryn Johnston. Mr Ward, who lives abroad, subsequently provided a written statement to the Inquiry. In his statement, he claims to have been the Commanding Officer of the Derry Fianna, the youth wing of the Provisional IRA (PIRA), on January 30, 1972. He describes its organisation and activities during the period leading up to that day. In addition, he describes the planning for a nail bomb attack by a Fianna section following the NICRA march that day and the involvement of both Martin McGuinness, the then second-in-command of the Derry PIRA, and Gerard Donaghy, one of those killed by Army action that day, in that plan. Also, he discusses, in more general terms, Mr McGuinness' role in PIRA during that period. Mr Ward's evidence becomes even more significant because very few members of republican paramilitary organisations have come forward to assist the Inquiry.
- 3 Mr Ward's application is based on Articles 2 and 3 of the European Convention for the Protection of Human Rights and Fundamental Freedoms as he has reasonable and genuine fears for his safety. As he puts it, he "*fears for his life*". This is based upon what he describes as the known PIRA response, namely, death, to an informer, which he might be termed because of his statement to this Inquiry, because of previous accusations of treachery made against him by the Irish National Liberation Army (INLA), another republican paramilitary group and because of a 2002 newspaper article, which described him as an informer for the Royal Ulster Constabulary. In addition, he claims that in 1983 he was kidnapped, beaten and threatened with death by the INLA before he escaped. For these reasons, he submits that it is safer for him to testify at the Central Hall than the Guildhall. His screening application is based on the likelihood that, unless he gave his evidence screened, he would be recognised by former friends and colleagues so that the

de facto anonymity he has acquired by reason of his long absence from Derry would be lost. As mentioned, he now lives abroad in what he terms “*secure living accommodation*”, which he might have to leave if he were, by chance, recognised there.

- 4 The Inquiry sought and, on 25 July 2003, obtained a threat assessment from the Northern Ireland Police Service. It said:

“We hold no current intelligence to indicate that a specific threat exists against Patrick Ward.

We are aware, however, of his terrorist history and further in-depth enquiries indicate that despite the passage of time, the potential for a terrorist grouping taking retaliatory action against Mr Ward does exist.

It would seem prudent, therefore, to support any effort to negate the risk to Mr Ward by allowing him to give his evidence to the Inquiry in London. Furthermore, the screening of Mr Ward whilst giving evidence would undoubtedly assist in reducing any risk to him.”

- 5 Although the PSNI assessment does not quantify the risk to Mr Ward, it does assist us to conclude that, in the circumstances, his fears for his personal safety are reasonable and genuine and thus his Convention rights prevail over the inroad to the public nature of the Inquiry that would result from his giving evidence screened and in London. Using the approach set out by Lord Phillips at paragraph 31 in *Lord Saville and others v Widgery Soldiers and others* (19 December 2001), we grant the application for Mr Ward to be screened while testifying in London. Mr Ward will remain visible to the Tribunal and to the legal representatives of the parties. His evidence may be fully tested. The screening will be on the same terms as those we described on 14 April 2003 for Martin Ingram.
- 6 We should record that Mr Ward has said that he would not testify if his application were refused. We have, however, allowed his application based on his Convention rights and, in reaching this conclusion, we have not taken his expressed intention into account.

A2.35: Ruling (1st October 2003): application for screening by Private L

- 1 Some days ago we issued a subpoena to compel the attendance of Soldier L to this Inquiry. On his own contemporary account Soldier L shot on Bloody Sunday and may have hit a civilian.
- 2 We took the course of issuing a subpoena after being informed by Soldier L's counsel that Soldier L was refusing to attend the Inquiry, despite being given notice many weeks earlier of the date on which we wished him to attend.
- 3 Soldier L did not comply with the subpoena, nor did he or his lawyer provide us with any good reason for his failure to do so. We accordingly took the view that on the information before us, we had no alternative but to put in hand the process of reporting Soldier L to the High Court for contempt of this Tribunal. At this time, counsel for Soldier L told us that he had no further information that he could usefully put before us to persuade us not to take this course.
- 4 The next day, Soldier L's counsel informed us that Soldier L was now willing to give evidence but wished to be screened. We accordingly directed that he should make an application to that effect forthwith.
- 5 This application is now before us. In its original form it was based on the proposition that screening was necessary in order to protect Soldier L's Article 2 rights in the sense of protecting him from possible attempts on his life. However, by an amendment to his application it was also submitted that for Soldier L to give evidence unscreened would expose him to an unacceptable risk to his health. We have seen medical evidence in relation to this latter submission. As is our normal practice this evidence has not been made public or distributed to the interested parties. However, we have concluded that this medical evidence does provide good grounds for allowing the application and so we do direct that Soldier L may give his evidence screened.

- 6 The application was, of course, made very late indeed. However, we sought and have been given reasons for this state of affairs and we have concluded that the failure to apply earlier does not in the circumstances detract from the genuineness or validity of the application based on medical grounds.
- 7 It remains to say that, in the circumstances, we see no point in considering the merits of the unamended application based on Article 2.

A2.36: Ruling (2nd October 2003): application for screening by Captain INQ 2225

1 This is an application by INQ 2225, a soldier who was on duty in Londonderry at the time of Bloody Sunday, that he be screened while giving evidence to this Inquiry.

2 The basis of the application may be found in paragraph 8 of Part I – Open of the formal application. This reads:

“8. INQ 2225 fears that were he to give evidence unscreened he would be exposed to an appreciably increased risk of terrorist attack. In particular it is submitted that if INQ 2225 were to give evidence unscreened there would be a real risk that his anonymity would be compromised and that it would be possible to trace him. It is submitted that these fears are objectively justified.”

3 The Tribunal has discussed on a number of occasions the principles to be applied when dealing with an application for screening. We draw particular attention to the written ruling delivered on 29 May 2002 in regard to an application by Dr John Martin and a ruling delivered orally on 20 June 2002 in regard to applications by Soldiers H and 104. It is unnecessary to set out those principles again at any length; it is their application to the present case with which the Tribunal is concerned.

4 If indeed INQ 2225 fears that by giving evidence unscreened he would be exposed to an appreciably increased risk of terrorist attack and this fear is objectively justified, the next step is for the Tribunal to balance the protection afforded by screening against any adverse consequences for the Inquiry of hearing his evidence screened.

5 The application is in two parts, the first an open part which has been distributed to the interested parties and the second a schedule marked Part II which is confidential to the members of the Tribunal, its Counsel and the Solicitor to the Inquiry. Since the precise factual basis for the fears expressed by INQ 2225 and which appears in Part II cannot be stated without defeating the purpose of the application, the Tribunal must proceed on the footing that Part II remains confidential.

6 In accordance with its practice when an application is made for screening, the Tribunal has asked the relevant security organisation to prepare a threat assessment. In such an assessment the Tribunal seeks to be informed whether by giving evidence unscreened there will be a significant increase in the vulnerability of the witness to attack, in this case by terrorists.

7 The Tribunal has distributed to the parties a summary that it is satisfied represents as much of the assessment as can properly be disclosed. The summary reads:

“The “assessment is that Soldier INQ 2225 would be taking a significant personal risk by giving evidence to the Inquiry unscreened. This assessment is based primarily on the increased likelihood of Soldier INQ 2225 being recognized as a result of (REDACTED). Moreover, the fact that publicly available information has also the potential to identify Soldier INQ 2225.”

The recommendation is “that screening Soldier INQ 2225 whilst he gives evidence may enhance his personal security, prevent further exposure of his identity, and therefore reduce his vulnerability to subsequent attack” .”

8 In delivering its ruling on the application by Soldiers H and 104 the Tribunal drew attention to the approach taken on behalf of the soldiers on their application for anonymity, namely that the soldiers would be seen by the families and the public when they gave evidence so that the inroads on the public and open nature of this Inquiry were limited. That approach was endorsed by the Court of Appeal. See in particular paragraphs 56 and 68 of the judgment of Lord Woolf MR, given in July 1999 on the anonymity application and paragraph 55 of the judgment of Lord Phillips MR given on 19 December 2001 on the Venue application. Nevertheless it is apparent that there may be particular circumstances personal to the individual which justifies screening, notwithstanding the benefit of anonymity.

9 While the Tribunal is constrained in dealing with this aspect of the application, it is satisfied from the confidential schedule that indeed there are special, personal circumstances which are likely to have the effect of destroying INQ 2225’s anonymity should he give evidence unscreened. In that event his circumstances would expose him to a significant increase in the risk of reprisals. In those circumstances the Tribunal is of the view that the application should be granted.

- 10 Objection has been taken to the granting of this application so long after similar applications by some other soldiers. In dealing with the screening application made by INQ 0005 (ruling delivered 2 October 2003), the Tribunal set out the relevance of delay in this context. We do not repeat what is said there because we are satisfied, from the chronology and description of events in the letter to the Inquiry from the applicant's solicitor dated 26 September 2003, that there has been in truth no delay. The letter has been distributed to the parties.
- 11 There will be an order in the terms sought by paragraph 2 of the application. We should add that the more limited order granted in the case of Dr Martin is, in our view, not sufficient in this case to give the protection which is properly sought.

A2.37: Ruling (2nd October 2003): application for screening by Private INQ 0005

1 This is an application by INQ 0005, a soldier who was on duty in Londonderry at the time of Bloody Sunday, that he be screened while giving evidence to this Inquiry.

2 The basis of the application may be found in paragraph 8 of Part I – Open of the formal application. This reads:

“8. INQ 0005 fears that were he to give evidence unscreened he would be exposed to an appreciably increased risk of terrorist attack. In particular it is submitted that if INQ 0005 were to give evidence unscreened there would be a real risk that his anonymity would be compromised and that it would be possible to trace him. It is submitted that these fears are objectively justified.”

3 The Tribunal has discussed on a number of occasions the principles to be applied when dealing with an application for screening. We draw particular attention to the written ruling delivered on 29 May 2002 in regard to an application by Dr John Martin and a ruling delivered orally on 20 June 2002 in regard to applications by Soldiers H and 104. It is unnecessary to set out those principles again at any length; it is their application to the present case with which the Tribunal is concerned.

4 If indeed INQ 0005 fears that by giving evidence unscreened he would be exposed to an appreciably increased risk of terrorist attack and this fear is objectively justified, the next step is for the Tribunal to balance the protection afforded by screening against any adverse consequences for the Inquiry of hearing his evidence screened.

5 The application is in two parts, the first an open part which has been distributed to the interested parties and the second a schedule marked Part II which is confidential to the members of the Tribunal, its Counsel and the Solicitor to the Inquiry. Since the precise factual basis for the fears expressed by INQ 0005 and which appears in Part II cannot be stated without defeating the purpose of the application, the Tribunal must proceed on the footing that Part II remains confidential.

6 In accordance with its practice when an application is made for screening, the Tribunal has asked the relevant security organisation to prepare a threat assessment. In such an assessment the Tribunal seeks to be informed whether by giving evidence unscreened there will be a significant increase in the vulnerability of the witness to attack, in this case by terrorists.

7 The Tribunal has distributed to the parties a summary that it is satisfied represents as much of the assessment as can properly be disclosed. The summary reads:

“Soldier INQ 0005 would be at greater personal risk giving evidence to the Tribunal unscreened, than if he were screened. This assessment is based primarily on the increased likelihood of Soldier 0005 being recognised as a result of (REDACTED); and the possibility thereafter of locating him to his home address through publicly available sources of information.

The recommendation is “that screening Soldier INQ 0005 whilst he gives evidence may enhance his personal security, prevent further exposure of his identity, and therefore reduce his vulnerability to subsequent attack”.

8 In delivering its ruling on the application by Soldiers H and 104 the Tribunal drew attention to the approach taken on behalf of the soldiers on their application for anonymity, namely that the soldiers would be seen by the families and the public when they gave evidence so that the inroads on the public and open nature of this Inquiry were limited. That approach was endorsed by the Court of Appeal. See in particular paragraphs 56 and 68 of the Judgment of Lord Woolf MR, given in July 1999 on the anonymity application and paragraph 55 of the judgment of Lord Phillips MR given on 19 December 2001 on the Venue application. Nevertheless it is apparent that there may be particular circumstances personal to the individual which justify screening, notwithstanding the benefit of anonymity.

9 While the Tribunal is constrained in dealing with this aspect of the application, it is satisfied from the confidential schedule and from the threat assessment that indeed there are special, personal circumstances which are likely to have the effect of destroying INQ 0005’s anonymity should he give evidence unscreened. In that event he would be exposed to a significant increase in the risk of reprisals. In those circumstances the Tribunal is of the view that the balance called for leads to the conclusion that the application should be granted.

- 10** Objection has been taken to the making of this application at such a late stage in the Inquiry. Delay in making a screening application is not of itself a bar to the making of an order. Its relevance lies in the light an explanation may throw on the genuineness of any fears expressed by the applicant and the weight to be attached to them. If, taking an explanation into account, the Tribunal is satisfied that those fears are genuine and that in other respects screening is warranted, delay does not preclude the making of an order.
- 11** The applicant's solicitor has provided the Tribunal with an explanation of the chronology in this case. Because that chronology bears on matters in the confidential schedule it is not possible to say more than that circumstances explain the making of the application at this stage. The Tribunal remains satisfied that the applicant's subjective fears are genuine.
- 12** There will be an order in the terms sought by paragraph 2 of the application. We should add that the more limited order granted in the case of Dr Martin is, in our view, not sufficient in this case to give the protection which is properly sought.

A2.38: Ruling (10th October 2003): applications for screening by Private AD and Private 203

Soldier AD

- 1 Soldier AD, who was on duty in Londonderry at the time of Bloody Sunday, is due to give evidence to this Inquiry on 13 October 2003.
- 2 On 1 October he lodged an application for an order that he may give evidence screened. The application is in the usual form, Part A – open and Part B – closed. Part A has been distributed to the interested parties; Part B necessarily remains confidential to the Tribunal.
- 3 The application has a twofold basis. The first is expressed as a genuine and reasonable fear of reprisals by terrorists if he can be traced. This fear is said to be heightened by reason of the fact that he fired live rounds on the day and claims to have shot a gunman. The second basis derives from medical evidence that his ability to give evidence to the Tribunal will be impaired if he is not screened.
- 4 On receipt of this application the Inquiry followed its usual practice of seeking a threat assessment from the appropriate authority. There have been, we are told, administrative hold ups in following the procedures necessary for an assessment. In any event an assessment is not yet to hand.
- 5 However, the Tribunal has considered the contents of Part B and it is apparent, even on the material available, that if Soldier AD gives evidence unscreened his anonymity is likely to be destroyed. This is by reason of his personal circumstances.
- 6 If his anonymity is lost he would be exposed to a significant increase in the risk of reprisals.
- 7 The principles to be applied in a case such as this have been explored in a number of rulings and we do not repeat them. However, we draw attention to our recent ruling on a screening application by INQ 0005 where we considered the effect of delay (ruling of 2 October 2003).

- 8 Part A sets out the circumstances which led to this application being made so late. There is a reasonable explanation and it does not affect our view that the applicant's fears are genuine. Since it is the loss of anonymity which lies at the heart of the application, a particular threat assessment is not likely to detract from the need to provide screening. We are therefore in a position to deliver our ruling at this stage.
- 9 We should add that the decision to order screening is based on the increased risk of reprisals. It is unnecessary to deal with the ground based on the applicant's medical condition.
- 10 There will be an order in the terms sought by paragraph 2 of this application.

Soldier 203

- 11 The Tribunal has also received an application for screening from Soldier 203. This soldier has already given evidence unscreened, but has been asked to give further evidence.
- 12 This application too has been made at a very late stage. However, on the basis of the confidential material now put before us, we are satisfied that screening is necessary in order to preserve the anonymity of this applicant and that the lateness of the application does not detract either from its genuineness or its validity. By reason of the confidential material now to hand it seems to us to be unnecessary to obtain a particular threat assessment in relation to Soldier 203.
- 13 Accordingly there will be an order in the terms sought by paragraph 2 of the application.

A2.39: Ruling (14th January 2004): allegations made against Lieutenant Colonel Colin Overbury

- 1 Lt Col Overbury, a qualified lawyer and then Assistant Director of Army Legal Services, went to Northern Ireland in 1972 as the representative of Army Legal Services to assist in preparing Army evidence for presentation to the Inquiry conducted by Lord Widgery into Bloody Sunday. In the course of performing this task, Col Overbury (and the Deputy Assistant Director Major Bailey) interviewed a number of soldiers who had been present on Bloody Sunday and took statements from them. Col Overbury was also present at a number of interviews of soldiers conducted by staff working for the Inquiry.
- 2 In a ruling dated 12th October 1999 the Tribunal set out the procedure to be followed in the event that interested parties wished to make allegations against witnesses to the Inquiry. That procedure was as follows:

“Lastly we deal with the procedure that is to be followed if the interested parties intend to make allegations, in the course of the proceedings, against witnesses to the Inquiry. By “allegations” we mean allegations of misconduct, improper behaviour, irresponsibility or incompetence. The procedure that we propose to lay down is this:

- i. If any of the interested parties seek to make an allegation against any of the Inquiry’s witnesses they must give details to the Inquiry of the allegation that they intend to make.
- ii. The Inquiry will give notice to the interested parties and to the relevant witness or witnesses of any allegations of which it is informed, unless any such allegation is clearly without sensible foundation, or is not within the Tribunal’s remit, or there is some other sound reason why it should not be entertained.
- iii. The Inquiry may require further information as to the nature of the allegation, or the evidence in support of it, or the basis upon which it is made before notifying the interested parties of it.

iv. None of the interested parties will be allowed, without the permission of the Tribunal, which is unlikely to be given save for very good reason, to pursue an allegation against any of the witnesses unless it has been the subject of a notice given to the Inquiry in good time, as to which see paragraph (v) below. Nor will they be allowed to pursue an allegation, which the Inquiry has declined to notify to the interested parties on one of the grounds set out in (ii) above.

v. Any allegations that are to be made must be notified to the Inquiry so soon as is reasonably practicable and, in any event, in such time as will enable the Inquiry to give notice to the witness concerned at least 3 weeks before the witness is first due to give evidence. The Tribunal appreciates that it will be necessary to have a rolling witness programme so that the interested parties know when any given witness or category of witnesses is first due to give evidence. The Tribunal appreciates that the making of allegations is something that requires careful thought and judgment; that there is much material to consider; and that it may be inappropriate to make an allegation without considering more material than that which prima facie appear to justify the allegation in question. That said, the Tribunal is not prepared to countenance a situation where allegations are made that could and should appropriately have been made at an earlier stage. It will be for those making allegations to satisfy the Tribunal that they were made at the earliest practicable moment. The Tribunal believes that it can trust in the good sense and judgment of Counsel for the interested parties and their instructing solicitors to ensure that any allegations that are to be made are, indeed, made as soon as is reasonably practicable, having regard to the considerations outlined above, and in accordance with the overall objective of this ruling which is that of preventing ambush and surprise.

vi. It is not necessary for the interested parties to adopt for themselves the issues referred to in Counsel's Report No 1, which identifies, with different degrees of specificity, a number of issues that are likely to arise in the course of the Inquiry. But it is necessary for them to use the procedure laid down above if they intend to make a positive case that, for instance, a particular lettered or numbered soldier shot a particular victim. Similarly if any of the interested parties intends, for instance, to make a positive case that a particular witness was shot whilst throwing a nail bomb, they should make an allegation to that effect.

vii. It may be that allegations are sought to be made against witnesses whom the Inquiry had not intended to call. If that is so the party seeking to make the allegation will be expected to have asked that the witness should be called, and to have given notice of the allegation as the reason, or one of the reasons, for him or her being called.

viii. If allegations are to be made against persons who are deceased they must be made as soon as is reasonably practicable and in any event in sufficient time to enable the witnesses who have relevant evidence to give in relation to that deceased to give evidence in the knowledge of that allegation. In practice that means no later than 3 weeks before the first witness whose evidence relates to the death of that deceased. What we have said in (v) above applies, of course, in this context.

ix. This procedure is not intended to be limited to allegations of misconduct on the day. If the interested parties intend to make a positive case in respect of, for instance, the planning for the day, e.g. that there was a deliberate plan to engage the IRA, they should make use of this procedure.

x. The fact that the Inquiry notifies any person of an allegation does not imply any view by the Inquiry as to the strength or validity of that allegation. Nor does it imply that the Tribunal or its Counsel will adopt any particular position in respect of it.

xi. Any interested party, who has made an allegation, is at liberty to withdraw it, in whole or in part, at any time. This should be done by notice in writing to the Inquiry. The Inquiry will give notice of the withdrawal of any allegation.

xii. The Tribunal will make any alterations to this procedure that prove to be necessary or desirable in order to secure the overall objective mentioned in (v) above. It will, also, be the arbiter in the event of any dispute in relation to the procedure.”

- 3 On 23rd August 2002 Madden & Finucane, acting on behalf of a number of families of those who died on Bloody Sunday and some of those wounded, wrote to the then Solicitor to the Inquiry a letter headed “*Allegations in respect of Colonel Overbury*” enclosing a list entitled “*Notice of Allegations and Issues re Col Overbury*”. In the list it was stated that without prejudice to the generality of the allegations already made (one of which, made in December 1999, was that Colonel Overbury had interfered with the course of justice) these interested parties proposed “*to raise the issue*” whether and to what extent Col Overbury had exercised his power and influence as leader of the Army Legal Services Team at the Widgery Inquiry:

“to suppress and/or distort evidence about the events of Bloody Sunday, in particular by:

- (a) causing or permitting his staff to ensure that soldiers made no incriminating or damaging admissions in their statements or testimony;
- (b) suppressing soldiers’ previous inconsistent statements;
- (c) suppressing photographic and film evidence that was inconsistent with the soldiers’ evidence and consistent with civilian evidence;
- (d) coaching Soldier V to give false evidence by causing him to retract an account of his conduct that was tantamount to an admission of the murder of a civilian and procuring the fabrication of a false exculpatory account;
- (e) coaching Soldier F to give false evidence by causing him to alter his original account and purport to justify the shooting of Michael Kelly;
- (f) generally discharging his functions in such a manner as to conceal the truth concerning the conduct of soldiers involved in the events of the day.”

- 4 On 13th September 2002 the Solicitor to the Inquiry wrote to Madden & Finucane. In the course of that letter the Solicitor said this:

“I note that your notice is described as a notice of allegations and issues. It is, of course, helpful, and in accordance with the spirit of the Tribunal’s ruling, to have advance notice of issues that will be canvassed. It is, also, possible that, in the course of canvassing those issues, facts emerge which support an allegation. But an allegation of serious misconduct cannot be transformed into something different by characterising it as an issue as to whether someone has been guilty of such misconduct. The contents of your notice appear to the Tribunal to amount to allegations.”

- 5 On the footing that Madden & Finucane were in fact making allegations, the Solicitor to the Inquiry informed these solicitors that the Tribunal was not satisfied that the allegations should be allowed to be pursued in their present form. The letter went on to request Madden & Finucane to state the basis on which they made the allegations and the evidence said to support them. The letter also made clear that nothing in it was intended to prevent Madden & Finucane from canvassing with the witness, insofar as it had not already been done by Counsel to the Tribunal, the process by which statements were taken; or the particular sequence of events in relation to any particular soldier, but that “... *the Tribunal is, however, concerned to prevent allegations that have no sound basis*

being made and to ensure that, if there is a sound basis for making them, the witness concerned knows what that basis is”.

- 6 Madden & Finucane wrote in reply to this letter on 16th September 2002. In the second paragraph of this letter they said this:

“The Notice was carefully drafted to strike a proper balance between the various duties and obligations imposed on us, including a duty to ventilate the reasonable concerns and suspicions of our clients, the duty to canvass concerns and suspicions with the witnesses to whom they relate most directly, the duty to give the witness fair notice of such concerns and suspicions and the obligation to avoid making positive allegations of grave misconduct without reasonable cause. Paragraph 3 of our Notice does not make a positive case about any of the matters set out therein and does not contain any positive allegations, properly so-called. For this reason the procedure set out in paragraph 101 of the Tribunal’s ruling of 12th October 1999 does not, strictly speaking, apply. However we were anxious to respect the spirit of the ruling and serve a notice that would meet the Tribunal’s objective of preventing “ambush and surprise”.”

- 7 The Inquiry responded to this letter on the following day, informing Madden & Finucane that in view of being told that no positive allegations were being advanced against Col Overbury, the Tribunal would proceed on that footing. The letter also stated that *“in the Tribunal’s view, on the material presently before them of which they are aware, there are presently no grounds for alleging that Colonel Overbury was guilty of misconduct, as your disavowal of a positive case now acknowledges, and, as things stand, they do not propose to allow you to allege that or do what amounts to the same thing in another form...”* The letter added that:

“In this, as in all cases, nothing is static, and the Tribunal will keep the matter under review. If further material comes forward, which makes it proper to make any such allegations, whether as a result of Colonel Overbury’s evidence or otherwise, the position would change.”

- 8 In the last of the letters to which we have referred the Solicitor to the Inquiry informed Madden & Finucane that since the position had to be made clear to Col Overbury, he would be sending a copy of the correspondence to his legal team, and this was duly done.

- 9 The upshot of this correspondence seems to us to be clear beyond doubt, namely that Madden & Finucane were not advancing any positive allegations against Col Overbury. In view of the terms of their letter of 16th September 2002 it seems equally clear that at that stage Madden & Finucane had no reasonable cause to advance any such allegations against Col Overbury, a view shared by the Tribunal. Thus when Col Overbury came to give evidence, it was on the basis that he was not, at least at that stage, being accused of misconduct.
- 10 Colonel Overbury gave oral evidence to the Tribunal on 3rd October 2002. Counsel acting on behalf of the clients of Madden & Finucane did not seek to re-open the question whether any of the allegations could be revived against Colonel Overbury, either during the course of the evidence of that witness or at the conclusion of his testimony. In addition, the question whether Colonel Overbury was instrumental in causing soldiers to suppress or falsify their evidence to Lord Widgery's Inquiry was not raised with any of the soldiers from whom Colonel Overbury had taken statements or at whose statement taking he had been present. In fact, nothing more was heard of the matter from Madden & Finucane until the Inquiry itself, in a letter dated 8th October 2003 dealing with a number of witnesses including Colonel Overbury, asked for clarification of the position regarding allegations "*which have been to a greater or lesser degree watered down in the course, or at the end, of the questioning of them, and/or which appear to be unsustainable in their original form,*" so that the parties concerned could be saved the time and expense of dealing in their final written submissions with criticisms that were not in fact going to be maintained.
- 11 This letter prompted a response from Madden & Finucane dated 18th November 2003. Part of this letter was headed "*Allegations against Colonel Overbury*" under which was set out the following:

"In our notice of 23 August 2002 and our letter to John Tate of 16 September 2002, we set out in some detail the issues concerning Col Overbury, as well as the evidence relating thereto. The allegations we now maintain against Col Overbury may be summarized as follows:

Lt Col Overbury exercised his supervisory role as head of the Army Legal Services team at the Widgery Inquiry to help conceal the truth concerning the conduct of soldiers involved in the events of Bloody Sunday, in particular by:

(a) doing his best to ensure that soldiers made no incriminating or damaging admissions (beyond those already made by them) in their statements or in their testimony;

(b) causing soldiers to withdraw or modify incriminating or damaging admissions already made in previous statements e.g. by Soldiers V, 15, 40 and 134;

(c) otherwise “ironing out” problems in soldiers’ accounts e.g. those of Soldier F;

(d) colluding in the suppression of Army photographs and films that were inconsistent with the soldiers’ evidence and consistent with civilian evidence; and

(e) colluding with Counsel for the Army and Counsel for the Tribunal for the purpose of concealing misconduct on the part of the soldiers e.g. in the cases of Soldiers F and V.”

- 12 On 2nd December 2003 the Solicitor to the Inquiry wrote to Madden & Finucane, pointing out that their latest letter appeared to the Tribunal to constitute, with some alterations, the allegations that they had told the Tribunal in September 2002 they were not making. The letter recorded the Tribunal’s preliminary view that the allegations now made did not appear to be justifiable by the particulars given, that of at least equal concern was the fact that they were not put to Colonel Overbury when he gave evidence, and that the Tribunal might well take the view that it would be unfair to Colonel Overbury for the allegations now to be pursued. The letter ended by informing Madden & Finucane that the Tribunal would give them the opportunity to make oral submissions on the matter.
- 13 These submissions were made in December 2003. They included submissions relating to somewhat similar allegations against Colonel Overbury raised by the clients of McCartney & Casey, to which we shall turn in due course.
- 14 On behalf of the clients of Madden & Finucane, Mr MacDonald produced part of his clients’ draft final submissions, which repeated and expanded upon the allegations as now formulated. He sought to persuade us that the right course to take was for us to allow the allegations to go forward as part of the final submissions of his clients, and that Colonel Overbury would have a full and fair opportunity to answer those allegations, if he could, in the course of his written reply to those submissions. He submitted that the notice of issues given in September 2002 gave Colonel Overbury full notice of the points that were being raised, so he was not being taken by surprise by the allegations that were now being advanced. He also, perhaps somewhat inconsistently and (as the correspondence reveals) certainly incorrectly, suggested that the reason why they had

not put allegations to Colonel Overbury was because the Tribunal had told them not to do so. What the Tribunal had in fact done was to tell Mr MacDonald's clients that since they had stated that they were not advancing any positive allegations they could not do so through the back door by dressing up allegations as "*issues*".

- 15 What we were anxious to learn from Mr MacDonald was whether there was anything in the evidence given by Colonel Overbury or later witnesses that enabled his clients to assert that the position had changed since September 2002 so that there was now reasonable cause for advancing allegations against Colonel Overbury.
- 16 So far as Colonel Overbury's evidence is concerned we were taken by Mr MacDonald to various parts of his testimony. For example, Mr MacDonald laid great stress on the fact that when he asked in relation to Soldier V whether Colonel Overbury's primary purpose in dealing with V was to protect the interests of the Army or help to uncover the truth about what had happened on Bloody Sunday, Colonel Overbury answered that it was the first. However, to our minds such an answer does not begin to suggest that Colonel Overbury was guilty of seeking to falsify or conceal evidence. The dichotomy Mr MacDonald seeks to rely upon in his question is not a true one. Protecting the interests of clients and engaging in falsifying or suppressing evidence are two separate things and the former does not establish the latter.
- 17 As to other parts of Colonel Overbury's evidence, Mr MacDonald suggested that this witness was not telling the truth, which in turn indicated real substance in the allegations. It is not necessary for us to consider these aspects of the evidence in any detail, for it suffices us to say that had there in truth been any real substance, Counsel of Mr MacDonald's experience would not have hesitated in forthwith seeking to persuade us allow the allegations to be put, if not at the end of the evidence, then at least shortly afterwards by way of an application for the recall of Colonel Overbury. We, likewise, found nothing in the testimony of Colonel Overbury that could be said to make it proper for the allegations to be revived at this late stage.
- 18 As to other evidence, we have already observed that none of the soldiers concerned was questioned whether Colonel Overbury had persuaded or assisted them to give false evidence or conceal material evidence. Mr MacDonald provided us with no explanation for this omission. This is, of course, unfair to the soldiers themselves, for if Mr MacDonald is right, they were parties with Colonel Overbury to serious misconduct. What Mr MacDonald did do, however, was draw attention to the fact that in the context of the allegation of suppression of Army photographs and films, Colonel Overbury had told the

Tribunal that the Deputy Assistant Provost Marshal was responsible for the Army photographs, whereas this individual (known to the Inquiry as INQ 1898) has told the Tribunal that he did not have any control over photographs as he did not have sufficient cupboard space for them. In our view this later evidence, considered alone or in the light of all the other material about Army photographs before us (including Colonel Overbury's testimony on the point), does not begin to form a foundation for any suggestion that Colonel Overbury "*suppressed photographic and film evidence that was inconsistent with the soldiers' evidence and consistent with civilian evidence*".

- 19 During the course of his oral submissions the Tribunal invited Mr MacDonald to inform the Tribunal of any other evidence emerging after Colonel Overbury's evidence (apart from this witness's own evidence and that concerning photographs and film) that could be said to support the proposition that there was now reasonable cause for making positive allegations against Colonel Overbury. Mr MacDonald did not respond to this invitation.
- 20 In the circumstances it seems to us that it would be unfair to Colonel Overbury and contrary to our ruling of October 1999 (which was designed to avoid unfairness) to allow allegations not put to this witness to be revived at this stage. To make allegations against a witness and then in effect to withdraw them, to put no allegations to that witness during his testimony, and then nevertheless many months later for no good reason to revive them, seems to us to be self-evidently unfair, giving rise to the very ambush and surprise Madden & Finucane professed to wish to avoid. If in truth there was any substance in the allegations they could and should have been raised long ago, but no attempt was made to suggest that December 2003 was the earliest practicable moment for them to be revived. We have a duty to seek the full truth about Bloody Sunday, but as we have observed on more than one occasion, this duty does not override our obligation to treat witnesses fairly. We have, of course, considered whether we should recall Colonel Overbury, but since we remain unpersuaded that the allegations have any sensible foundation, to do so would run counter to our own ruling of October 1999, would to our minds serve no useful purpose, and would in our view be even more unfair to the witness now than it would have been in September 2002.
- 21 For these reasons we direct that the allegations identified in Madden & Finucane's letter of 18th November 2003 cannot be raised at this late stage and accordingly must not appear in the final written submissions of their clients.

- 22 We now turn to allegations that the clients of McCartney & Casey submit they should be permitted to advance against Colonel Overbury. The correspondence with the Inquiry reveals that in recent letters from McCartney & Casey to the Inquiry these allegations have altered more than once in both form and content, but finally in the course of his oral submissions Lord Gifford on behalf of these interested parties put forward as the definitive allegation that Colonel Overbury suggested in the course of interviewing Soldiers 15, 40 and 134 that they should falsify their evidence in order to make it consistent with the Army's case that all firing by the soldiers was justifiable.
- 23 No notice was given to Colonel Overbury before he gave evidence that McCartney & Casey were seeking to raise this or any similar allegation against him. Lord Gifford sought to explain this by saying that it had not become apparent to him until Colonel Overbury gave evidence that this officer had interviewed these soldiers. Be that as it may, the fact remains that Lord Gifford did not put the allegation to Colonel Overbury. It is true that he suggested to Colonel Overbury that he may have tried "*to put a spin on some evidence which was otherwise potentially damaging to the Army*" a suggestion that Colonel Overbury rejected, but to our minds this falls far short of the allegation as it is now formulated. To put a "*spin*" on evidence may well merely mean an attempt, not to falsify evidence, but to present it in the most persuasive or attractive way. If it was to be alleged that Colonel Overbury had, in fact, conspired to pervert the course of justice then that should have been suggested in terms. As it is, the transcript reveals that at the time the Tribunal expressed itself as not regarding the questioning by Lord Gifford as putting forward an allegation against Colonel Overbury; and Lord Gifford did not seek to persuade the Tribunal that this was what he in fact was seeking to do.
- 24 As with Madden & Finucane, no attempt was made to raise the allegation with the soldiers concerned. Nor was it suggested that any later evidence supported the making of such a serious allegation against Colonel Overbury. Likewise, no attempt was made to establish that the allegation was made at the earliest practicable moment. In the circumstances it seems to us that, as in the case of Madden & Finucane and for much the same reasons, it would be unfair to Colonel Overbury and contrary to our ruling of October 1999 to allow allegations not put to this witness to be revived at this stage or to recall Colonel Overbury to deal with them.
- 25 For these reasons we direct that the allegations identified by Lord Gifford cannot be raised at this late stage and accordingly must not appear in the final written submissions of the clients of McCartney & Casey.

- 26 We should add this. During the course of the oral submissions it seemed that the question of making allegations against Colonel Overbury was really being treated by both Mr MacDonald and Lord Gifford as an end in itself. As we have repeatedly made clear, the object of looking at the evidence collected for the purpose of Lord Widgery's Inquiry and the manner in which it was collected and given, is not in order to judge whether or not proper procedures were followed at that Inquiry, but whether the present Inquiry can place any and if so what reliance on that evidence. We would re-emphasise that it is the latter to which the interested parties should be directing their attention in their final submissions.
- 27 In this connection, it is important to bear in mind that this ruling is confined to the question whether the Tribunal should allow to be pursued the allegations now sought to be revived against Colonel Overbury. The ruling is in no way concerned with the truth or falsity of the evidence about Bloody Sunday prepared for or given at Lord Widgery's Inquiry and in no way impedes our task of assessing that evidence. Thus, for example, when we come to review the evidence of Soldier V and the soldiers interviewed by Colonel Overbury, we shall, of course, consider the role that he played in relation to these soldiers. We shall also consider his role generally with regard to the preparation and presentation of the Army case to that Inquiry. We shall do so to the extent necessary to assist us in judging what reliance, if any, we can place upon that evidence and that of other soldiers. Likewise, nothing in this ruling impedes us in assessing what weight we should place upon Colonel Overbury's own testimony, again insofar as this may be relevant to the same task. As Mr Elias put it on behalf of Col Overbury, the ruling leaves unaffected "*all the ordinary tools of forensic analysis*".

A2.40: Ruling (13th February 2004): refusal of witnesses to answer questions or attend; PIRA 9 [Martin Doherty] found in contempt of the Tribunal and certified to the High Court; status of Witness X

Refusal to answer questions or attend

- 1 In a number of instances during the course of taking oral evidence at this Inquiry witnesses have refused to answer questions. These witnesses include journalists and members or ex members of paramilitary organisations as well as others.
- 2 In the case of journalists the refusal was to identify some of their sources of information relating to the events of Bloody Sunday, on the grounds that to do so would breach the undertaking of confidentiality given by the journalist to the source. In legal terms, the question was whether, applying Section 10 of the Contempt of Court Act 1981, the interests of justice were of such an overriding nature that the journalists were nevertheless obliged to reveal that source to the Inquiry.
- 3 In the case of paramilitaries, the refusal was to identify some others who were members of the organisations at the time of Bloody Sunday or give logistical or similar information relating to those organisations at that time, on the grounds that to do so would be disloyal to their comrades or would contravene the oath or undertakings that they gave when joining those organisations. It was not suggested by the lawyers acting on behalf of these individuals that there was any legal justification for a refusal based on these grounds.
- 4 In the case of others, the refusal was to provide similar information. Here no particular reason was advanced to justify the refusal, though to our minds it is possible, at least in some cases, that fear of possible reprisals from paramilitary organisations still active may have been the reason. In some of these cases, therefore, the refusal may be justifiable on the grounds that to require an answer would be to breach the individual's rights under Article 2 of the European Convention on Human Rights.

- 5 Depending on the circumstances, in each case the Tribunal either simply noted the refusal, or told the witness that it might prove necessary to have a further hearing to decide whether or not to direct the witness to answer, or, having given lawyers acting on behalf of the witness an opportunity to make submissions, made a formal direction that the witness was obliged to answer. In the case of journalists, the matter was fully argued out on more than one occasion, and the Tribunal gave reasons for concluding that as a matter of law it should direct the journalists in question to reveal the source, which it then did.
- 6 In some cases, the witness concerned later provided the information in question. In other cases, the journalists at our request sought and obtained a waiver of the undertaking of confidentiality and revealed that source to us. In a substantial number of further cases, the Inquiry was eventually able from its own investigations to discover the information that it was seeking. There remain, however, some instances where the Inquiry has not been successful in this regard. Thus we have to consider whether it is appropriate to take any further steps in these latter cases, by giving the witness in question a further opportunity to provide the information sought, or to show a legal justification for a refusal or, in those instances where the Tribunal has already directed the witness to answer, to certify to the High Court that in its view the witness is in contempt of the Tribunal.
- 7 Having considered the matter, the Tribunal has concluded that it is not appropriate to take any further steps in these cases. In the view of the Tribunal it is unlikely that any further action will produce new information of real value to its investigation of the events of Bloody Sunday. Furthermore, any attempt to pursue the matter is likely to cause substantial delay in completing this Inquiry, which has already lasted more than six years. The fact of the matter is that we have heard the oral testimony of over 900 witnesses, have considered the written testimony of an even greater number and have a wealth of contemporary video, photographic and other evidence. In theory, an Inquiry of the present kind could continue indefinitely, in an attempt to follow up every possible lead, however unpromising it might appear. In practice, however, the time must come when the Tribunal has to draw a line, balancing the prospects of obtaining further information of value with the need to keep the duration of the Inquiry within reasonable limits. In our judgment that time has come and the balance falls on the side of concluding our search for relevant information from the witnesses in question. Our task now is to draw conclusions from the voluminous material that we have gathered over the last six years.

- 8 There remain those individuals who have failed to comply with subpoenas to attend to give evidence. These are Daniel McGilloway AM507, Vera McGilloway AM506, and the witnesses known as PIRA 9 [Martin Doherty] and Witness X.
- 9 As we stated on Day 423, both Mr and Mrs McGilloway indicated at that time that there were health reasons that justified their non-attendance. However, they failed to comply with the Inquiry's request that they should provide proper medical evidence in support of this contention. They have now indicated that a belated application to set aside the subpoenas is to be made on their behalf. The Tribunal will consider any such application and will, in the light of any further information provided by the McGillows, decide what further action, if any, to take.
- 10 PIRA 9 refused to be interviewed by the Inquiry or to make a statement. He was served with a subpoena that required his attendance on Day 424. He failed to attend on that day and failed to avail himself of a further opportunity given to him by the Tribunal to attend yesterday. He has made clear through his solicitors that he will not attend to give evidence. His solicitors have informed the Inquiry that PIRA 9 claims not to have been present on Bloody Sunday but have put forward no adequate reason for his refusal to attend. We take the view that PIRA 9 is in contempt of the Tribunal and will so certify to the High Court in Belfast.
- 11 Witness X was required to appear to give evidence on Day 418. On that day, after he had failed to attend, we informed the interested parties that a question had arisen as to the state of his health. That question remains unresolved. We will decide what action, if any, to take, in the light of the further information that we hope to obtain in respect of this witness.
- 12 Finally, we should make clear that nothing in this ruling is intended to inhibit any interested party from submitting that the Tribunal could and should draw inferences from the refusal of witnesses to answer questions, or indeed from the failure or refusal of witnesses of potential importance to come forward to assist the Tribunal in its task.

A2.41: Ruling (11th October 2004): the requisite standard of proof for inquiries of this nature

- 1 In the course of hearing the closing submissions of the interested parties to this Inquiry an issue arose as to the standard of proof which the Tribunal should apply before making findings in its report. On the one hand it was argued that the Tribunal should apply the criminal standard of proof before making any findings implying criminal conduct on the part of an individual, and what was described as the enhanced civil standard of proof (said to mean the balance of probabilities modified to take account of inherent improbability and likely consequences) before making any finding of serious misconduct falling short of criminality on the part of an individual. On the other hand it was argued that the Tribunal should not be obliged to apply these standards, provided it made clear in its report the degree of confidence or certainty with which it reached its conclusions and gave its reasons for coming to those conclusions. The former approach was urged on us mainly (though not exclusively) by those representing the soldiers in this Inquiry, who have asked the Tribunal to make a ruling, before publishing its final report, by stating in principle the approach which it intends to adopt.
- 2 The point has arisen in the present Inquiry because we are looking into an event where British soldiers shot and killed or wounded a number of civilians and where there has ever since been a debate as to whether or not they were justified in so doing.
- 3 According to those submitting that the former approach should be adopted, this would entail that the Tribunal would be precluded from making any findings implying criminality or serious misconduct unless satisfied to the criminal or enhanced civil standard as the case might be, notwithstanding that the evidence and reasoning supported a finding based on a different or lesser standard.
- 4 Counsel cited a number of authorities for the proposition that as a matter of law we were constrained to act in this manner.
- 5 The first group of cases cited were *In Re H* [1996] AC 563, *B v Chief Constable of Avon and Somerset* [2001] 1 WLR 340, *Gough v Chief Constable of the Derbyshire Constabulary* [2002] QB 1213, *R (McCann and others) v Crown Court at Manchester* [2003] 1 AC 787. These were cases in which the Courts discussed the standard of proof required in, respectively, proceedings where a local authority were seeking to take

children into care on the basis that a child had been sexually abused, where a Chief Constable was seeking a sex offender order, where a Chief Constable was seeking a football banning order and where a Chief Constable was seeking anti-social behaviour orders.

- 6 The point sought to be made from these cases is that the more serious the allegation, the more cogent must be the evidence to prove it. Thus the approach of Lord Nicholls in the first of these cases was that though the standard of proof to be applied in care proceedings is the balance of probabilities, the court must have in mind, to whatever extent is appropriate in the particular case, that the more serious the allegation the less likely it is that the event occurred and, hence, the stronger should be the evidence before the court concludes that the allegation is established on the balance of probabilities. In the second of these cases Lord Bingham considered that although the standard of proof to be applied was the balance of probabilities, this was a flexible standard and that the allegation that an individual was a sex offender was so serious that for all practical purposes the standard of proof was the same as the criminal standard. Much the same was said by the court in the third of the cases cited, namely that while technically the civil standard of balance of probabilities applied, that standard is flexible and must reflect the consequences that will follow if the case for a football banning order is made out, so that the standard of proof will be in practice hard to distinguish from the criminal standard. Finally, in the last of these cases, the House of Lords held that although applications for anti-social behaviour orders were civil in nature, the seriousness of the allegation and of the consequences for the person concerned were the order to be made meant that it was only fair to require the allegation to be proved to the criminal standard of proof.
- 7 In the context of the cases cited no one could seriously quarrel with the approach adopted by the courts. In each of these cases to make the orders sought would have the most serious consequences for the individuals concerned, by removing or diminishing in a substantial way the rights, liberties and freedoms to which they would otherwise be entitled. Thus it is hardly surprising that in such cases the courts require cogent and compelling evidence in the same or much the same way as in criminal cases, where a conviction can also have like consequences.
- 8 In the context of the present Inquiry, there is no question of the Tribunal having any power to remove or diminish the rights, liberties or freedoms of anyone. It is not the function of an Inquiry of the present kind to determine rights and obligations of any nature. Its task, set by Parliament, is to inquire into and report upon the events on Sunday 30th January 1972 which led to loss of life in connection with the procession in

Londonderry on that day, taking account of any new information relevant to events on that day. The Inquiry cannot be categorised as a trial of any description. Unlike the courts it cannot decide the guilt (or innocence) of any individual or make any order in its report. Our task is to investigate the events of Bloody Sunday, to do our best to discover what happened on that day and to report the results of our investigations. It accordingly follows that the considerations that led the courts in the cases cited to require proof to a very high standard before making orders that affected the rights, liberties and freedoms of individuals are no guide to the task entrusted to the Tribunal.

- 9 We should add at this point that we were also referred to the recent case of *Lu v LB in the Court of Appeal* [2004] EWCA (Civ) 567 as well as the observations on the question of standard of proof made in the reports of a number of inquiries, but we were not persuaded that these take the matter any further or provide us with any additional assistance. However, after the oral hearings, our Counsel drew our attention to what Dame Janet Smith in the Shipman Inquiry had to say on the topic in question:

“9.43 In an inquiry such as this, there is no required standard of proof and no onus of proof. My objective in reaching decisions in the individual cases has been to provide an answer for the people who fear or suspect that Shipman might have killed their friend or relative. I have also sought to lay the foundation for Phase Two of the Inquiry. My decisions do not carry any sanctions. Shipman has been convicted of 15 cases of murder and sentenced appropriately. He will not be tried or punished in respect of any other deaths. Nor will my decisions result in the payment of compensation by Shipman. It is possible that relatives might recover damages from Shipman if they can show that Shipman has killed their loved one, but my decision that he has done so will not automatically result in an award of compensation against him. Accordingly, I have not felt constrained to reach my decisions in the individual cases by reference to any one standard of proof.”

- 10 We consider that these observations are apt in our consideration of the events of Bloody Sunday.
- 11 The second group of cases cited to us related to the standard of proof to be applied in cases of coroners' inquests.
- 12 The first of these cases is *R v West London Coroner, ex parte Gray* [1988] 1 QB 467, where the Divisional Court held that the correct standard of proof before a verdict of unlawful killing could be returned was that of proof beyond a reasonable doubt and

expressed the view that the same standard applied to any verdict that entailed that a criminal offence had been committed. In the course of his judgment Watkins LJ cited the words used by Lord Lane CJ in the earlier case of *R v South London Coroner, ex parte Thompson* reported in the *Times* of 9th July 1982. These were:

“Once again it should not be forgotten that an inquest is a fact finding exercise and not a method of apportioning guilt. The procedure and rules of evidence which are suitable for one are unsuitable for the other. In an inquest it should never be forgotten that there are no parties, there is no indictment, there is no prosecution, there is no defence, there is no trial, simply an attempt to establish facts. It is an inquisitorial process, a process of investigation quite unlike a criminal trial where the prosecutor accuses and the accused defends, the judge holding the balance or the ring, whichever metaphor one chooses to use.”

- 13 The other coroner’s inquest cases cited to us were *R v Wolverhampton Coroner, ex parte Mcurbin* [1990] 1 WLR 719 and *R v HM Coroner for the County of Hampshire, ex parte HM Attorney-General*, in respect of which we were provided with a transcript of the judgment delivered on 21st June 1990. In the latter case Leggatt LJ simply stated that it was plain upon authority that for practical purposes to support a verdict of unlawful killing proof is necessary beyond reasonable doubt. In the former case Woolf LJ accepted that there may be force in the submission that in the case of a coroner’s inquest the standard of proof was a very high one indeed though based on the civil rather than the criminal standard, but held that since the result would almost inevitably be the same whichever standard was applied, the practical guidance given by Watkins LJ was correct.
- 14 It is clear from the remarks of Lord Lane CJ cited by Watkins LJ in *R v West London Coroner, ex parte Gray* (supra) that a coroner’s inquest is inquisitorial in nature and thus has this in common with the present Inquiry. However, there are other features that are quite different.
- 15 A coroner’s inquest is limited in the verdicts that it can return, and where there is a jury it is obviously necessary for the jurors to be given clear and simple directions as to the degree of certainty with which they can reach particular verdicts. Unless there were different and specified degrees of certainty, it would be difficult if not impossible to reach a particular verdict, for example between unlawful killing and death by misadventure. Furthermore, as Woolf LJ pointed out in *R v Wolverhampton Coroner, ex parte Mcurbin* (supra at page 724), before a change in the law in 1977 a jury could under Section 4(3) of the Coroner’s Act 1887 return a verdict that named a person or persons as guilty of

murder or manslaughter, which in his view still provided considerable assistance in considering the question of the standard of proof which was applicable, “*since that section made clear the importance of the decision of the coroner’s jury and the gravity of the issues which they had to determine which could result in a person being at that time arrested and in due course tried for murder or manslaughter*”. There are accordingly both practical and historical reasons for requiring a high standard of proof before making a finding of unlawful killing, reasons that do not apply to an Inquiry of the present kind, which does not have to select and give a particular verdict, but instead has to provide a report on the matters referred to it.

- 16 It is also important to note that in the same case (at page 727) Woolf LJ made clear that in different proceedings there are different considerations which lead to what is the appropriate test which it is useful to apply, having regard to the role of the decision-making body that has the task of coming to a conclusion on the facts. To our minds this is a clear indication that the Court in that case was not seeking to lay down any rule or principle applicable to all kinds of inquisitorial inquiry or which are apt in our consideration of the events of Bloody Sunday.
- 17 In our view, therefore, the cases cited to us do not provide any support for the proposition that as a matter of principle we cannot make any findings implying criminality unless we are satisfied to the criminal standard of proof or of serious misconduct unless we are satisfied to the enhanced civil standard.
- 18 As we have said earlier, since we are an Inquiry and not a Court (criminal or civil) we cannot give a verdict or pass a judgment on the question whether an individual was guilty of a specific crime or legally recognised serious wrongdoing. For the same reason the terminology and requirements of the criminal or civil law are largely inapplicable. Thus it seems to us that we can and should reach conclusions without being bound by rules designed for court cases, such as who has the burden of proof and the strict rules of evidence.
- 19 In this connection we have found assistance in the approach taken by the Supreme Court of Canada in *Canada (Attorney-General) v Canada (Commission of Inquiry on the Blood System)* 1997 3 SCR 440, a case concerned with the Krever Inquiry into the blood system in Canada after many had contracted HIV and hepatitis C from blood or blood products. Although the Act under which this Inquiry was being conducted differs in many respects from the Act under which we are operating, the observations of Cory J (who gave the judgment of the Court) at paragraphs 34–54 seem to us to have general

application. As he pointed out, the findings of a commission of inquiry relating to an investigation are simply findings of fact and statements of opinion reached by the commission at the end of the day; and though they may affect public opinion, they are not and cannot be findings of criminal or civil responsibility.

- 20 We now turn to the suggestion that it would be unfair to the individual to make findings implying criminal or other serious wrongdoing without applying the suggested standards of proof.
- 21 What was said on this was that the consequences of a finding implying wrongdoing on Bloody Sunday would be extremely serious for the individuals concerned, particularly so having regard to the standing of the Inquiry, the fact that it is charged to report to Parliament, the widespread publicity which its findings will undoubtedly rightly attract and the possibility that an individual may, as a result of the outcome, be exposed to the risk of prosecution.
- 22 We have found it difficult to follow this submission. The Inquiry is indeed concerned with matters of the greatest seriousness. The question whether the shooting of civilians by soldiers was or was not justified is central. The very subject matter of the Inquiry raises the possibility that individuals may be the subject of the most serious criticism and there may well be wide publicity, though it should be noted that most of those concerned have been granted anonymity. But for the Tribunal to conclude that while it was not sure, nevertheless it seemed probable that a particular shooting was deliberate and unjustified (objectively and subjectively) could hardly create or increase a risk of prosecution; indeed it would be more likely to have the opposite effect. Furthermore, apart from the reference to the possible risk of prosecution, no attempt was made to explain what “*serious consequences*” would follow were the Tribunal not to apply the suggested standards of proof, save that it was also suggested that the media would be likely to misrepresent the views of the Tribunal, and categorise the individual as being guilty without reference to the degree of confidence or certainty expressed by the Tribunal in making any findings implying criminality or serious misconduct. The fact (if such it be) that the media may misrepresent the views of the Tribunal does not seem to us to be a sound or satisfactory basis for requiring the Tribunal to refrain from expressing those views.
- 23 In our view, provided the Tribunal makes clear the degree of confidence or certainty with which it reaches any conclusion as to facts and matters that may imply or suggest criminality or serious misconduct of any individual, provided that there is evidence and reasoning that logically supports the conclusion to the degree of confidence or certainty

expressed, and provided of course that those concerned have been given a proper opportunity to deal with allegations made against them, we see in the context of this Inquiry no unfairness to anyone nor any good reason to limit our findings in the manner suggested. Thus, to take an example, we cannot accept that we are precluded in our report from analysing and weighing the evidence and giving our reasons for concluding that in the case of a particular shooting, we are confident that it was deliberate, that there was no objective justification for it, and though we are not certain, that it seems to us more likely than not that there was no subjective justification either. Of course we would have in mind the seriousness of the matter on which we were expressing a view, but that is not because of some rule that we should apply, but rather as a matter of common sense and justice.

24 It was also submitted that there would be no point in reaching conclusions on matters implying criminality or serious misconduct, unless we were sure beyond a reasonable doubt. We do not understand this submission. We are asked to investigate and report on an event that took place some three decades ago, where on any view soldiers of the British Army shot and killed (and wounded) a number of civilians on the streets of a city in the United Kingdom and where the question whether or not they were justified in doing so has been the subject of such debate ever since that it led to the institution of this (the second) Inquiry some thirty years later. It seems to us that it would be quite wrong to confine ourselves in relation to this central part of the Inquiry to making findings where we were certain what happened. On the contrary, it is in our view our duty to set out fully in our report our reasoned conclusions on the evidence we have obtained and the degree of confidence or certainty with which we have reached those conclusions. We are not asked to report only on these central matters on which the evidence makes us certain.

25 In this context it is important to note where the application of specific standards of proof could lead. In one of the Treasury Solicitor's letters seeking to persuade the Tribunal to apply those standards, the following reply was given to a question by the Tribunal about the ramifications of the submissions being made:

"If the Tribunal thought that it was only highly probable that Y was shot in circumstances where there was not and was not thought to have been any justification, and that on the balance of probabilities the shooter was either A, B or C, the Tribunal should make the following findings:

- (1) The Tribunal is not satisfied that Soldier A fired without subjective justification.
- (2) The Tribunal is not satisfied that Soldier B fired without subjective justification.

- (3) The Tribunal is not satisfied that Soldier C fired without subjective justification.
- (4) The Tribunal concludes that it is highly probable that Y was doing nothing which objectively justified his being shot.
- (5) The Tribunal concludes that it is more likely than not that Y was shot by one of Soldiers A, B or C, but cannot be sure that he was not shot by somebody else.
- (6) The Tribunal cannot conclude that Y was killed without subjective justification.”

26 To our minds, to express our conclusions in this way would be the antithesis of a proper report.

27 For these reasons we are not persuaded by the arguments that seek to impose on us the criminal or enhanced civil standard of proof in relation to findings implying criminality or serious misconduct falling short of criminality. We should emphasise, as we have made clear on numerous occasions during the course of the Inquiry, that this does not mean that we shall entertain or allow to be pursued allegations of this kind which have no sensible foundation at all or in respect of which the individual concerned has not been given a proper opportunity to answer, for to do so would offend one of the principles of justice referred to by Lord Diplock in *Mahon v Air New Zealand* [1984] AC 808.

A2.42: Ruling (9th December 2004): application by Witness X to set aside a subpoena

- 1 We have received an application from solicitors acting on behalf of Witness X for an order that the subpoena issued by the Tribunal dated 20 January 2004 and which required the attendance of Witness X before the Tribunal on 29 January 2004 be set aside.
- 2 We will set out briefly the history of this matter. Witness X is a witness whom the Tribunal regards as important and from whom the Tribunal has, from an early stage, wished to hear oral evidence. He made a statement to the Inquiry on 9 February 2000. On 21 January 2004 we ruled that he should be granted anonymity and should be screened while giving evidence. On 22 January 2004 he was served with a subpoena that required him to give evidence at the Guildhall in Londonderry on 29 January 2004.
- 3 On 22 January 2004 Witness X, through his solicitors, provided a medical certificate which indicated that he was unfit to attend before the Tribunal. The Inquiry sought further details and additional medical evidence was provided on 28 January 2004. It is the practice of the Tribunal not to make public the details of medical evidence supplied to it on behalf of its witnesses and we will not depart from that practice in the case of Witness X. It is sufficient to say that this evidence indicated that Witness X was at the time too unwell to appear. However, Witness X's solicitors indicated on 30 January 2004 that Witness X might be fit to give oral evidence shortly thereafter. No application was made at that time on Witness X's behalf for the subpoena to be set aside.
- 4 The information provided in January 2004 by Witness X's solicitors, including the medical evidence, was insufficient to satisfy us that Witness X should not give oral evidence, whether at that time or at all.
- 5 In the application to set aside the subpoena which has now been made, Witness X claims that he failed to attend on 29 January 2004 both for medical reasons and because he believed that his anonymity had been compromised. He asks the Tribunal to set aside the subpoena on the basis that his identity is now known to a number of people and therefore the condition of anonymity on which he was to have given evidence can no longer be met. It is not suggested on his behalf that he is now unfit for medical reasons to give oral evidence.

- 6 Witness X has provided the Tribunal with details of various persons who, he alleges, have or may have learned of his identity. In order to minimise the risk of any further compromise of his anonymity, these details have been redacted from the version of his application made available to the parties.
- 7 We accept that there has been speculation about the identity of Witness X and that various individuals have guessed, or in some cases even learned of, his identity. However, there is no evidence available to the Tribunal from which we could conclude that those who do, or may, know of his identity wish to do him harm. While we cannot make public the details of the information available to us, we can say that some of those alleged to know of his identity are alleged to have had that knowledge for a substantial period of time. It is not contended on behalf of Witness X that these individuals have caused or threatened harm to him.
- 8 The Tribunal wishes to question Witness X about a document in which he is recorded to have provided information to the Royal Ulster Constabulary about paramilitary activity on Bloody Sunday. This document has been made available to the parties. We accept the submission made on his behalf that the information contained in the document is highly sensitive. However, anyone who knows the identity of Witness X must already know, or could very easily discover, the content of the document about which the Tribunal wishes to question Witness X. Indeed, Witness X himself appears to have given an interview to the *Derry Journal* in April 2002 in which he commented on that document.
- 9 We have considered with care a threat assessment concerning Witness X provided by the Police Service of Northern Ireland and dated 7 November 2003. We do not believe that the information contained in that assessment should cause us to conclude that Witness X should be excused from giving oral evidence.
- 10 In the application made on behalf of Witness X, no attempt has been made to explain why the giving of oral evidence would aggravate the current position. We are not persuaded that the anonymity of Witness X would be further compromised or his situation made worse than it now is by a requirement that he should give oral evidence.
- 11 We are not satisfied that fear of compromise of his anonymity was a reason for Witness X's failure to attend on 29 January 2004. No such reason was put forward at the time. Indeed, we were told then that it was hoped that he would be able within days to give oral evidence. The information provided concerning Witness X's health at that time also remains unsatisfactory. However, we have insufficient material available to us from

which we could properly conclude that Witness X's failure to attend on 29 January 2004 amounted to a contempt of the Tribunal. In these circumstances, we have decided to grant the application of Witness X and we order that the subpoena be set aside.

- 12 However, we will require Witness X to attend to give oral evidence before the Tribunal at a date and time which will be notified to him and to all parties. The Tribunal, with the assistance of its staff, will consider the most expeditious and convenient means by which Witness X can give his evidence. One possibility is that he may give evidence by video link.
- 13 Witness X will, of course, remain entitled to anonymity and will be screened while giving evidence.

A2.43: High Court of Justice, Queen's Bench Division (Divisional Court) (London, 16th March 1999): anonymity for soldiers (item 4 above)

[1999] EWHC Admin 232

In the High Court of Justice
Queen's Bench Division
(Divisional Court)

Royal Courts of Justice
Strand, London, WC2A 2LL

Tuesday, 16th March 1999

Before:
Lord Justice Kennedy,
Mr Justice Owen
and Mr Justice Blofeld

Regina

-v-

Lord Saville of Newdigate, The Rt Hon Sir Edward Somers,
The Hon Mr Justice Hoyt
(The Members of the Tribunal sitting as the Bloody Sunday Inquiry)
Ex parte 'B', 'O', 'U' and 'V'

(Computer-aided transcript of the Stenograph notes of Smith Bernal Reporting Limited,
180 Fleet Street, London EC4A 2HD. Tel: 0171 831 3183. Official Shorthand Writers to the Court)

Mr Edwin Glasgow QC, Mr David Lloyd Jones and Mr Michael Bools (instructed by the Treasury Solicitor, London SW1H 9JS) appeared on behalf of the Applicants; and instructed by Jacqueline Duff Solicitors, Lynnholm, Thropton, Northumberland NE65 7JE for Soldier 'H'.

Mr Christopher Clarke QC, Mr Alan Roxburgh and Jacob Grierson (instructed by Philip Ridd, Solicitor to the Inquiry, London EC3V 9JB) appeared on behalf of the Respondents.

Mr I Burnett QC (instructed by the Treasury Solicitor, London SW1H 9JS) appeared on behalf of the Ministry of Defence as an interested party.

Lord Gifford QC and Mr Martin Wynn-Jones (instructed by BM Birnberg & Co., London NW1 7HG, London Agents for McCartney & Casey, Derry, Northern Ireland BT48 6HG) appeared, on behalf of the late James Wray, as an interested party.

Mr Michael Lavery QC and Mr Seamus Treacy (instructed by BM Birnberg & Co., London NW1 7HG, London Agents for Madden & Finucane, Belfast BT1 1HE) appeared, on behalf of some of the families, as interested parties.

Mr John Coyle (instructed by BM Birnberg & Co., London NW1 7HG, London Agents for Desmond J Doherty & Co., Derry, Northern Ireland BT48 7EP) appeared, on behalf of McGuigan, as an interested party.

Judgment (As approved by the Court) © Crown copyright

Tuesday, 16th March 1999

LORD JUSTICE KENNEDY:

1. This is an application for Judicial Review of the decision of the Bloody Sunday Inquiry taken on 14th December 1998 in relation to applications for anonymity made on behalf of certain individuals who were on 30th January 1972 soldiers serving in the city of Londonderry, and who on that day fired live ammunition. The Inquiry is still at an early stage. Solicitors acting on behalf of the Inquiry have yet to interview and take statements from the applicants, after which the statements will be circulated and some at least of the applicants may be called to give evidence, as they did in 1972 before the Tribunal of Lord Widgery C.J. Before that Tribunal, and in its report, steps were taken to ensure that the applicants remained anonymous, and in particular their names were not used. They were referred to only by a letter of the alphabet, hence the five letters used for the purposes of this application.

2. Jurisdiction.

Before us a preliminary point was taken by Mr Lavery QC, supported by Lord Gifford QC and Mr Coyle, as to the jurisdiction of this Court to review a decision of an Inquiry which has been set up to investigate an event in Northern Ireland, and which is expected to hold most of its public hearings there. If there is to be any judicial review Mr Lavery contended that it should be by the High Court sitting in Belfast, which has already accepted jurisdiction in relation to at least one other matter.

Having heard submissions from the three advocates, who represent between them many, if not all, of the families of those who were killed or injured on Bloody Sunday, and having also heard from Mr Glasgow QC on behalf of the applicants before us, we were satisfied that we have jurisdiction to entertain this application, and we so ruled. We give our reasons for that ruling later in this judgment.

3. Issues before us.

Mr Glasgow, supported by Mr Burnett QC, instructed by the Ministry of Defence on behalf of soldiers in the same position as the applicants but not yet identified, made a number of submissions which can be briefly identified as follows:

- (1) The Inquiry misunderstood the nature of the anonymity granted to the applicants by Lord Widgery.
- (2) Having set out in a public statement what the applicants would have to establish in order to be granted anonymity, and having given a clear indication as to the extent of the anonymity which would be granted to the applicants if they satisfied the test, the Inquiry acted quite differently when it came to give its decision.
- (3) Before giving its decision the Inquiry rightly sought assistance from the Security Service as to the extent to which the applicants would be in jeopardy if identified, and the Security Service produced a threat assessment which, the applicants contend, the Inquiry misunderstood.
- (4) When giving its decision the Inquiry placed undue weight upon what it described as the absence of "concrete evidence of a specific threat". In fact it had never previously suggested that it required such evidence. For obvious reasons very little if any of that type of evidence was likely to be available to the applicants, and such evidence of that type as the Inquiry had it undervalued.

- (5) Having found that the applicants satisfied the Inquiry's own test, and so were entitled to some protection, the Inquiry, by requiring disclosure of surnames only, adopted a position for which no one had argued, and in relation to which there was no evidence of the risks involved.
- (6) The Inquiry's ruling, which should have been informed by Article 2 of the European Convention on Human Rights, does not sufficiently recognise its potential impact upon the lives of the applicants.
- (7) Just before the Inquiry gave its ruling it received a letter from Desmond J. Doherty and Co. The applicants contend that the letter itself and their comments upon it were not properly taken into consideration by the Inquiry in reaching its decision, and indeed that the procedure adopted by the Inquiry just before its ruling was made public indicates a lack of procedural propriety which, given the seriousness of the issues involved, was entirely inappropriate.
- (8) Finally it is contended that the ruling, which was made before many of those most affected had been identified by the Inquiry, was premature.

The order in which we have set out the submissions is not quite the same as that adopted by those who made submissions to us, but our summary does we believe cover the principal points which were made.

4. The Widgery Assurance.

As Mr Clarke QC, for the Inquiry, pointed out, Sunday 30th January 1972 in Londonderry was a tragic day. British soldiers who were present in the city in large numbers fired 108 rounds of live ammunition. Thirteen civilians were killed and another thirteen were injured, most if not all of them being shot by soldiers. In the minds of many people what happened that day was an outrage, and the dead were simply murdered. The government of the day acted swiftly, and Lord Widgery was appointed to conduct a tribunal of inquiry. It was an inquiry to which the provisions of the Tribunals of Inquiry (Evidence) Act 1921 applied, as they apply to the present Inquiry, and, as Lord Gifford urged upon us, it is worth taking a little time to look at the nature and powers of such tribunals.

As is clear from section 1(1) of the Act, such tribunals are only established by resolution of both Houses of Parliament "that it is expedient that a tribunal be established for enquiring into a definite matter described in the resolution as of urgent public importance." The expectation clearly is that such tribunals will normally sit in public because section 2(a) of the Act states that a tribunal to which the Act applies -

“Shall not refuse to allow the public or any portion of the public to be present at any of the proceedings of the Tribunal unless in the opinion of the Tribunal it is in the public interest expedient to do so for reasons connected with the subject matter of the inquiry or the nature of the evidence to be given.”

In order to discharge its functions a tribunal of inquiry is given very wide powers, as is clear from section 1(2) of the Act. If any one summoned as a witness fails to attend, or having attended fails to answer any questions to which the tribunal may legally require an answer, he can be punished as if guilty of contempt of court. There is therefore considerable pressure on any one regarded by a tribunal as a potential witness to co-operate.

In 1966 a Royal Commission headed by Salmon L.J., as he then was, reported on Tribunals of Inquiry, and justified their continued existence to deal with amongst other things -

“matters causing public concern which cannot be dealt with by ordinary civil or criminal processes but which require investigation in order to allay public anxiety.”

Lord Gifford invites our attention to the object of allaying public anxiety, which he submits necessarily involves a public process. In paragraphs 27 and 28 of its report the Salmon Commission said -

“27. The exceptional inquisitorial powers conferred upon the Tribunal of Inquiry under the Act of 1921 necessarily expose the ordinary citizen to the risk of having aspects of his private life uncovered which would otherwise remain private, and to the risk of having baseless allegations made against him. This may cause distress and injury to reputation. For these reasons, we are strongly of the opinion that the inquisitorial machinery set up under the Act of 1921 should never be used for matters of local or minor public importance but always be confined to matters of vital public importance concerning which there is something in the nature of a nation-wide crises of confidence. In such cases we consider that no other method of investigation would be adequate.

28. Normally persons cannot be brought before a tribunal and questioned save in civil or criminal proceedings. Such proceedings are hedged around by long standing and effective safeguards to protect the individual. The inquisitorial procedure is alien to the concept of justice generally accepted in the United Kingdom. There are, however, exceptional cases in which such procedures must be used to preserve the purity and integrity of our public life without which a successful democracy is impossible. It is essential that on the very rare occasions when crises of public confidence occur, the evil, if it exists, shall be exposed so that it may be rooted out; or if it does not exist, the public shall be satisfied that in reality there is no substance in the prevalent

rumours and suspicions by which they have been disturbed. We are satisfied that this would be difficult if not impossible without public investigation by an inquisitorial Tribunal possessing the powers conferred by the Act of 1921. Such a Tribunal is appointed by Parliament to inquire and report. The task of inquiring cannot be delegated by the Tribunal for it is the Tribunal which is appointed to inquire as well as to report. The public reposes its confidence not in some other body or person but in the Tribunal to make and direct all the necessary searching investigations and to produce the witnesses in order to arrive at the truth. It is only thus that public confidence can be fully restored.”

The observations of the Commission were of course not directed to a particular Tribunal of Inquiry, but they do, as Lord Gifford points out, stress that whenever a Tribunal of Inquiry is set up the gravity of the situation must be such as to call for exceptional measures, and that in such a situation loss of privacy is a price which has to be paid to restore public confidence. However, the Salmon Commission was not, so far as we are aware, directing its mind to a loss of privacy which would result in a risk to personal safety, and no doubt that is what caused Lord Widgery in 1972 to grant anonymity to those who gave evidence before him, including in particular the soldiers who had fired live ammunition. The present Inquiry had very little information as to what was said by or on behalf of Lord Widgery in 1972 to those who testified, but his report contains this paragraph -

“Since it was obvious that by giving evidence soldiers and police officers might increase the dangers which they, and indeed their families, have to run, I agreed that they should appear before me under pseudonyms”.

We now have rather more information as to what went on in 1972 than may have been available to the present Inquiry when it made its decision last December. In particular soldier ‘H’, recently identified, on 10th February 1999 swore an affidavit, part of which at paragraph 3 reads :-

“I know that I and other soldiers were told quite clearly at the time, that the Lord Chief Justice had agreed that we would be anonymous if we gave evidence to the Tribunal. Although my recollection is not clear at this remove I believe that I was also told this by the Solicitor from Treasury Solicitors Department who took my statement.”

Paragraphs 5 to 7 of the affidavit read:-

“5. It did not occur to me to ask for how long this protection would last because I was under the clear impression that my anonymity would be maintained in the future.

6. If I had not been told that I was going to be granted anonymity I would have asked what precautions were going to be taken to give me and my family protection. At that time my new wife was pregnant with our first child. If I had been told that after I had given my evidence I would be named or otherwise identified at some time in the future I would have asked what protection my family and I would be given at that time and in the future.

7. I do not pretend to be able now to remember precisely what was said but my firm understanding was that I would never be identified and until now it has never been suggested that I should be."

As to what was done at the hearings before Lord Widgery we have information from Mr Lawton of the Treasury Solicitors Department who acts for the applicants. He says in his second affidavit of 27th January 1999 at paragraph 8 -

"The pseudonyms used to refer to the applicants were those by which they are referred to in the present application, namely soldiers 'B', 'O', 'U' and 'V'. I understand that, in addition to being assigned a letter or number by which he was referred to by all concerned throughout that Inquiry, each military witness arrived at the hearings of the Inquiry wearing a combat jacket without insignia of rank or regiment. They were accompanied by a group of about five or six other soldiers similarly dressed and all wore dark glasses. Once called to give evidence the witness took the stand away from the group, removed his glasses and gave evidence facing Lord Widgery. Throughout the proceedings the military witnesses were referred to only by their letter or number."

As a result of the precautions taken in 1972 the applicants have never been identified as the soldiers who fired live ammunition so, of course, they have never been threatened in that capacity. According to paragraph 9 of Mr Lawton's second affidavit, and according to the affidavit of soldier 'H', they have all now left the armed forces, and are living as civilians. That, as it seems to us, is all important background material against which the decision now under challenge falls to be considered. It seems to us to be clear that in 1972 each of the applicants was led to believe that if he co-operated with the Tribunal, by answering questions, giving a statement, and giving evidence if called upon to do so, his identity and in particular his name as well as his address, would not be revealed by anyone in authority as the source of the information obtained by the Tribunal so long as the danger which led to the grant of anonymity continued to exist. In other words, subject to some compelling unforeseen circumstance, so long as there was any danger of reprisals being taken against him or his family because he fired live rounds on Bloody Sunday, no one in authority would do anything which would enable anyone to attach his name to that of a soldier previously identified only by letter who gave evidence before the Widgery Tribunal in 1972. If that is a correct analysis of

the assurance given to the applicants in 1972 then, as it seems to us, any decision which involves disclosure of their surnames for the purposes of this present Inquiry is on the face of it a breach of the 1972 assurance because, once their surnames are revealed, together with such information as they may now give, it will be possible to discover who appeared under which letter in 1972. Indeed it seems almost inevitable that if the present decision stands each applicant will now be cross-examined publicly about what he said in 1972. It may be that at the present time circumstances are such as to justify that course, that is not for us to decide, but we do have a clear view about the assurances given in 1972, and, as will become apparent, our understanding of the position differs in significant respects from that of the present Inquiry.

5. Establishment of this Inquiry.

The proposal to establish the present Inquiry was announced to Parliament by the Prime Minister on 29th January 1998, and part of what he said, as reported in Hansard, reads thus -

“It is for the Tribunal to decide how far its proceedings will be open, but the Act requires them to be held in public unless there are special countervailing considerations.

The hearings are likely to be partly here and partly in Northern Ireland, but, again, that is largely for the Tribunal. Questions of immunity from prosecution for those giving evidence to the Inquiry will be for the Tribunal to consider in individual cases, and to refer to my Right Honourable and learned friend the Attorney General as necessary. The Inquiry will report its conclusions to my Right Honourable friend the Secretary of State for Northern Ireland, and our intention is that they will be made public.

Let me make it clear that the aim of the Inquiry is not to accuse individuals or institutions, or to invite fresh recriminations, but to establish the truth about what happened on that day, so far as that can be achieved at 26 years distance. It will not be easy, and we are all well aware that there were particularly difficult circumstances in Northern Ireland at that time.

Bloody Sunday was a tragic day for all concerned. We must all wish that it had never happened. Our concern now is simply to establish the truth, and to close this painful chapter once and for all. Like the honourable member for Foyle, members of the families of the victims have conducted a long campaign for that end. I have heard some of their remarks over recent years and have been struck by their dignity. Most do not want recriminations; they do not want revenge; but they want the truth.

I believe that it is every one's interests that the truth be established and told. That is also the way forward to the necessary reconciliation that will be such an important part of building a secure future for the people of Northern Ireland.”

The resolution which was duly passed by both Houses of Parliament was -

“That it is expedient that a Tribunal be established for inquiring into a definite matter of urgent public importance, namely the events on Sunday 30th January 1972 which led to the loss of life in connection with the procession in Londonderry on that day, taking account of any new information relevant to events on that day.”

The remit of the Inquiry is therefore reasonably clear, and it is also clear that Parliament did nothing to fetter its discretion in relation to, for example, the grant of anonymity to individual witnesses, bearing in mind the statutory background to which we have referred.

6. The July Statement.

The Inquiry delivered an opening statement on 3rd April 1998, and held a preliminary hearing in July 1998 which dealt with a number of matters of no concern to us, but one of the issues raised was the question of anonymity, and in its ruling and observations of 24th July, 1998 the Inquiry said this -

“In the expectation that the question of anonymity would arise, we asked the interested parties for any general observations or submissions they might have as to the approach that we should adopt in relation to it. It will be recalled that, with the exception of five senior officers, the soldiers who gave evidence before the Widgery Inquiry were not required to disclose their names.

We have not yet been asked to make rulings on anonymity in respect of any individual witnesses or groups of witnesses who may give evidence to this Inquiry. However the Treasury Solicitor and Ministry of Defence have indicated that applications for anonymity are likely to be made in due course on behalf of soldiers or former soldiers who were serving in Londonderry on Bloody Sunday.

It should be remembered that there are various different forms of anonymity. Depending on the circumstances, it might be appropriate to allow a witness to give evidence without stating his or her name and address in public, or perhaps to give evidence from behind a screen in order to conceal his or her physical appearance. It might also be necessary to preserve the anonymity of individuals by substituting letters or numbers for names in witness statements and other documents.

Mr Treacy referred us to a number of authorities in this field..... Mr Treacy argued that the granting of any form of anonymity was a very grave step that should only be taken if justified on compelling grounds.

In adversarial procedure, great importance is rightly attached to the principle of open justice. In particular, the courts require very strong grounds indeed before departing from the rule that a person charged with a criminal offence is entitled to know the identity of prosecution witnesses and to see them give their evidence. One of the reasons for this is to enable the opposing party to investigate and assess the credibility of those witnesses.

The position in relation to an Inquiry such as this one is, in our view, rather different. Nobody is being prosecuted before this Tribunal, nor is it our function to do justice between parties competing in an adversarial contest. Our task is to do justice by ascertaining, through an inquisitorial process, the truth about what happened on Bloody Sunday. The proper fulfilment of that task does not necessarily require that the identity of everyone who gives evidence to the Inquiry should be disclosed in public. The Tribunal will know the identity of all witnesses and, unlike a court, will itself take responsibility for investigating their credibility if there is reason to think that such an investigation is necessary.

Indeed we think that there are likely to be circumstances in which granting anonymity will positively help us in our search for the truth. Witnesses are unlikely to come forward and assist the Tribunal if they believe that by doing so they will put at risk their own safety or that of their families. Moreover it would be a mistake to suppose that the grant of anonymity would always operate to protect soldiers who are alleged to have been guilty of serious offences on Bloody Sunday. There may well be witnesses who wish to give evidence that is favourable to the interpretation of events for which the families and the wounded contend, but who will not co-operate with the Tribunal without assurances as to their anonymity. We are aware, for example, of certain television programmes in which people describing themselves as ex-soldiers present on Bloody Sunday have criticised the conduct of the Army on that day, but have done so anonymously, presumably for fear of reprisals by their former comrades.

Accordingly, we will be willing to grant an appropriate degree of anonymity in cases where in our view it is necessary in order to achieve our fundamental objective of finding the truth about Bloody Sunday. We will also be prepared to grant anonymity in cases where we are satisfied that those who seek it have genuine and reasonable fears as to the potential consequences of disclosure of their personal details. As to the degree of anonymity that is appropriate, our current view is that restricting the disclosure of names and addresses ought to be sufficient in most, if not all, cases. We would regard the use of a screen as a wholly exceptional measure.

The obligation nevertheless remains firmly on those who seek anonymity of any kind to justify their claim. Applicants for anonymity must supply the Tribunal with a written explanation of the basis of their application, together with any material relied upon in support of it. Of course, unless and until the application is refused, the Tribunal will not reveal any information in its possession, disclosure of which might pre-empt its ruling. Otherwise, however, and subject to any claim for public interest immunity, we propose to circulate any written applications for anonymity to all interested parties and to invite their submissions before making a ruling.

It is obviously important that these applications should be determined sooner rather than later, especially in view of the problems that delay will cause in respect of the distribution of documents containing the names of potential applicants for anonymity. The fact that so far only a few of the soldiers have been traced presents a practical difficulty that their instructions cannot be obtained until they have been found. Rather than waiting for them to be located, we intend to ask the Ministry of Defence to put forward any application for anonymity on their behalf, together with such submissions and evidence as it considers appropriate in relation to any continuing security risk to which they may be exposed. The Solicitor to the Tribunal will shortly be writing to the Ministry of Defence in this connection, as well as to the Treasury Solicitor on behalf of the soldiers represented by Mr Glasgow. Meanwhile, in order to provide to interested parties as many as possible of the documents we have collected to date, we shall blank out the names etc of those who we consider may have a case for anonymity, in order not to pre-empt any future ruling and to minimize delay in the publication of documents.”

We have set out that part of the ruling and observations almost in full because it is so important in relation to the issues before us. Mr Glasgow and Mr Burnett contend that the paragraph which begins with the word “Accordingly”, and which we have emphasised in the text, sets out in clear terms :-

- (1) What a soldier would have to show to the satisfaction of the Inquiry in order to qualify for anonymity - genuine and reasonable fears as to the potential consequences of disclosure of his personal details:
- (2) the degree of anonymity which a soldier who passed the qualification test might expect - restriction of disclosure of name and address.

Mr Clarke QC is understandably anxious that we should not take that paragraph out of context, which is why we have set out the extract in full. He also emphasises, quite rightly, the opening sentence of the next paragraph, as demonstrating that the burden of proof remains firmly on those who seek anonymity of any kind to justify their claim. That we recognise, but in our judgment the submissions of Mr Glasgow and Mr Burnett as to the interpretation of the rulings and observations of the Inquiry dated 24th July, 1998 are well founded. The written rulings and observations were clearly intended to assist the applicants and those who represented them to make appropriate and full submissions. Both the applicants and the Inquiry knew that in 1972 a Tribunal acting with precisely similar powers had granted all soldiers, including in particular those who had fired live ammunition, the opportunity to appear without being named. That level of anonymity could not therefore be regarded as obviously inappropriate for the present Inquiry simply because it is a Tribunal of Inquiry with the powers given to such an Inquiry by the 1921 Act, nor has it been possible to point to anything said by the Prime Minister or by the Inquiry in its opening statement to lead to that conclusion. That point seems worth making in the light of subsequent events so as to emphasise what the July statement did not say. It did not suggest, even tentatively, that the level of anonymity granted in 1972 might not be available, yet in due course this Inquiry ruled that -

“If anonymity in the strict sense were to be allowed on a widespread or blanket basis that would represent a material derogation from the Tribunal’s public investigative function.”

In his submission to us Mr Clarke said -

“To conceal completely the identities of those most centrally involved would be, as the Tribunal found, a material derogation from its public investigative function. It is not an answer to this point to say that the Tribunal itself would have the names. If the soldiers names cannot be referred to in the course of proceedings or in the report that will fundamentally alter the character of the Inquiry. It will jeopardise the public perception of a thorough exposure of the truth, and prejudice the Tribunal’s aim of resolving the public crisis of confidence. The Tribunal’s duty is not just to acquire information but to disseminate it.”

There may be much to be said for that approach, but it is noticeably absent from what was said in July.

7 The Threat Assessment

On 28th July 1998 the Secretary to the Inquiry asked the Home Office whether, to assist the Inquiry in forming a judgement of the need for anonymity, it could provide advice on the continuing risk to those soldiers who were involved in Bloody Sunday. An assessment was obtained from the Security

Service on 22nd October 1998, and it was sent to the Inquiry by the Home Office on 23rd October 1998. It is headed "Threat Assessment - Bloody Sunday Inquiry" and we set it out in full:

"GENERAL ASSESSMENT

Though the current situation in Northern Ireland means that the threat of terrorist attacks by the Provisional IRA (PIRA) is currently low, the possibility of attacks by republican dissidents remains.

The potential targets of dissident republican terrorists are unlikely to be significantly different from those formerly favoured by PIRA. The military has long been regarded as a legitimate target by republican terrorists, and numerous military personnel have been attacked on the mainland. Given the continuing signs of the dissidents' intent to disrupt the peace process through violence, and the importance of 'Bloody Sunday' in republican history, we assess that there is the potential for military witnesses to the Inquiry to be singled out for attack.

Republican dissident groups have demonstrated the ability to launch a variety of attacks particularly in Northern Ireland. Further, republican dissidents have in recent months twice prepared to mount an attack on the British mainland. In April 1998 a vehicle-borne improvised explosive device destined for the mainland was intercepted at Dun Laoghaire. On 10th July 1998 three individuals alleged to be members of a republican dissident group were arrested in London and have since been charged with conspiracy to cause explosions and, in the case of one of them, possession of explosives. We assess that republican dissidents retain the materiel and personnel to mount attacks on the British mainland. As for the individual groups, the future of the 'Real' IRA's current ceasefire is uncertain. The Continuity IRA, the only Irish Republican terrorist group not currently on ceasefire, has not yet mounted mainland attacks, but the possibility of it doing so cannot be discounted. PIRA has been observing a ceasefire since July 1997 but has so far maintained the capability of returning to violence should it decide to do so. Taken together, these factors indicate that the overall level of threat to the mainland, and to identifiable military personnel, could rise at short notice.

ANONYMITY AND IDENTIFICATION.

Even where terrorists have the capability and intent to mount an attack, if individuals cannot be identified and located then they are not at threat. This is the basis for the requirement for anonymity, which cannot be recovered once it has been lost. The variety of sources of information in the public domain make it increasingly easy to locate individuals, and where the names are unusual it is possible to do so on the basis of name alone. Thus if their names are revealed military witnesses to the Inquiry will be at a moderate level of threat, and this is likely to increase in the event of an increase in the overall mainland threat.

A number of military witnesses due to attend the Inquiry have already had their names publicly associated with the events of Bloody Sunday. Since they have already been identified they are already at a moderate level of threat, and this will not increase solely as a result of their attendance at the Inquiry. However, if the proceedings focus on the conduct of particular military personnel, and those personnel are identified by name, it is possible that the threat to them will rise.

We do not consider that, in general, visual identification of military witnesses is likely to cause the Irish-related terrorist threat to them to rise. The exceptions would be those who are (or will be) operationally deployed, any who are of particularly distinctive appearance or have a high public profile, and possibly those who live or work in Northern Ireland.”

What, it may be asked, is “a moderate level of threat?” Unfortunately the Security Service did not explain, and the Inquiry, which did not ask for an explanation, was left to draw its own conclusions. Mr Glasgow is critical of the Inquiry for not asking for further information but, as Mr Clarke emphasises, the Inquiry did leave it to those seeking anonymity to provide evidence to support their case, and they did receive copies of the Threat Assessment. For present purposes we find it unnecessary to decide who was “to blame”. Suffice to say that it now seems clear that the Inquiry did not interpret the Threat Assessment as the author of that assessment, namely the Security Service, intended. In its ruling, to which we will come in due course, the Inquiry, having referred to the Threat Assessment, concluded that “the evidence of risk, viewed objectively, is limited and unspecific”. In an affidavit sworn on 11th February 1999 Mr Solomons, an Assistant Treasury Solicitor, sets out the reaction of the Security Service, which is no party to these proceedings, to the Inquiry’s interpretation of its assessment. Part of what he says is worth quoting -

“The terms of the ruling indicate that the Tribunal has misunderstood the nature of the assessment. Threat assessments do not, by their nature, consist of concrete predictions. If they did, atrocities could be foreseen and pre-emptive measures taken. Nor are they assessments of risk. A moderate threat to a vulnerable target will produce a higher level of risk than a moderate threat to a target of low vulnerability. ... The system identifies six levels of threat, two of which come below “moderate” and three above. The term “moderate” is used to indicate that there is potential for a target to be singled out for attack. At the time the assessment was made (October 1998) a “moderate” threat was the highest applied to any public figure in Great Britain on account of domestic terrorism. At the next level up a target would be assessed to be a priority target.

The Tribunal appears to have been looking for very specific intelligence that a particular group intended to target soldiers involved in Bloody Sunday. This is not the way threat assessments work. ... The Tribunal twice referred to the risk to the soldiers as being “unspecific” but were

specific intelligence to be received which indicated that the witnesses were high priority targets, then they would be at such a high risk of threat that the normal response would be for them to be provided with armed police protection.

The significance of the device which was intercepted at Dun Laoghaire, and the arrests in London in July 1998, is that mainland attacks have recently been attempted. The intended targets are not known. But it is known that the military are considered "legitimate" and highly desirable targets for Republican terrorists. This would be likely to apply a fortiori to former soldiers who killed Catholic youths."

In his written skeleton argument before us Mr Clarke says -

"Mr Solomons offers a gloss, itself somewhat obscure, on the meaning of the words "moderate risk" used in the threat assessment. If the term was intended to have a meaning different from, or more specific than, the ordinary English meaning of those words, this should surely have been explained to the Tribunal when the threat assessment was provided."

We do not regard Mr Solomon's gloss as obscure. It plainly clarifies the meaning of "moderate" where that word is used in the Threat Assessment, and Mr Clarke's submission we regard as little short of an admission that the Inquiry attached a different and less sinister meaning to the word. Obviously the Tribunal's understanding of the Threat Assessment formed a significant part of the material to which it had regard when reaching its conclusion.

8. Submissions other than Threat Assessment.

On 2nd September 1998 Mr Lawton sought anonymity "in respect of all the soldiers whom I currently represent". His clients included officers whose names had already been disclosed, and for them he sought only the withholding of addresses and telephone numbers. For the soldiers his application was that "no information tending to disclose their identities, occupations, addresses or telephone numbers should be disclosed to any person other than members of the Tribunal and its staff." His letter continues -

"I consider that the Ministry of Defence is better placed to inform the Tribunal about the nature and extent of the security risk. Indeed, one of my difficulties and serious concerns arises out of the fact that I have very little information about the true nature of the security risks. I and my clients are almost wholly dependant on others to provide such information.

The principal basis on which my applications for anonymity are made is that my clients believe that they and their families would be at risk of being killed if their identities and whereabouts were revealed. Some of those whose identities are already known have already been subject to threats of murder or have been informed at one time or another that they are at such risk. Save in the case of the letter bomb intercepted by General Ford's bank (where the nature of the threat was self-evident) and the express written threat which he received, the only information given to my identified clients has been the fact that a threat has been perceived by others."

At the end of the letter Mr Lawton says -

"It remains my submission that the universal perception of the soldiers that they are at risk is manifestly reasonable. If the Tribunal is not prepared to make the orders which I seek we will make application to advance further argument in camera."

On 23rd October 1998 the Ministry of Defence, having seen the Threat Assessment, asked for preservation of the anonymity of soldiers not yet contacted until more was known about their personal circumstances. As the writer of the MOD letter put it -

"Essentially the test to be adopted is whether the public interest in open justice is outweighed by the public interest in protecting the physical security of potential witnesses."

Mr Clarke contended that the Inquiry by its ruling did what had been asked of it by the MOD. That we do not accept. The MOD asked that no ruling be made until the soldiers could be seen and instructions be obtained from them, but the Inquiry made a ruling, even if it did leave some room for further submissions at a later stage. During November 1998 submissions were made by two firms of solicitors acting for families of the dead and injured, and by British Irish Rights Watch, and the Committee on Administration of Justice. The thrust of those submissions is reflected in paragraphs 5 and 6 of the submission on behalf of the family of James Wray, deceased, which read -

"5. The Inquiry has promised a radically different approach from the Widgery Inquiry. One of the most objectionable features of Widgery was that soldiers gave their evidence under the cloak of anonymity, told lies, and were never prosecuted or called to account. If this Inquiry adopts the same practice on anonymity, it will attract the same cynicism and disrespect. A process that starts by covering up the names of key witnesses will be seen as yet again covering up the truth.

6. By contrast, an Inquiry which starts by making clear that it proposes to conceal nothing of relevance, and that it expects witnesses to come forward, identify themselves, and be subjected to fair and public scrutiny, will deserve and will receive the confidence and participation of the public."

It is contended that in 1999, in contrast to 1972, the increase in the personal security risk to former soldiers if their names were to be disclosed would be negligible, whereas withholding names would seriously damage the Inquiry and the Peace Process.

On 27th November 1998 the Inquiry gave the solicitors for the applicants an opportunity to respond to the November submissions, and they responded on 3rd December 1998. That submission stressed that a refusal of anonymity could amount to a withdrawal of what was granted by Lord Widgery. It referred to the Wray submission that names without addresses are untraceable, and continued -

“While there may be some force in this submission it is equally true that an individual’s name is the starting point for tracing them, particularly now that the Electoral Role is freely available on the Internet, and the submission does not and cannot detract from the genuineness and reasonableness of the soldiers fears of the consequences of disclosure.”

Reference was made to the Security Service Threat Assessment, and to the suggestion that anonymity would prejudice the Inquiry’s fundamental objective. As to that the applicants submitted in paragraph 17 -

“When the Tribunal knows all that there is to be known about all witnesses who appear before it, the effectiveness, thoroughness and fairness of its inquiry will not in any way be compromised by the fact that the names and addresses of witnesses are not published.”

The submission addressed the suggestion that soldiers might be more inclined to lie if giving evidence anonymously and other arguments which for present purposes do not need to be rehearsed.

9. The Doherty Letter

On 1st December 1998 one member of the Inquiry, Sir Edward Somers, left for New Zealand.

On 2nd December 1998 Desmond J Doherty and Co sent to the Inquiry by fax a letter on behalf of some people who had already given statements to the solicitors acting for the Inquiry. The main paragraphs of the letter read:

“Some of my clients have expressed a concern at their addresses being available on the Internet. My clients are in no way criticising the very proper way the Inquiry is being dealt with by way of information to the public but I do trust you appreciate that they are very sensitive to the fact that someone may have access to their address via the statement on the Internet. ...

To be more direct in connection with the matter and again by way of example one of my clients has already given a very lengthy and detailed statement to Messrs. Eversheds which I am in the process of amending and agreeing with my client. My client also gave a statement for the previous Inquiry and gave oral evidence at that Inquiry.

My client has confirmed to me that a number of threats were received by the client from certain organisations as the address of this client had been published in a national paper.”

As Mr Clarke points out, the request was simply to withhold addresses, not names, and the threat referred to what happened after the 1972 Tribunal, not to the current Inquiry.

By the time that the Doherty letter was received the Inquiry had almost completed work on its rulings on anonymity and venue. As can be seen from the letter written by Mr Ridd, solicitor to the Inquiry, on 29th December 1998. He says that the rulings -

“ Followed several discussions between the three Members of the Tribunal in several meetings in the Inquiry’s offices.”

His letter continues -

“A final discussion on points of detail took place on Friday 11th December, but Sir Edward Somers had already departed to New Zealand and was therefore not at that meeting. The latest draft of the Rulings was faxed to Sir Edward late on 11th December, and he signified his agreement by fax on Monday 14th December. I believe a small change of internal paragraph numbering was made subsequently and that Lord Saville initialled the final version on Tuesday 15th December.”

On 14th December 1998, the day when Sir Edward signified his assent by fax, the Inquiry sent a copy of the Doherty letter to the solicitor for the applicants, inviting a response by 8th January 1999. There was an immediate response, by fax, on 16th December 1998, the last paragraph of which reads -

“Mr Doherty’s request dated 2nd December raised issues which are highly material to the applications made on behalf of our clients in relation to anonymity and venue. I should be grateful for your confirmation that the matters raised by Mr Doherty’s letter and any responses to Mr Doherty’s requests will be taken into account by the members of the Tribunal in considering those applications on behalf of our clients.”

On 17th December 1998 Mr Ridd responded, saying -

"I can confirm that the Tribunal was aware of the new application when your client's applications on anonymity and venue were considered, but responses to Mr Doherty's application had not by then been received. The intention is that rulings on anonymity and venue will be published today."

The rulings were then published as anticipated.

10. The December decision.

The ruling on anonymity covers 26 pages of transcript, and we do not therefore attempt to incorporate it in full into this judgment, but we draw attention to the following points -

- (1) In paragraph 14 the Inquiry recites part of its July statement before referring to the submissions it received.
- (2) In paragraph 18 the Inquiry deals with the grant of anonymity by Lord Widgery and says -

"We do not know by whom or in exactly what terms this assurance is supposed to have been given. It seems to us that we can assume no more than that the soldiers understood and expected that their names would not be divulged in the course of the proceedings before Lord Widgery. We are not aware of any reason to believe that an assurance was given that their names would never be disclosed by anyone. Accordingly, we treat these as fresh applications for the grant of anonymity and we start with no presumption that the existing de facto anonymity should be preserved."

For the reasons set out in paragraph 4 of this judgment we cannot regard that as a proper approach to the assurances given in 1972. Strictly construed it would mean, as Mr Glasgow pointed out, that as soon as Lord Widgery reported, if not before, the assurance ceased to have any effect. No serving soldier or policeman would have been comforted by an assurance as limited as that.

- (3) In paragraph 28 of the Ruling the Inquiry, after acknowledging that Bloody Sunday has always been "a matter of exceptional controversy in many quarters" states -

“Nevertheless, there is virtually no material before us that demonstrates the extent, even prior to the paramilitary cease-fires, of any specific risk to former soldiers or their families arising from their previous involvement in controversial events in Northern Ireland. Mr Lawton’s application mentions that General Ford at one time received a written threat and a letter bomb was intercepted by his bank. But we do not know when these incidents occurred, nor whether there was any evidence to link them directly to Bloody Sunday.”

Mr Glasgow is, perhaps understandably, critical of that passage. He says that if the Inquiry did not know when the threat to General Ford was made, and it purported to have some background knowledge of events connected with Northern Ireland, it could easily have asked. As to the connection with Bloody Sunday, the link was obvious. He was the commanding officer at the material time.

In paragraph 28 the Inquiry goes on to refer to the Dun Laoghaire interception, mentioned in the Threat Assessment, and to the subsequent arrests, but the Inquiry is impressed by the Wray submission that “there is no indication that individual soldiers have been targeted in recent years, or that any soldier has ever been attacked specifically as a result of having given evidence in any proceedings.”

- (4) In paragraph 29 the Inquiry accepts that the past may not be a reliable guide to the future, and continues -

“Even so, we think it fair to say that the evidence of a continuing threat to soldiers who may be called as witnesses before this Inquiry is general as opposed to specific. Perhaps of necessity, it amounts to informed speculation as to what could happen, instead of a more concrete prediction based upon specific past experience.”

So, having, as we accept, misunderstood the Threat Assessment the Inquiry makes its own assessment of the evidence of risk which it describes in the next paragraph as “limited and unspecific”.

- (5) However, it accepts that soldiers not previously named may genuinely believe themselves to be at risk. As to the objective reality of the risk the Inquiry says “in the light of the Threat Assessment we are not prepared to castigate that general fear as unreasonable. “
- (6) In paragraph 31, still purporting to act “in accordance with the principles set out in our ruling in July, the Inquiry sets out to consider “what if any kind of anonymity would be appropriate in the circumstance”.

As we have indicated above it seems to us that, if the July ruling was to be followed, once a genuine and reasonable fear was established the kind of anonymity to be granted was self-evident, because the tribunal had itself said that “restricting the disclosure of names and addresses ought to be sufficient”. But in paragraph 31 the Inquiry adopts a much more cautious approach, saying that “before granting anonymity of any kind we must be satisfied that we can do so without prejudicing our fundamental objective of establishing the truth about what happened on Bloody Sunday”.

- (7) All of the arguments against any grant of anonymity are then rehearsed, including this consideration in paragraph 37 -

“It is clear that the families of the deceased and the injured would like to see prosecutions brought against the soldiers who in their view were guilty of serious offences on Bloody Sunday. If that were to happen, the names of the defendants would in the ordinary way become public. The position would not be affected by any anonymity for the purposes of this Inquiry, because the prosecuting authorities would still be able to ascertain the true identity of the soldiers concerned.”

As Mr Glasgow points out the Inquiry itself could have chosen to grant anonymity at the investigative stage and reserved for later consideration whether to name certain people in its report. That option does not seem to have been seriously canvassed before the Inquiry.

- (8) In paragraph 39 the Inquiry concludes that -

“None of the factors to which we have so far referred is, in our view, sufficient to demonstrate that the granting of anonymity would prejudice the fundamental objective of the Inquiry.”

That paragraph then goes on -

“We attach considerably greater weight, however, to another factor, which appears in the submissions only in the form of an argument that to grant anonymity would diminish public confidence in the Inquiry by creating the impression that the true facts are being concealed.”

- (9) The point is developed in paragraph 40 -

“We see the point of substance as being not the maintenance of public confidence as such, but rather the proper fulfilment of our public duty to ascertain what happened on Bloody Sunday. An intrinsic part of that task is the investigation of the actions of individual soldiers on that day, which in our view encompasses not only what they did, but who they were. We do not think that this makes it axiomatic that the name of every soldier involved should be disclosed, no matter what his individual circumstances might be. Even a code letter or number provides a degree of identification, in the sense that it distinguishes the witness concerned from all others involved. To restrict the disclosure of the actual names of a few soldiers, for sound reasons, would not in our view substantially impair our investigation of the facts. But we are satisfied that, if anonymity in the strict sense were to be allowed on a widespread or blanket basis, that would represent a material derogation from the tribunal’s public investigative function.”

That, Mr Glasgow submits, is a critical paragraph, and it is, to say the least, not as clear as it might be. If the public duty of the Inquiry is to ascertain what happened on Bloody Sunday, and that is what the original remit did suggest, certainly the Inquiry itself would need to know the identities of individual soldiers, but that is not what the application for anonymity was all about. It was about whether the knowledge of identities, and in particular of names, should be confined to the Inquiry and its staff. So what did the Inquiry mean by saying that its task encompasses “not only what they did but also who they were?” And, as we said earlier in this judgment, if the Inquiry did take the view that any widespread anonymity would derogate from its public investigative function, that was something not hinted at in July or at any time thereafter.

- (10). Paragraph 41 recognises that addresses, occupations and telephone numbers should not be revealed. That was not contentious and no one had asked for a screen. Then, in paragraph 42 the Inquiry returns to the question of-

“Whether any, and if so what, degree of anonymity is appropriate, having regard to our views as to the nature and extent of the risk, and our rejection of widespread or blanket anonymity, in the strict sense, as being incompatible with the Tribunal’s fundamental objectives.”

(11). In paragraph 44 the Inquiry concludes that -

“It would be wrong in principle to give a general dispensation allowing all military witnesses to give evidence without revealing their names”.

The Inquiry expresses the belief that -

“This would, in the majority of cases, be going further than is justifiable or appropriate in circumstances where there is no concrete evidence of a specific threat.”

At least by implication the Inquiry is there seeking that which, for reasons now explained by Mr Solomons, cannot be produced, namely concrete evidence of a specific threat.

(12) In paragraph 45 the Inquiry considered the special position of those soldiers, such as these applicants, who fired live rounds on Bloody Sunday, and accepts that they have “more compelling and substantial grounds than others for believing themselves to be at risk.”

(13) But, as the Inquiry points out in paragraph 46, their conduct lies at the very heart of the Inquiry, so the Inquiry concludes -

“To allow this group to remain entirely anonymous would be a step which we would find difficult to reconcile with our public duty to determine what happened on Bloody Sunday.”

Obviously, as Mr Glasgow submits, that begs the question of what really is encompassed by the public duty of the Inquiry to determine what happened on Bloody Sunday.

(14) In paragraph 47 the Inquiry concludes that it would be justifiable to permit those who fired live rounds “a limited form of additional anonymity, under which their surnames will be disclosed but their forenames will not.” As everyone accepts, this compromise had not previously been ventilated, and there had been no submissions addressed to it. The Inquiry regarded it as “the best available solution to a difficult problem because it will create a significant extra element of assurance for these individuals as regards their personal security without having any material adverse effect on the fulfilment of our task.” The Inquiry goes on to explain that if the surname is common it will be very difficult to locate an individual on the basis of name alone, but such disclosure “will avoid giving them or others the false impression that they are immune from any effective public scrutiny or from criticism should it prove to be justified.”

- (15) In paragraph 48 the Inquiry indicates a willingness to consider special factors which might tell in favour of withholding surnames in individual cases - for example, if a witness lives in Northern Ireland, or has an very unusual name. Conversely a forename as well as a surname might be disclosed if, for example, there was evidence that on Bloody Sunday someone was heard to call a witness by his forename.

11. The Function of this Court.

A. Jurisdiction.

Despite the persuasive arguments addressed to us by Mr Lavery we have no hesitation in saying that this application is properly brought before this Court. The Inquiry was set up by resolution of both Houses of Parliament. It has the powers of an English statute. It is based in London, and that is where the ruling was made which is now being challenged. The ruling primarily affects former members of the armed forces, most of whom are probably not now resident in Northern Ireland, and although it obviously has wider ramifications we see no reason why it should not be challenged here. In saying that we do not forget that the incident which is at the centre of the Inquiry took place in Londonderry, and that the Inquiry expects to discharge many of its functions there. As has already been demonstrated there may well be matters best considered by the High Court in Northern Ireland, but we cannot regard this application as being one which we cannot entertain.

B. Anxious Scrutiny.

Although we were treated to a good deal of learning from all sides there is in reality no issue as to the approach which ought to be adopted by this Court to an application of this kind, involving as it does the personal safety and possibly the lives of the applicants and their families. In R v Home Secretary ex parte Bugdaycay (1987) AC 514 Lord Bridge said at 531 -

“The most fundamental of all human rights is the individual’s right to life, and when an administrative decision under challenge is said to be one which may put the applicant’s life at risk the basis of the decision must surely call for the most anxious scrutiny.”

In the same case at 537 Lord Templeman said -

“Where the result of a flawed decision may imperil life or liberty a special responsibility lies on the court in the examination of the decision-making process.”

In R v Coventry City Council ex parte Phoenix Aviation (1995) 3 All E R 37 at 62 Simon Brown LJ said that “when fundamental human rights are in play the courts will adopt a more interventionist role”. In Ministry of Defence ex parte Smith (1996) QB 517 Sir Thomas Bingham MR at 554 accepted as an accurate distillation of the principles counsel’s submission which was -

“The court may not interfere with the exercise of an administrative discretion on substantive grounds save where the court is satisfied that the decision is unreasonable in the sense that it is beyond the range of responses open to a reasonable decision-maker. But in judging whether the decision-maker has exceeded this margin of appreciation the human rights context is important. The more substantial the interference with human rights, the more the court will require by way of justification before it is satisfied that the decision is reasonable in the sense outlined above.”

In R v Secretary of State for the Home Department ex parte Ahmed, 30th July 1998 unreported, Lord Woolf MR said at page 18 of the transcript -

“The relevance of the European Convention of Human Rights is that it provides a background against which a complaint of irrationality can be considered. The fact that a decision maker failed to take account of Convention obligations when exercising an administrative discretion is not of itself a ground for impugning that exercise of discretion.”

Our task therefore is plain. It is to approach this decision with care, making proper allowance for the discretion afforded to the Inquiry, but also because of the subject matter exercising anxious scrutiny in relation to the challenges which have been made.

C. Fresh Evidence.

Normally this court is at pains only to have regard to the material which was available to the body whose decision is impugned, but where the decision is said to impinge on personal safety, and perhaps even put lives at risk, we cannot disregard material information which has come to hand since the original decision was made. So we do have regard to the affidavits, and in particular to those passages in the affidavits to which we have referred in the course of this judgment. If we are to exercise anxious scrutiny we cannot do otherwise.

12. Conclusions.

We return finally to the issues which we identified at the beginning of this judgment -

- (1) We are satisfied that the present Inquiry did misunderstand the nature and extent of the anonymity granted to the applicants by Lord Widgery, and that this misunderstanding played a significant part in the Inquiry's reasoning process when arriving at the decision under challenge. Unlike Mr Glasgow we do not find it helpful to speak in terms of withdrawing anonymity, but we do consider it important for the Inquiry to have a clear perception of what was granted in 1972 and what endured.
- (2) We are further satisfied that the July statement, perhaps inadvertently, did create the impression that if a soldier satisfied the Inquiry that he had a genuine and reasonable fear of the potential consequences of disclosure of his personal details then his name and address would not be disclosed.
- (3) We are satisfied that the Inquiry did misinterpret the Security Service Threat Assessment. The error is understandable, but it is relevant. The Assessment needs to be interpreted in the light of what Mr Solomons now says.
- (4) We are troubled by the fact that having given in its July statement a clear indication of what any one seeking anonymity should try to prove the Inquiry when it came to make its decision looked for something rather different, namely concrete evidence of specific threats. If that was what was required it seems to us that the requirement should have been made clear, even though the point that no such evidence had been produced was made by the relatives of the dead and injured, so the applicants did have a brief opportunity to respond to it.
- (5) We are also troubled by the fact that the Inquiry:
 - (a) accepted that all soldiers probably had genuine and reasonable fears, and that soldiers who fired live rounds had more compelling and substantial grounds than others for believing themselves at risk, so that by inference they were entitled to some form of anonymity, yet -
 - (b) granted to that limited class a form of anonymity for which no one had contended and the safeguarding effects of which were at best a matter of speculation. In saying that we do bear in mind Mr Ridd's affidavit evidence as to the Tribunal's own difficulty in tracing former soldiers and the distinction made by Mr Clarke between identification and tracing,

but the safeguarding effects of a “surnames only” policy which has to be waived if the surname is unusual or the forename is relevant must be questionable.

Although submissions were made to us as to the impact of Article 2 of the European Convention we do not believe that, even by way of background, the Convention adds anything significant to the law which we have to apply. And we were not impressed by either of the last two issues to which we were referred. It seems to us that the letter from Desmond J Doherty & Co was not really in point in relation to the question of whether or not soldiers should be given names, and no comment on that letter would have been likely to assist the Inquiry either way. As to procedural impropriety it is clearly necessary that all members of a tribunal should take a full part in any decision which is made. Having said that, we have no reason to think that there was any significant shortcoming in this case. Finally as to prematurity, we do not accept that the decision was premature. Interviewers of soldiers and ex-soldiers need to be able to tell their interviewees what the future holds, so a policy decision does need to be made now, even if some soldiers are not yet identified and some may be able to put forward a special case.

For the reasons which we have set out we are satisfied that in more than one respect the decision under challenge is flawed. In the language of judicial review the flaws can be expressed in different ways. For example, the misunderstanding as to the nature of the 1972 anonymity and the misunderstanding of the Threat Assessment can be categorised as failures to take relevant matters properly into consideration. The imbalance which we perceive between the July statement and the December ruling could be described as a procedural impropriety. The nomenclature is of little importance, but in our judgment the result must be that the decision is set aside and the matter is returned to the Inquiry for it to re-determine. We should however make it clear that we express no view whatsoever as to whether there should be any grant of anonymity of any kind. That is not our function. It is clear from the information before us that there are powerful arguments both ways. How those arguments should be resolved the Inquiry must decide.

MR GLASGOW QC: My Lord, in the terms of our application, may I respectfully ask that we have a declaration that the decision is unlawful and invalid, an Order for certiorari to move to their Lordship's court and quash the decision and, of course, I ask for no order as to costs.

Would your Lordships forgive me for mentioning one very small typing mistake? Would your Lordships be kind enough to go to page 22 and to the “Conclusions” paragraph, numbered 12 sub-paragraph (2)? I think “a general” has crept in for “a genuine”. It is a minor point, but could be important.

LORD JUSTICE KENNEDY: If I read “general”, I apologise.

MR GLASGOW QC: My Lord, there is one other tiny date correction. At “The Threat Assessment” paragraph, which is paragraph 7, the date is given in the fourth line as “An assessment was obtained by the Security Service on 22nd November ...” The date was actually October, and, as your Lordships will see, it is followed on the next line that it was sent on the 23rd.

MR CLARKE QC: My Lord, there is one matter. I seek to raise one precise form of Order. I do not dissent from my learned friend’s invitation to your Lordships to make the declaration as he formulated, that the decision is unlawful and invalid and an Order for certiorari to move to quash it, provided that the antecedents to the said decision is made clear.

Do your Lordships have the Form 86A? If your Lordships turn to page 2 of the internal pagination of the form (it may be page 3 in the pagination) the decision referred to is the decision as in (1):

“The decision of the Bloody Sunday Inquiry (‘the Tribunal’) taken on the 14th December 1988 withdrawing anonymity from the Applicants save for a limited form...”

Might I put forward a suggestion, particularly in the light of the observations of your Lordships’ judgment, as to the utility of the expression of “withdrawing”? The decision might be characterised as:

“The decision of the Bloody Sunday Inquiry (‘the Tribunal’) taken on the 14th December insofar as it denied anonymity to the Applicants save ...”

If, in the drawing up of the Order, it is made clear that when it is the “said decision” it is the decision that I have just characterised, I think that would meet everybody’s needs. If there is any disagreement I will come back on that.

There is one final matter. I seek from your Lordships a leave to appeal? Your Lordships will appreciate that I have not been unable to take instructions, in the light of the oral agreement that your Lordships have understandably imposed, and the fact that I seek such leave does not necessarily mean that if your Lordships gave it to us the Tribunal will avail itself of it, but I need to ask your Lordships for leave.

There is, in particular, one matter that your Lordships may think appropriate for consideration in another place, which is the true interpretation of the assurances given by Lord Widgery. Your Lordships have taken a clear and different view from that of the Tribunal, and your Lordships I am sure will appreciate that the extent to which this Tribunal in some shape or form is bound or affected by Lord Widgery’s decision as to anonymity is a matter of some importance, interest and concern in a number of different quarters. So I will respectfully ask your Lordships for leave?

MR GLASGOW QC: My Lords, on the form of the Order, subject to one tiny matter, I entirely accept what my learned friend has helpfully said. We just need to include, in drawing up the Order, that it is, of course, "... the Applicants, including H..." He was associated with us, but not an Applicant. If you will forgive us for doing that, we will draw it up in precisely the terms that my learned friend suggested.

As to leave to appeal, the matter has to be in your Lordships' hands. We will only say, with respect, that, having won this matter on a number of quite distinct grounds, any one of which would have been sufficient to justify the judicial review. The fact that there may be another matter that the Tribunal would wish to give consideration to, then it can give it, but it will be wrong to continue any further uncertainty about this. It is not as if this has been a technical win on one ground. Effectively, every single substantive complaint that has been made is justified in your Lordships' judgment. In those circumstances, if leave is to be granted, it should be granted elsewhere, and the sooner the better.

LORD JUSTICE KENNEDY: Does anyone else want to say anything?

COUNSEL: No, my Lords.

RULING AS REGARDS LEAVE TO APPEAL

LORD JUSTICE KENNEDY: Mr Clarke, we are not prepared to grant leave.

A2.44: Court of Appeal (Civil Division) (London, 30th March 1999): anonymity for soldiers (item 4 above)

[1999] EWCA Civ 1136

**In the Supreme Court of Judicature
In the Court of Appeal (Civil Division)
On appeal from the Queen's Bench Division (Crown Office List)
(Lord Justice Kennedy, Owen and Blofeld JJ)**

**Royal Courts of Justice
Strand, London, WC2A 2LL**

Tuesday 30th March 1999

**Before:
The Master of the Rolls
(Lord Woolf)
Lord Justice Otton
Lord Justice Ward**

Regina

-v-

**Lord Saville of Newdigate
The Honourable Sir Edward Somers
The Honourable Mr Justice William L Hoyt
(Members of the Tribunal sitting as the Bloody Sunday Inquiry)
Ex parte: B; O; U and V**

(Computer-aided transcript of the Palantype notes of Smith Bernal Reporting Limited, 180 Fleet Street, London EC4A 2HD. Tel: 0171 421 4040. Official Shorthand Writers to the Court)

Mr C Clarke QC and Mr A Roxburgh (instructed by Philip Ridd, London, EC3V 9JB) appeared on behalf of the Applicants.

Mr E Glasgow QC, Mr D Lloyd Jones, Mr M Bools (instructed by the Treasury Solicitor, London SW1H 9JS) appeared on behalf of the Respondents.

Mr J Coyle (instructed by Messrs Birnberg & Co, London, SE1 1NN, London agents for Desmond J Doherty & Co, Derry BT48 7EP, McCartney & Casey, Madden & Finucane and McDermott & McGurk) appeared on behalf of various parties.

Mr I Burnett (instructed by the Treasury Solicitor, London, SW1H 9JS) appeared as an interested party.

Judgment
(As approved by the Court)
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Tuesday 30th March 1999

JUDGMENT

LORD WOOLF, MR: This is an application for leave to appeal part of a decision given by the Divisional Court, Kennedy LJ, Owen and Blofeld JJ, on 16 March 1999. On an application for judicial review, the Divisional Court granted five former soldiers, B, O, U, V and H, a declaration that a decision of the second Bloody Sunday tribunal, of 14 December 1998, set up by Parliament under the Tribunals of Inquiry (Evidence) Act 1921, was unlawful. The Divisional Court also granted an order of certiorari quashing that decision.

The decision which was quashed was that the five former soldiers, who had been granted anonymity at the first tribunal presided over by Lord Widgery, LCJ, in 1972, were not to have full anonymity if they are called to give evidence at the second inquiry. The decision was to be subject to any further decision of the tribunal.

The second tribunal is being conducted by the respondents, the Right Honourable Lord Saville of Newdigate, the Right Honourable Sir Edward Somers and the Honourable Mr Justice William L Hoyt. The hearing before the Divisional Court was expedited as was the hearing before this court. We are grateful for the helpful arguments which were prepared by all parties for this hearing, together with the skeleton arguments with which we were provided.

I turn to the background facts which I can largely take from the skeleton argument prepared by Mr Christopher Clarke QC, counsel to the inquiry. The tribunal inquiry was appointed to enquire into the events in Londonderry on 30 January 1972, commonly known as Bloody Sunday. In the course of those events, regrettably, 13 people were shot dead and at least that number injured by gunfire on the streets of Londonderry. It is not in dispute that the majority, at least, of the casualties was the result of shooting by members of the British Army, but the circumstances of the shooting are, and always have been, acutely controversial.

The army's version of events is that the soldiers only aimed shots at identified gunmen and nail or petrol bombers. The relatives of the deceased and injured, and many civilian witnesses, maintain that the victims were innocent of any wrongdoing and that the shooting was unjustified and criminal. Within a very short time of Bloody Sunday, a public inquiry into the events of that day was established under the Act, to be presided over by Lord Widgery, LCJ. Public hearings were held in Colerain in February and March 1972. Lord Widgery's Report was presented to Parliament in the following month. That is within a remarkably short period of time.

The relatives of some of the dead and injured have never accepted the findings and conclusions of the Widgery Report. Rightly or wrongly, vigorous criticism of that Report and the procedures of the tribunal have been made over the years by a number of commentators. Those criticisms contributed to the pressure for a new inquiry to be set up into the events of Bloody Sunday. On 29 January 1998 the Prime Minister announced his decision to establish the "second tribunal" to conduct a fresh investigation of those events. We were informed that the terms of reference of both tribunals were the same.

An opening statement was delivered to the second tribunal in Londonderry on 3 April 1998. Various matters were considered at a hearing of 24 July 1998. That hearing of 24 July 1998 is a hearing to which I will have to make further reference. Further rulings made by the second tribunal as to the venue for the hearings and anonymity of military witnesses were published on 17 December 1998. It was these rulings which gave rise to the application for judicial review.

Although the preparatory work for the tribunal has been carried out in London, the public hearings are due to be held at the Guildhall in Londonderry commencing on 27 September 1999. The hearings will obviously take a long time and it is difficult at this stage to estimate when they will conclude. As a result of the decision of the Divisional Court, further consideration will have to be given to the ruling on anonymity.

As I indicated at the outset of this judgment, the application for leave to appeal only concerns part of the decision of the Divisional Court. It is accepted by the second tribunal that the issue of anonymity will need to be reconsidered afresh and the and the tribunal is naturally anxious that reconsideration should take place as soon as possible. It is because of the concerns of the tribunal, and of this court, that the parties should have as much time as possible to prepare for any further hearing in relation to the question of anonymity, that this court is giving judgment immediately, having heard argument yesterday, and has not reserved judgment as it would otherwise have wished to do.

At the first tribunal 40 soldiers gave oral evidence, including 23 of the 28 soldiers who admitted that they had fired live rounds on the day. Five of the witnesses at the first tribunal, who were senior officers, gave evidence under their own name. Their identities were widely known in any event. Other military witnesses were allowed to give evidence anonymously. Those who admitted that they fired live rounds were given code letters, others were given code numbers.

The tribunal accepts that it is subject to the supervision of the courts in an application for judicial review, although under section 2 of the Act of 1921 it has certain of the “powers, rights and privileges” vested in it of the High Court in relation to obtaining evidence. The Divisional Court also found in favour of the applicants, who were the soldiers to whom I referred, on five grounds. Those grounds were set out in paragraph 12 of the judgment under the heading “Conclusion”. I set out those 5 grounds:

“(1) We are satisfied that the present Inquiry did misunderstand the nature and extent of the anonymity granted to the applicants by Lord Widgery, and that this misunderstanding played a significant part in the Inquiry’s reasoning process when arriving at the decision under challenge. Unlike Mr Glasgow [on behalf of the soldiers] we do not find it helpful to speak in terms of withdrawing anonymity, but we do consider it important for the Inquiry to have a clear perception of what was granted in 1972 and what endured.”

It is this ground which gives rise to this appeal. The grounds continue:

“(2) We are further satisfied that the July statement [24 July 1998], perhaps inadvertently, did create the impression that if a soldier satisfied the Inquiry that he had a genuine and reasonable fear of the potential consequences of disclosure of his personal details then his name and address would not be disclosed.

(3) We are satisfied that the Inquiry did misinterpret the Security Service Threat Assessment. The error is understandable, but it is relevant. The assessment needs to be interpreted in the light of what Mr Solomons now says.”

Mr Solomons is a member of the Treasury Solicitor’s Department acting on behalf of the Ministry of Defence.

“(4) We are troubled by the fact that having given in its July statement a clear indication of what anyone seeking anonymity should try to prove the Inquiry when it came to make its decision looked for something rather different, namely concrete evidence of specific threats. If that was what was required it seems to us that the requirement should have been made clear, even though the point that no such evidence had been produced was made by the relatives of the dead and injured, so the applicants did have a brief opportunity to respond to it.

(5) We are also troubled by the fact that the Inquiry:-

(a) accepted that all soldiers probably had genuine and reasonable fears and that soldiers who fired live rounds had more compelling and substantial grounds than others for believing themselves at risk, so that by inference they were entitled to some form of anonymity, yet:

(b) granted to that limited class a form of anonymity for which no one had contended and the safeguarding effects of which were at best a matter of speculation. In saying that we do bear in mind Mr Ridd’s affidavit evidence as to the Tribunal’s own difficulty in tracing former soldiers and the distinction made by Mr Clarke between identification and tracing, but the safeguarding effects of a ‘surnames only’ policy which has to be waived if the surname is unusual or the forename is relevant must be questionable.”

Having set out the five grounds, I would examine the first ground which is challenged in this court. The Divisional Court, in accordance with the usual practice nowadays, set out its reasons for refusing leave to appeal to this court in the following terms:

“This is essentially an ‘interlocutory’ appeal and our decision requires the Inquiry to reconsider whether certain witnesses should not be named. We come to that conclusion because we were satisfied as to [a] number of complaints made in relation to the original ruling. When the

Respondents sought leave to appeal only one point was raised, namely our interpretation of the assurances given by Lord Widgery in 1972, which differs from that of the Inquiry, but even if we were wrong about that the result would still be the same.”

In other words the Divisional Court were indicating that, although they gave five reasons for their decision and those reasons are obviously, to an extent, cumulative, if they were wrong in relation to the first reason they would still have come to the same decision. This would then be on the basis of the other four reasons which they gave.

Having regard to the fact that only one of the grounds for the decision of the Divisional Court is under attack on this application for leave to appeal, Mr Glasgow, on behalf of the soldiers, submits that it is not as a matter of jurisdiction possible for this court to hear an appeal. But, in the course of argument he accepted that if this court considered that the second tribunal would be assisted by knowing the views of this court, it would be undesirable to deprive the tribunal of those views. That is a realistic and constructive approach. However, it is not possible to confer jurisdiction on this court by consent. The jurisdiction is statutory and therefore it is right that I should make clear that I am satisfied that this court, in the circumstances of this case, has jurisdiction to hear the appeal.

It is important to remember that decisions on applications for judicial review frequently do not only affect the immediate parties but affect the public as a whole. In this case it is in the interests of the public, the families and the former soldiers who will give evidence, that the tribunal which has been set up by Parliament to reconsider the Bloody Sunday incident is conducted in a fair and just way.

In support of the contention that no jurisdiction exists, Mr Glasgow referred the court to section 16(1) of the Supreme Court Act 1981 which reads, so far as relevant:

“...the Court of Appeal shall have jurisdiction to hear and determine appeals from any judgment or order of the High Court.” (My emphasis).

Mr Glasgow submits that you do not have appeals against reasons as opposed to the judgment or order. Secondly, he refers, making the same point, to RSC Order 59 rule 3(2), which provides:

“Notice of Appeal may be given either in respect of the whole or in respect of any specified part of the judgment or order of the court below; and every such notice must specify the grounds of the appeal and the precise form of the order which the appellant proposes to ask the Court of Appeal to make.”

He submits that provision of the Rules of the Supreme Court support his submission. He refers to a number of authorities which are well-known, starting with the case of Lake v Lake [1955] P 336, where Lord Evershed, MR, said in relation to the words, “judgment or order”:

“Nothing from the cases brought to our attention by counsel for the wife persuades me that by the words ‘judgment or order’ in the rule or in the subsection is meant anything other than the formal judgment or order which is drawn up and disposes of the proceedings and which, in appropriate cases, the successful party is entitled to enforce or execute.”

The other cases, include Prudential Assurance Co Ltd v Waterloo Real Estate CA 22 January 1999 (unreported). All the cases are to like effect to the case of Lake.

Mr Glasgow submits that for an appeal to lie to the Court of Appeal there must be a possibility of the order of the court below being varied as a result of the appeal. He draws attention to the order made in this case and submits that there is no such possibility.

On the other hand, he also drew our attention to the case of Curtis v London Rent Assessment Committee [1999] QB 92 where the relief sought was remission for re-hearing and determination in accordance with the correct opinion of the court, where a different approach was adopted by this court at page 109.

The response of Mr Clarke to these submissions is to refer to Order 59 rule 10(3), which sets out the very wide powers of this court on an appeal in these terms:

“The Court of Appeal shall have power to draw inferences of fact and to give any judgment and make any order which ought to have been given or made, and to make such further other order as the case may require.”

In relation to the powers of a court on judicial review, he refers to Order 53 rule 9(4) which is a similar provision to that which was being considered in the Curtis case. Under the heading “Hearing of Application for judicial review”, paragraph (4) states:

“Where the relief sought is an order of certiorari and the Court is satisfied that there are grounds for quashing the decision to which the application relates, the Court may, in addition to quashing it, remit the matter to the Court, tribunal or authority concerned with a direction to reconsider it and reach a decision in accordance with the findings of the Court.”

In this case the tribunal could be relied on to follow any guidance given by the Divisional Court. Because of this there was no need for the Divisional Court to make an order under Order 53 rule 9(4). If the power under Order 53 rule 9(4) had been exercised, it would have been unfortunate if there was an uncorrected error in the reasoning of the Divisional Court as the tribunal would be directed to reconsider the matter in accordance with that decision. If that power had been exercised under Order 53 rule 9(4), it would certainly be appropriate for this court to correct the reasoning of the Divisional Court.

It seems to me that, if there is an error in the reasoning of the Divisional Court (even though the power under Order 53 rule 9(4) has not been exercised), it is equally appropriate for this court to consider whether there is a correction needed to the reasoning of the Divisional Court. In these circumstances it is essential that this court should have what I believe it to have, that is a jurisdiction to remit the case to the tribunal and when doing so to correct an error in the reasoning of the decision of the Divisional Court. When this is the situation the fact that in a particular case it is, in practice, unnecessary to remit the case, cannot affect the jurisdiction of the Court of Appeal.

In my judgment, Mr Glasgow was absolutely right to make the concession that the judgment should be corrected, if indeed there was an error which required such correction. Before turning to the part of the decision which is the subject of the application for leave to appeal, I would make two observations of a general nature. First, I would emphasise that it would be quite wrong because on this occasion the Divisional Court exercised its jurisdiction to grant judicial review in relation to an interlocutory decision of a tribunal set up under the 1921 Act, to draw the inference that it is part of the normal role of the Crown Office or the Divisional Court to review interlocutory decisions of tribunals of this sort. Tribunals such as this often have the most difficult task to perform. They are set up without guidance as to the precise procedures which they have to follow. They have to work out that procedure for themselves. They will inevitably know much more about the problems of the particular area into which they have to enquire than can be known by a supervising court, such as the Crown Office Judge or the Divisional Court on an application for judicial review. Tribunals are entitled to determine their procedure for themselves. The courts should only interfere when there is some very good reason for them so to do.

In this particular case it was said that the decision of the tribunal could have adverse consequences to the soldiers concerned which could affect their security and indeed their lives. One can see that in that exceptional situation the Divisional Court would feel it was appropriate to intervene. No-one before this court has suggested that the Divisional Court was otherwise than correct in intervening in the way that it did on the basis of the conclusions to which it came. As I have indicated, this is a special situation and normally this is an area in which the courts would be wise not to become involved.

The second observation of general guidance I would make is that the approach indicated in the authorities upon which Mr Glasgow relies, not to allow appeals from the reasons of a lower court, in general is sound and should be observed by this court. With isolated exceptions today appeals always require leave and I would expect courts to be reluctant to grant leave in relation to decisions which are said only to be at fault because of some reason expressed by a tribunal. However, whenever there is a general rule, there are always situations which prove to be exceptional, as in this case.

I return to the part of the decision which is criticised. I begin by emphasising that it is but a small part of the reasoning which the tribunal gave for its decision on this occasion which is the subject of criticism on this appeal. Reading the reasoning of the tribunal, which extends to 29 pages (but also deals with issues of venue), I am impressed by the great care which the tribunal has exhibited in coming to its conclusions. It seeks to balance the interests of the families and others who are concerned to ensure that their longheld desire for the truth is fulfilled, as against the legitimate interests of the soldiers not to be inappropriately subjected to risks to their security.

It is also important to bear in mind that the decision of the tribunal was to an extent an interim decision. This is because the tribunal recognised that it would, if necessary, reconsider questions of anonymity either because of the material put before it by the families or because of further representations which were made on behalf of particular soldiers. Nonetheless, the tribunal was giving a general decision which would influence their conclusions on any further specific applications which were made. This is why it is important, if they had made an error in their reasoning, however careful they were, that the error is drawn to their attention and rectified. As I have already indicated, Mr Clarke's submissions to this court are confined to the first ground. Paragraph 13 of the decision explains what the tribunal meant by the use of the word "anonymity". It says:

"...we use the term 'anonymity' not only in its strict sense, in which it denotes the withholding of a name, but also to cover any restriction on the disclosure of a witness's address or other personal details, as well as concealment of his or her physical appearance."

I refer to paragraphs 17 and 18 of the tribunal's reasoning, which gave rise to a considerable proportion of the argument:

"17. One matter arising at the outset is Mr Glasgow's submission that, in relation to soldiers who gave evidence to the Widgery Tribunal, the issue with which we are concerned is not the granting of anonymity but its withdrawal. He does not contend that we are formally bound by any decision of the Widgery Tribunal. He submits nevertheless that there should be a presumption in favour of anonymity, because a number of the soldiers made statements and gave evidence before Lord Widgery 'after receiving assurance that anonymity would be preserved'.

18. We are not persuaded by this submission. We do not know by whom or in exactly what terms this assurance is supposed to have been given. It seems to us that we can assume no more than that the soldiers understood and expected that their names would not be divulged in the course of the proceedings before Lord Widgery. We are not aware of any reason to believe that an assurance was given that their names would never be disclosed by anyone. Accordingly we treat these as fresh applications for the grant of anonymity and we start with no presumption that the existing *de facto* should be preserved.”

The approach indicated by the last sentence of paragraph 18 could be described as a “clean sheet” approach. The tribunal are saying that they are considering the matter afresh. They are not influenced by what had happened previously in relation to anonymity before the Widgery tribunal. That clean sheet approach was the subject of the critical first finding of the Divisional Court.

Having given that indication, the tribunal points to the arguments advanced on behalf of the families as to why it would be desirable for there to be no anonymity; the fact that if a witness is permitted to remain anonymous he will feel insulated from effective criticism; the fact that there may be witnesses who have made previous statements that are inconsistent with the evidence to the tribunal; and that those witnesses’ names and addresses is a starting point for their investigation of his or her credibility.

In paragraph 44 of the decision the tribunal says:

“The application for names to be withheld creates for us a much more acute dilemma. For the reasons we have given, we have reached the view that it would be wrong in principle to give a general dispensation allowing all military witnesses to give evidence without revealing their names. Moreover we believe that this would, in the majority of cases, be going further than is justifiable or appropriate in circumstances where there is no concrete evidence of a specific threat. It seems to us that in the generality of cases the witnesses concerned will be sufficiently protected by the non-disclosure of their other personal details.”

45. We have anxiously considered whether there are, or may be, any particular cases in which anonymity in the strict sense should be granted. One category, which might arguably qualify for different treatment, consists of all soldiers who fired live rounds on Bloody Sunday. Since those soldiers alone must, between them, be directly responsible for killing and wounding all those who were killed or wounded by Army gunfire on that day, we think that they would have more compelling and substantial grounds than others for believing themselves to be at risk.

46. At the same time, it has to be recognised that these are the very soldiers whose conduct lies at the centre of this Inquiry. To allow this group to remain entirely anonymous would be a step that we would find difficult to reconcile with our public duty to determine what happened on Bloody Sunday.

47. The conclusion we have reached is that, subject to what we say below about special factors relating to individuals, it would be justifiable to permit those in this category only a limited form of additional anonymity, under which their surnames will be disclosed but their forenames will not. It seems to us that this is the best available solution to a difficult problem, because it will create a significant extra element of assurance for these individuals as regards their personal security, without having any material adverse effect on the fulfilment of our task. As to the former point, if the surname is even moderately common, it will be extremely difficult to locate an individual on the basis of that name alone. As to the latter point, we do not think that the forenames of those involved represent a critical element of the facts that we are required to determine. In addition, we believe that by disclosing the surnames of these soldiers, we will avoid giving them or others the false impression that they are immune from any effective public scrutiny, or from criticism should it prove to be justified. It will of course be open to any soldier to waive the anonymity granted to him if he so desires.”

The tribunal then deals with special factors in individual cases. As I have indicated, there is scope for those special factors to be taken into account later.

I now turn to what the Divisional Court had to say on this subject. I do so bearing in mind that, in any event, there has to be a reconsideration of the decision in this case. I move, first, to page 16 of the judgment where, under the heading “The December decision”, the Divisional Court refers to the decision of the tribunal and then deals with the clean sheet approach and adds:

“For the reasons set out in paragraph 4 of this judgment we cannot regard that as a proper approach to the assurances given in 1972. Strictly construed it would mean, as Mr Glasgow pointed out, that as soon as Lord Widgery reported, if not before, the assurance ceased to have any effect. No serving soldier or policeman would have been comforted by an assurance as limited as that.”

As I understood the arguments advanced by Mr Clarke, he did not criticise that comment by Kennedy LJ. He does however criticise what is set out in paragraph 4 of the judgment. I would divide that paragraph into four subparagraphs, (a), (b), (c) and (d).

“a) As a result of the precautions taken in 1972 the applicants have never been identified as the soldiers who fired live ammunition so, of course, they have never been threatened in that capacity. According to paragraph 9 of Mr Lawton’s second affidavit...”

Mr Lawton is member of the department of the Treasury Solicitor acting on behalf of the soldiers.

“... and according to the affidavit of soldier ‘H’, they have all now left the armed forces, and are living as civilians. That, as it seems to us, is all important background material against which the decision now under challenge falls to be considered.

(b) It seems to us to be clear that in 1972 each of the applicants was led to believe that if he cooperated with the Tribunal, by answering questions, giving a statement, and giving evidence if called upon to do so, his identity and in particular his name as well as his address, would not be revealed by anyone in authority as the source of the information obtained by the Tribunal so long as the danger which led to the grant of anonymity continued to exist.

(c) In other words, subject to some compelling unforeseen circumstance, so long as there was any danger of reprisals being taken against him or his family because he fired live rounds on Bloody Sunday, no one in authority would do anything which would enable anyone to attach his name to that of a soldier previously identified only by letter who gave evidence before the Widgery Tribunal in 1972.

(d) If that is a correct analysis of the assurance given to the applicants in 1972 then, as it seems to us, any decision which involves disclosure of their surnames for the purposes of this present Inquiry is on the face of it a breach of the 1972 assurance because, once their surnames are revealed, together with such information as they may now give, it will be possible to discover who appeared under which letter in 1972. Indeed it seems almost inevitable that if the present decision stands each applicant will now be cross-examined publicly about what he said in 1972. It may that at the present time circumstances are such as to justify that course, that is not for us to decide, but we do have a clear view about the assurances given in 1972, and, as will become apparent, our understanding of the position differs in significant respects from that of the present Inquiry.”

It will be observed from the last sentence of paragraph (d) that, as one would expect, the Divisional Court were under no illusions as to the fact that their role was a reviewing role. If there was any doubt about that, I would merely point to the concluding words of the judgment as a whole which are in these terms:

“For the reasons which we have set out we are satisfied that in more than one respect the decision under challenge is flawed. In the language of judicial review the flaws can be expressed in different ways. For example, the misunderstanding as to the nature of the 1972 anonymity and the misunderstanding of the Threat Assessment can be categorised as failures to take relevant matters properly into consideration. The imbalance which we perceive between the July statement and the December ruling could be described as a procedural impropriety. The nomenclature is of little importance, but in our judgment the result must be that the decision is set aside and the matter is returned to the Inquiry for it to re-determine. We should however make it clear that we express no view whatsoever as to whether there should be any grant of anonymity of any kind. That is not our function. It is clear from the information before us that there are powerful arguments both ways. How those arguments should be resolved the Inquiry must decide.”

In that paragraph the Divisional Court is emphasising as clearly as possible that it is not the role of a reviewing court to take the decision itself. It is the role of the reviewing court to leave the taking of decisions to the appropriate body which in this case is the second tribunal.

Notwithstanding those general comments of the Divisional Court, Mr Clarke, in his measured criticisms of the decision of the Divisional Court, suggests that they have exceeded their responsibilities as a reviewing court and departed from the allotted role of a court on an application for judicial review. His criticisms fall into various categories.

He first submits that the Divisional Court had no business taking additional evidence into account in the way indicated in paragraph (a). Secondly, he submits that, in any event, the evidence which was before them was not evidence on which they should have acted, even if they were entitled to so to do. Thirdly, he criticises the tribunal for making findings which were not the Divisional Court's responsibility to make, but which were for the tribunal to make. Finally, he makes submissions as to the inconsistency between the wording of paragraph (b) and paragraph (c). As to the additional evidence, the Divisional Court explains why it departed from the normal approach with regard to accepting fresh evidence on an application for judicial review. I refer to paragraph C on page 22 of the judgment where, under fresh evidence, the Divisional Court said:

“Normally this court is at pains only to have regard to the material which was available to the body whose decision is impugned, but where the decision is said to impinge on personal safety, and perhaps even put lives at risk, we cannot disregard material information which has come to hand since the original decision was made. So we do have regard to the affidavits, and in particular to those passages in the affidavits to which we have referred in the course of this judgment. If we are to exercise anxious scrutiny we cannot do otherwise.”

In regard to that general statement it is important to bear in mind that they were not only dealing with the additional evidence referred to in paragraph (a), they were referring to the additional evidence which indicates that the tribunal misunderstood the material which was placed before it as to the scale of the risk. The tribunal said in their conclusions that that matter needs to be interpreted in the light of what Mr Solomons (the member of the Treasury Solicitor's department who deals with that matter) says.

In relation to paragraph (a) and the reference therein made to background material, I feel it is unnecessary to pray in aid the special role of a court where personal safety is involved. It was entirely appropriate for the Divisional Court to have regard to the additional evidence for the purpose for which they were using that evidence. It was used as no more than background to the present application. As was apparent in the course of argument, one of the submissions which was made on behalf of the soldiers was based upon legitimate expectation. Legitimate expectation can, and often is, only regarded as one aspect of the general requirement of fairness which the court on an application for judicial review has a responsibility to safeguard.

If a soldier such as "H", whatever the merits of his individual evidence, says "I understood the matter in a particular way", he is entitled to have that evidence taken into account with regard to his contention that he has a legitimate expectation and to treat him in the manner proposed would be unfair. His assessment of what he was told is not conclusive in any way. The court does not act on his view alone. His evidence is a matter of background to which the court is entitled to have regard when taking into account whether he is a person who would be adversely affected by a course of conduct in a way which would be contrary to his legitimate expectation.

The evidence which was put forward by Mr Lawton is evidence of a general nature which, bearing in mind the tribunal had the difficult task of trying to ascertain what happened in 1972, the Divisional Court was entitled to take into account in order to perform its task in seeing whether there been a contravention of the requirement of fairness.

We were told that before the Divisional Court no objection was taken to that evidence being put forward. In that case, it seems to me that in any event it would not be appropriate to rely take issue with the very limited reliance which was placed here on this evidence by the Divisional Court.

As to the submission that the evidence is of little or no value, there is no reason to think from the judgment of the Divisional Court that it misunderstood the value or weight of the evidence. More significant is the criticism that the tribunal's role of finding facts was usurped by the Divisional Court. In this connection, it is important that there is no dispute as to the material which was before the Divisional Court and the tribunal as to what was the reason for the approach adopted by the

first tribunal. This appears from what Lord Widgery, LCJ, said in the Report. It is limited to this paragraph:

“Since it was obvious that by giving evidence soldiers and police officers might increase the dangers which they, and indeed their families, have to run, I agreed that they should appear before me under pseudonyms.”

The Divisional Court were required to give effect, as they saw it, to that language, in order to assess the effect of that statement as to what was the appropriate course for the second tribunal to adopt as to anonymity. In doing so, they have reached an inevitable conclusion. I have already referred to the fact that Mr Glasgow was recorded by the Divisional Court as indicating that what the soldiers were told was not intended to be confined, from a temporal point of view, to the period during which the tribunal was in session. So far as time is concerned, it was clearly to have a greater effect than that. The Divisional Court stated that it was to be limited to the period of danger which led to the grant of anonymity. They also indicated that there might be unforeseen circumstances of sufficient materiality that the need for anonymity of the soldiers would have to give way to those unforeseen circumstances.

In understanding what the Divisional Court had to say, it is important to pay careful attention to paragraph (d). Lord Widgery could only deal with what was to happen at his inquiry. He could not bind others. However he was saying to the soldiers at the tribunal for which he was responsible, that they were to have anonymity. So, if thereafter that anonymity were to be removed notwithstanding the fact that they were still in danger, this would be contrary to what was intended to happen. The fact that it was contrary to that intention does not mean that a tribunal considering the situation 27 years later is bound by what Lord Widgery said. He could not, and did not, purport to bind any subsequent body. For example, he could not bind a prosecution which took place shortly after the first tribunal had concluded its hearing.

However in deciding what is appropriate and what is fair in relation to the soldiers, what Lord Widgery had said in 1972 could not be ignored; a clean sheet approach, which the second tribunal could be said to have adopted was not acceptable. The soldiers were entitled to have a second tribunal take into account what was said, albeit as long ago as 1972. They were entitled to have that taken into account because of what they had been told that at the inquiry in 1972. It would in some circumstances be possible to have an inquiry in 1999 as to matters which were investigated in 1972 when the second inquiry did not of necessity involve reference to what had happened at the 1972 inquiry. But that is not the position with regard to these two inquiries. It is inevitable, that the identification of a soldier at the second inquiry will result in his identification in relation to the evidence he gave in the 1972 inquiry. This is no more than a consideration to which the second

tribunal will have to give what they consider is the appropriate weight. They cannot ignore it because it is a relevant matter.

Paragraph (d) of the reasoning of the Divisional Court, as I understand it, was referring to the exact point I have just been making. To reveal the names now would be in direct conflict with the anonymity granted by the Lord Chief Justice in 1972 because it would be possible to discover who appeared under which letters in 1972. As the Divisional Court said:

“Indeed it seems almost inevitable that if the present decision stands each applicant will now be cross-examined publicly about what he said in 1972.

I therefore reject the suggestion that in the paragraphs of which complaint is made the Divisional Court was fettering the proper role of the tribunal. It was doing no more than drawing the tribunal’s attention to a matter it cannot ignore. I would suggest that what the Divisional Court was saying was self evident. I do not say that the tribunal were unaware of the point which I have just been making, but I do say that the reasoning which the Divisional Court criticised gives the impression that, by saying that it was going to adopt a clean sheet approach, the tribunal was putting out of its mind a material matter. That being so, the criticisms Mr Clarke makes are not well founded.

I have not dwelt on the inconsistencies to which Mr Clarke drew our attention. In my judgment it is important to look at the criticised passages as a whole in the context of the judgment which was given. I do not consider that the reasoning of the Divisional Court can be faulted. When the matter is reconsidered by the tribunal they should take into account what are no more than obvious inferences which are to be drawn from what Lord Widgery said. They do not bind the second tribunal to take any particular course, but they do indicate that the second tribunal are required to take into account matters which so far they may not have taken into account having regard to the reasoning which they gave.

In these circumstances this as a case where it is appropriate to grant the tribunal leave to appeal but where that appeal should be dismissed.

LORD JUSTICE OTTON: I agree that the appeal should be dismissed for the reasons given by my Lord, the Master of the Rolls. I wish to add a few observations which are meant to assist the tribunal and its representatives in the future. The tribunal’s decision to withdraw the anonymity of the soldiers is based, in part at least, on the tribunal’s interpretation of the phrase in Lord Widgery’s Report:

“I agreed that they should appear before me under pseudonyms. This arrangement did not apply to Senior Officers....”

I am less than happy that the tribunal's decision should be founded on such a narrow basis and that it is not reached within the context of how and in what circumstances this agreement or arrangement was reached. I find it surprising that apparently there is no contemporaneous documentation which records this agreement, the precise terms upon which the soldiers were ordered to give evidence and the arrangements made to procure and maintain this anonymity for some but not others in the army. I am left with a distinct feeling of unease that this aspect has not been explored with as much diligence as this grave and potentially dangerous situation requires, or that sufficient steps have been taken to enable the tribunal to inform itself of the nature and extent of the anonymity granted.

In his affidavit the solicitor for the tribunal states that the tribunal has access to the papers of the Widgery inquiry but they are not complete. Two of the sources which might still be available are the records and recollections of the legal representatives involved and the records of the units concerned. Those in command of the units must have received communications, orders, instructions or advice on this subject from higher in the chain of command and, in turn, issued orders within the units down to the soldiers concerned. It is not beyond the realms of possibility that their superiors in rank reduced into writing a document containing the precise terms of the anonymity, coupled with the decision whether or not to grant immunity from criminal prosecution and what was to occur in the event of civil proceedings. This may well have been considered both appropriate and efficacious at the time as the soldiers may well have believed, if not have been led to believe, that their anonymity would be preserved, if not for ever then, at least, for so long as a significant risk existed. The solicitor states:

"[The Tribunal] has never undertaken to conduct its own investigations in order to find evidence in support of interlocutory applications made by the interested parties."

If this be the case, perhaps the tribunal may care to reconsider this approach and be more proactive in establishing a better informed and more satisfactory matrix of fact in which to conduct the reconsideration of anonymity it is required to undertake. Until such lines of inquiry are exhausted, any future decision may be vulnerable to an argument that it is unreasonable in the sense that the decision maker has not taken into consideration all relevant and available material.

For my part, I would also go so far as to suggest, with respect to the distinguished members of the tribunal, that they might wish to reconsider the fairness of imposing the obligation "on those who seek anonymity of any kind to justify their claim", as indicated in the tribunal's decision (ref ADL p.369), and paragraphs 9 and 10 of their solicitor's affidavit. Similarly, they may wish to revisit their requirement that there must be "concrete evidence of specific threat". This is particularly so in the light of that part of their July statement which is as follows:

“Our task is to do justice by ascertaining, through an inquisitorial process, the truth about what happened on Bloody Sunday. The proper fulfilment of that task does necessarily require that the identity of everyone who gives evidence to the Inquiry should be disclosed in public. The Tribunal will know the identity of all witnesses and, unlike a court, will itself take responsibility for investigating their credibility if there is reason to think that such an investigation is necessary.

Indeed we think that there are likely to be circumstances in which granting anonymity will positively help us in our search for the truth. Witnesses are unlikely to come forward and assist the Tribunal if they believe that by doing so they will put at risk their own safety or that of their families. Moreover it would be a mistake to suppose that the grant of anonymity would always operate to protect soldiers who are alleged to have been guilty of serious offences on Bloody Sunday. There may well be witnesses who wish to give evidence that is favourable to the interpretation of events for which the families and the wounded contend, but who will not co-operate with the Tribunal without assurances as to their anonymity.”

I accept Mr Christopher Clarke QC’s submission that as a matter of law no legitimate expectation of any kind arises. However, it is worth bearing in mind that the genesis of the concept of legitimate expectation is the requirement of the decision maker to act fairly. It may still be possible for the tribunal to reach a decision that it would be fairer to impose the obligation on those seeking to remove the anonymity (rather than on those seeking to sustain it) and to satisfy the tribunal that there is no real or significant risk or some other formula which is less onerous on the soldiers.

Finally, they may also wish to reconsider the practicalities of allowing surnames to be disclosed unless the soldier has “a particularly unusual surname”. What is a particularly unusual surname may in itself be difficult to assess. More important, perhaps, is that those who retain anonymity may be perceived by some (who may not know or understand this reason) that anonymity has been granted because that soldier has more to hide than those named Smith or Jones.

It may well be possible to accommodate some, if not all, of these suggestions without prejudicing the fundamental objective of the inquiry.

LORD JUSTICE WARD: The passage in Lord Widgery’s Report which has come under such close scrutiny is paragraph 8 in his introduction dealing with sources of evidence. He said that the risk of increased danger to the soldiers and their families was “obvious” and because of that Lord Widgery “agreed” that the soldiers should appear before him under pseudonyms. Judging the matter solely by the language in that sentence which has been read by the Master of the Rolls, it seems to me, as it seems to my Lords, to be obvious that Lord Widgery was clearly concerned that if the identity

of the soldiers was revealed that would heighten risk to them and their families which justified the protection by the use of pseudonyms.

There may be a risk that that anonymity would be imperilled by their giving evidence to the Saville Inquiry or by the manner of their giving evidence. Such a risk would undermine the protection which they were given by Lord Widgery and so undermine the basis upon which they gave evidence to him. That risk and their legitimate expectations in maintaining their anonymity were relevant factors to take into account and the Saville Tribunal were in error in ignoring them in the way that they did. The assessment of those matters and the weight to be given to it is of course entirely a matter for them. Other factors, such as public confidence in their deliberations, are obviously among the other relevant matters which they must assess and weigh and bring into the appropriate balance.

Adding but briefly to what Lord Justice Otton has said, I am struck by the fact that paragraph 8 of Lord Widgery's Report is an historical account of something he had already agreed. It is obvious that the question of anonymity would have been raised at an early stage of that inquiry, as it is raised in this, and that the soldiers would not have given evidence before their protection had been guaranteed. We are told that the papers reveal nothing of those early deliberations nor of the basis upon which that matter was discussed before him and agreed by him. I must accept what I am told but I am surprised that there is no record.

I agree with my Lords that the appeal should be dismissed for reasons more fully given by them.

Order: Leave to appeal granted. Appeal dismissed. No order as to costs.

**A2.45: High Court of Justice, Queen's
Bench Division (Divisional Court)
(London, 17th June 1999): anonymity
for soldiers (item 8 above)**

[1999] EWHC Admin 556

In the High Court of Justice
Queen's Bench Division
(Divisional Court)

Royal Courts of Justice
Strand, London, WC2A 2LL

Thursday, 17th June 1999

Before:

Lord Justice Roch
Mr Justice Maurice Kay
Mr Justice Hooper

In the matter of an application for judicial review

Regina

-v-

The Right Honourable Lord Saville of Newdigate
Sir Edward Somers
Mr Justice William Hoyt
(Sitting as the Saville Inquiry)
(Ex parte A; B; D; H; J; K; M; O; Q; R; S; U; V; Z; AC and AD)

(Computer-aided transcript of the Palantype notes of Smith Bernal Reporting Limited, 180 Fleet Street, London EC4. Telephone No: 0171 421 4040. Official Shorthand Writers to the Court)

Sir Sydney Kentridge QC with Mr D Lloyd Jones QC and Mr M Bools (instructed by AD Lawton, Treasury Solicitor) appeared on behalf of the Applicants.

Mr Christopher Clarke QC with Mr A Roxburgh and Mr J Grierson (instructed by Mr John Tate, Solicitor to the Inquiry, London SW1Y 4WG) appeared on behalf of the Respondent.

Mr Ian Burnett QC (instructed by the Treasury Solicitor) appeared on behalf of the Ministry of Defence as an interested party.

Lord Gifford QC with Mr B MacDonald (instructed by Messrs McCartney & Casey, Derry BT48 6HG) appeared on behalf of the late James Wray, as an interested party.

Mr Michael Mansfield QC with Mr John Coyle (instructed by Messrs Desmond J Doherty & Co, Derry BT48 7EP) appeared on behalf of the family of Bernard McGuigan (deceased) an interested party.

Mr Hugh Martin Rodgers (instructed by Messrs Brendan Kearney, Kelly & Co, Londonderry BT48 7EX) appeared on behalf of Michael Bradley and Michael Bridge, as interested parties.

Mr Arthur Harvey QC with Mr Seamus Treacy (instructed by Messrs Madden & Finucane, Belfast BTY1 1HE) appeared on behalf of the next of kin and the wounded as interested parties.

Judgment
(As approved by the Court)
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Thursday, 17th June 1999

JUDGMENT

LORD JUSTICE ROCH:

1. On 29th January 1998 the Government tabled a resolution before both Houses of Parliament in these terms:

“That it is expedient that a Tribunal be established for inquiring into a definite matter of urgent public importance, namely the events on Sunday, 30 January 1972 which led to loss of life in connection with the procession in Londonderry on that day, taking account of any new information relevant to events on that day.”

2. That resolution was adopted by both Houses and as a consequence a tribunal of inquiry was set up under the Tribunal of Inquiry (Evidence) Act, 1921. That tribunal is presided over by Lord Saville of Newdigate and the other members are the Rt Hon Sir Edward Somers and the Hon Mr Justice William L Hoyt.
3. That tribunal is to enquire into the events of Sunday 30th January 1972 in which, during a demonstration in the city of Londonderry shots were fired resulting in injuries to 26 people, those injuries being fatal in 13 cases. Those events led to that occasion being given the name “Bloody Sunday”.

4. In presenting the resolution to the House of Commons the Prime Minister said:

“Bloody Sunday was different [from deaths or injuries caused by the actions of terrorists] because, where the state’s own authorities are concerned, we must be as sure as we can of the truth, precisely because we pride ourselves on our democracy and respect for the law, and on the professionalism and dedication of our security forces.

This has been a very difficult issue. I have re-read Lord Widgery’s report and looked at the new material. I have consulted my colleagues most closely concerned. We have considered very carefully whether it is appropriate now to have a fresh inquiry into the events of Bloody Sunday. I should emphasise that such a new inquiry can be justified only if an objective examination of the material now available gives grounds for believing that the events of that day should be looked at afresh, and the conclusions of Lord Widgery re-examined.

I have been strongly advised, and I believe, that there are indeed grounds for such a further inquiry. We believe that the weight of material now available is such that the events require re-examination. We believe that the only course that will lead to public confidence in the results of any further investigation is to set up a full-scale judicial inquiry into Bloody Sunday.”

5. Later the Prime Minister referred to the Act requiring the proceedings of the tribunal to be held in public “unless there are special countervailing considerations”.

6. In 1972 the British Government had set up a tribunal consisting of the then Lord Chief Justice, Lord Widgery, under the 1921 Act to enquire into the events of that day. Lord Widgery produced his report within a remarkably short period of time, namely by 19th April 1972. The conduct of that inquiry and the contents of that report have been subjected to reasoned criticisms. All military witnesses in that inquiry, save for five senior officers, gave their evidence without giving their names. They were simply identified either by numbers or, in the case of soldiers who admitted firing their weapons on that day by letters of the alphabet.
7. On 5th May this year the Tribunal considered applications made by the Ministry of Defence on behalf of the generality of soldiers or former soldiers who might be required to give evidence to the tribunal, and by 17 of the soldiers who fired live rounds on Bloody Sunday, that they be permitted to give their evidence without disclosing their names. It was accepted by all parties interested in the inquiry that it would not be appropriate for witnesses to be required to give their addresses or their current occupations. The principal basis for the applications for anonymity was that soldiers giving evidence to the tribunal, particularly those soldiers who fired their weapons that day, once they became traceable by any of the republican terrorist groups would be at risk of being attacked and killed or seriously wounded.
8. The tribunal had submissions from counsel for the tribunal and from those representing the families of some of those killed on Bloody Sunday.
9. On 5th May this year the Tribunal decided that the danger created by identifying soldiers, even those soldiers who fired live rounds on Bloody Sunday, did not outweigh or qualify the Tribunal's duty to conduct a public open inquiry. Consequently there would be no grant of anonymity by the withholding of names either to the generality of those witnesses who are or were soldiers or to those witnesses who were soldiers who had fired their weapons. The tribunal indicated that the tribunal was still prepared to consider individual circumstances which might lead to the conclusion that in particular cases the danger was greater. If the tribunal found that to be so they would reconsider the question of anonymity in such cases.
10. This is an application for judicial review of that decision by the tribunal on the basis that the tribunal failed to take account of relevant circumstances or alternatively failed to attach proper weight to certain relevant matters, and secondly, that by placing the objective of conducting an open inquiry above the right of witnesses to safety for themselves and their families, the tribunal reached a decision that was unreasonable, in that it was outside that band of decisions which a tribunal in these circumstances could properly reach. The remedies that the 17 applicants seek are

11. First, an order of certiorari quashing the decision taken by the tribunal on the 5th May and published on the 7th May;
12. Second, a declaration that the tribunal in all the circumstances, by its decision in withdrawing anonymity from, or alternatively refusing to grant anonymity to, those soldiers and former soldiers who were on duty in Londonderry on the 30th January 1972, acted unreasonably and unlawfully;
13. Third, an order pursuant to Rule 53.9(4) remitting the matter to the tribunal and directing it to reconsider and reach a decision in accordance with the finding of this court.
14. The Ministry of Defence have not themselves sought judicial review of the tribunal's decision, but they have presented written and oral submissions in support of the 17 applicants' application.
15. The application has been opposed by counsel for the tribunal, Mr Clarke QC, and by counsel representing the families of the deceased and the wounded, namely Mr Harvey QC, Lord Gifford QC, Mr Rodgers and Mr Mansfield QC.
16. Because criticisms of the tribunal's decision are based on earlier statements and decisions by the tribunal relating to the issue of anonymity, it is necessary to set out the way in which this matter has progressed.
17. The tribunal made an opening statement on 3rd April 1998. The tribunal fixed a preliminary hearing at the Guildhall Londonderry for 20th July 1998. Prior to that the tribunal published to all interested parties a statement indicating the matters to be addressed at that preliminary hearing. Paragraphs 20 and 21 of that statement related to "applications for anonymity" and "immunity from prosecution". Paragraph 20 read:

"20.1 If any potential witness wishes to give evidence without revealing publicly his or her name and/or from behind a screen in order to conceal his or her face, an application should be made to the Tribunal in writing, explaining the reasons why this is considered necessary.

20.2 Each such application will be considered on its merits and, if anonymity is granted, the Tribunal will state the reasons in public.

20.3 If the interested parties have any general observations or submissions to make as to the circumstances in which such applications should or should not be granted, they are invited to do so in their written summaries."

18. The preliminary hearing extended over two days. On 24th July 1998 the tribunal issued a document entitled “Rulings and Observations of the Tribunal on the matters Raised at the Preliminary Hearing on 20th and 21st July 1998”. At the outset of that statement the tribunal rejected a suggestion that cases should be presented to the tribunal in an adversarial fashion. In rejecting that suggestion the tribunal cited a passage from the report of the Royal Commission on Tribunals of Inquiry in November 1966 under the chairmanship of the Rt Hon Lord Justice Salmon which included these sentences:

“The task of inquiring cannot be delegated by the Tribunal for it is the Tribunal which is appointed to inquire as well as to report. The public reposes its confidence not in some other body or person but in the Tribunal to make and direct all the necessary searching investigations and to produce the witnesses in order to arrive at the truth. It is only thus that public confidence can be fully restored.”

19. The commission had pointed out a little earlier that it is only in exceptional cases where the purity and integrity of our public life has been called into question that tribunals are set up under the Act of 1921. Indeed it would seem that in the 78 years since the Act was passed, it has been resorted to on some 21 occasions.
20. Later in that document the tribunal said:

“There remain some matters which do not call for an immediate ruling by us, but on which we wished to hear the views of those represented before us.

The first of these concerns the question of anonymity.

In the expectation that the question of anonymity would arise, we asked the interested parties for any general observations or submissions they might have as to the approach that we should adopt in relation to it. It will be recalled that, with the exception of five senior officers, the soldiers who gave evidence before the Widgery Inquiry were not required to disclose their names.

We have not yet been asked to make rulings on anonymity in respect of any individual witnesses or groups of witnesses who may give evidence to this Inquiry. However the Treasury Solicitor and Ministry of Defence have indicated that applications for anonymity are likely to be made in due course on behalf of soldiers or former soldiers who were serving in Londonderry on Bloody Sunday.

It should be remembered that there are various different forms of anonymity. Depending on the circumstances, it might be appropriate to allow a witness to give evidence without stating his or her name and address in public, or perhaps to give evidence from behind a screen in order to conceal his or her physical appearance. It might also be necessary to preserve the anonymity of individuals by substituting letters or numbers for names in witness statements and other documents.

... Mr Treacy [junior Counsel for the next of kin and wounded represented by Madden and Finucane, Solicitors] argued that the granting of any form of anonymity was a very grave step that should only be taken if justified on compelling grounds.

In adversarial procedure, great importance is rightly attached to the principle of open justice. In particular, the courts require very strong grounds indeed before departing from the rule that a person charged with a criminal offence is entitled to know the identity of prosecution witnesses and to see them give their evidence. One of the reasons for this is to enable the opposing party to investigate and assess the credibility of those witnesses.

The position in relation to an Inquiry such as this one is, in our view, rather different. Nobody is being prosecuted before this Tribunal, nor is it our function to do justice between parties competing in an adversarial contest. Our task is to do justice by ascertaining, through an inquisitorial process, the truth about what happened on Bloody Sunday. The proper fulfilment of that task does not necessarily require that the identity of everyone who gives evidence to the Inquiry should be disclosed in public. The Tribunal will know the identity of all witnesses and, unlike the court, will itself take responsibility for investigating their credibility if there is reason to think that such an investigation is necessary.

Indeed we think that there are likely to be circumstances in which granting anonymity will positively help us in our search for the truth. Witnesses are unlikely to come forward and assist the Tribunal if they believe that by doing so they will put at risk their own safety or that of their families. Moreover it would be a mistake to suppose that the grant of anonymity would always operate to protect soldiers who are alleged to have been guilty of serious offences on Bloody Sunday. There may well be witnesses who wish to give evidence that is favourable to the interpretation of events for which the families and the wounded contend, but will not co-operate with the Tribunal without assurances as to their anonymity. We are aware, for example, of certain television programmes in which people describing themselves as ex-soldiers present on Bloody

Sunday have criticised the conduct of the Army on that day, but have done so anonymously presumably for fear of reprisals by their former comrades.

Accordingly, we will be willing to grant an appropriate degree of anonymity in cases where in our view it is necessary in order to achieve our fundamental objective of finding the truth about Bloody Sunday. We will also be prepared to grant anonymity in cases where we are satisfied that those who seek it have genuine and reasonable fears as to the potential consequences of disclosure of their personal details, provided that the fundamental objective to which we have referred is not prejudiced. As to the degree of anonymity that is appropriate, our current view is that restricting the disclosure of names and addresses ought to be sufficient in most, if not all, cases. We would regard the use of a screen as a wholly exceptional measure.

The obligation nevertheless remains firmly on those who seek anonymity of any kind to justify their claim. Applicants for anonymity must supply the Tribunal with a written explanation of the basis of their application, together with any material relied upon in support of it. Of course, unless and until the application is refused, the Tribunal will not reveal any information in its possession, disclosure of which might pre-empt its ruling. Otherwise, however, and subject to any claim for public interest immunity, we propose to circulate any written applications for anonymity to all interested parties and to invite their submissions before making a ruling.”

21. I have set out that part of that statement at length because the applicants place considerable reliance upon it in two ways. First it is said that that statement gave rise to a legitimate expectation on the part of the applicants that the tests there propounded would, if the applicants could satisfy either of the tests, lead to the granting of anonymity. Second, it is submitted that the tribunal's statements as to its function and as to its fundamental objective were correct and that it follows that the principles the tribunal there formulated for the granting or withholding of anonymity were the correct principles. The tribunal's subsequent departures from those principles was irrational and moreover the tribunal has given no reason or no adequate reason for such a departure.
22. Subsequently in September of 1998 the Treasury Solicitor, Mr Lawton, made application for anonymity on behalf of seven soldiers who had given evidence to the Widgery Tribunal. On 17th December 1998 the Tribunal decided that the tribunal would withhold from publication the addresses, telephone numbers and other personal details of all military witnesses, apart from their names, unless they informed the tribunal that they were content that this information should be published. The tribunal would impose no

restriction on the publication of the name of Soldier 236 (which had by that time come into the public domain) or of the soldiers whose names appeared in the transcripts of the Widgery Inquiry. The tribunal decided to allow any soldier who admitted firing one or more live rounds on Bloody Sunday a limited form of additional anonymity, under which his surname would be published but not his forenames. The tribunal decided to take this step:

“... because it will create a significant extra element of assurance for these individuals as regards their personal security, without having any material adverse effect on the fulfilment of our task. As to the former point, if the surname is even moderately common, it will be extremely difficult to locate an individual on the basis of that name alone. “

23. The tribunal left it open to such a soldier or his next of kin if the soldier was dead, to apply for full anonymity if there were special reasons making that necessary. The two examples of special reasons given by the tribunal were first, that the witness was currently living in Northern Ireland and the second that the witness had a particularly unusual surname where such witness

“... might persuade us that he should not have to disclose it because it will make his whereabouts readily discoverable”.

24. The tribunal would not restrict the publication of the names of any other soldiers unless they or their next of kin if they were now dead satisfied the tribunal that there were special reasons making such a restriction necessary. The tribunal indicated that they would be prepared to lift or modify the restrictions on the identification of witnesses that they were imposing if circumstances arose which made any of the restricted information of direct and immediate relevance to the tribunal's factual investigation.
25. In reaching that decision the tribunal said that an intrinsic part of their task was the investigation of the actions of individual soldiers on the day which in the tribunal's view encompassed not only what the soldiers did but also who they were. The tribunal were satisfied that if anonymity in the strict sense were to be allowed on a widespread or blanket basis, that would represent a material derogation from the tribunal's public investigative function. The tribunal turned to consider what degree of anonymity was appropriate

“... having regard to our views as to the nature and extent of the risk, and our rejection of widespread or blanket anonymity, in the strict sense, as being incompatible with the Tribunal’s fundamental objectives. We have previously made clear that, because anonymity represents a departure from the principle of open justice, it will only be appropriate if and to the extent that a clear justification is demonstrated.”

26. The correct reading of that decision is a matter of controversy. The applicants say that the tribunal, on the basis of a threat assessment, at that time assessed as “moderate” was granting appropriate anonymity to soldiers who fired their weapons that is to say a degree of anonymity which would make them “extremely difficult to locate”. Counsel for the tribunal says that a proper reading of the decision must concentrate on paragraph 46 where the tribunal said:

“At the same time, it has to be recognised that these are the very soldiers whose conduct lies at the centre of this Inquiry. To allow this group to remain entirely anonymous would be a step that we would find difficult to reconcile with our public duty to determine what happened on Bloody Sunday.”

27. That decision was challenged by way of an application for judicial review by four soldiers who had fired rounds on Bloody Sunday. The application came before a Divisional Court consisting of Kennedy LJ, Owen J and Blofeld J in March of this year. That Divisional Court on 16th March quashed that order and remitted the matter to the tribunal for re-determination. The Divisional Court concluded that the tribunal had in reaching its decision, which I shall call the first decision, erred in five ways.
28. First, the tribunal had misunderstood the nature and extent of the anonymity granted to the applicants by Lord Widgery in 1972, and that that misunderstanding had played a significant part in the tribunal’s reasoning when arriving at its first decision.
29. Second, that the July statement had created the impression that if a soldier satisfied the inquiry that he had a genuine and reasonable fear of the potential consequences of disclosure of his personal details then his name and address would not be disclosed. The Tribunal had then ordered otherwise notwithstanding the tribunal’s finding that such a fear existed.
30. Third, the tribunal had misinterpreted the threat assessment provided by the Security Services by concluding that the threat was less than it in fact was.

31. Fourth, that the tribunal in its July statement had indicated that what those seeking anonymity should try to prove was a genuine and reasonable fear of reprisals but then had relied in its ruling on the absence of concrete evidence of specific threats without making clear the tribunal was then requiring concrete evidence of specific threats before anonymity would be granted.
32. Fifth, that the tribunal having accepted that all soldiers properly had reasonable and genuine fears and that those who had fired live rounds had more compelling and substantial grounds than others for believing themselves to be at risk, yet granted to that limited class a form of anonymity (i.e. surnames only) for which no one had contended and the safeguarding effects of which were at best a matter of speculation.
33. The Divisional Court ended its judgment with these words:

“We should however make it clear that we express no view whatsoever as to whether there should be any grant of anonymity of any kind. That is not our function. It is clear from the information before us that there are powerful arguments both ways. How those arguments should be resolved the Inquiry must decide.”

34. The tribunal appealed one of the conclusions reached by the Divisional Court, namely that with regard to the grant of anonymity by the first tribunal in 1972. In the course of his judgment, Lord Woolf MR at page 13E of the transcript pointed out that tribunals set up under the 1921 Act have to determine their own procedures, being those necessary to enable them to perform their tasks and then he said:

“They [the tribunals] will inevitably know much more about the problems of the particular area into which they have to enquire than can be known by a supervising court, such as the Crown Office Judge or the Divisional Court on an application for judicial review. Tribunals are entitled to determine their procedure for themselves. The courts should only interfere when there is some very good reason for them so to do.”

35. On the point raised in the appeal Lord Woolf said at page 26B of the transcript:

“Lord Widgery could only deal with what was to happen at his inquiry. He could not bind others. However he was saying to the soldiers at the tribunal for which he was responsible, that they were to have anonymity. So, if thereafter that anonymity were to be removed notwithstanding the fact that they were still in danger, this would be contrary to what was intended to happen. The fact that it was contrary to that intention

does not mean that a tribunal considering the situation 27 years later is bound by what Lord Widgery said. He could not, and did not, purport to bind any subsequent body. ...

However in deciding what is appropriate and what is fair in relation to the soldiers, what Lord Widgery had said in 1972 could not be ignored; a clean sheet approach, which the second tribunal could be said to have adopted was not acceptable. The soldiers were entitled to have a second tribunal take into account what was said, albeit as long ago as 1972. They were entitled to have that taken into account because of what they had been told at the inquiry in 1972. It would in some circumstances be possible to have an inquiry in 1999 as to matters which were investigated in 1972 when the second inquiry did not of necessity involve reference to what had happened at the 1972 inquiry. But that is not the position with regard to these two inquiries. It is inevitable, that the identification of a soldier at the second inquiry will result in his identification in relation to the evidence he gave in the 1972 inquiry. This is no more than a consideration to which the second tribunal will have to give what they consider is the appropriate weight. They cannot ignore it because it is a relevant matter.”

36. The Master of the Rolls went on to reject complaints made of passages in the Divisional Court’s judgment on this aspect of the case saying that the Divisional Court was not fettering the proper role of the tribunal; it was doing no more than drawing the tribunal’s attention to a matter the tribunal could not ignore.
37. In a concurring judgment, Otton LJ regretted that the only information available to the court of appeal, and apparently at that time to the tribunal as to the granting of anonymity to military witnesses was one short paragraph in Lord Widgery’s report. Otton LJ found it surprising that there was no other contemporaneous documentation explaining how the decision to grant anonymity in 1972 had been reached. Otton LJ suggested that the members of the second tribunal might wish:
- “... to reconsider the fairness of imposing the obligation on those who seek anonymity of any kind to justify their claim.”
38. He added that the members of the second tribunal might wish to revisit their requirement that there must be concrete evidence of a specific threat.
39. Following the Court of Appeal’s decision, the solicitor to the Inquiry wrote to the Treasury Solicitors Department a letter dated 22nd March 1999, sending copies of the letter to all the other solicitors for interested parties:

“As a result of the Divisional Court’s decision the Tribunal must consider the position of the lettered soldiers and any other soldier who fired live rounds [‘the relevant soldiers’] afresh. It will do so in the light of that decision and the submissions and evidence put before it, without any predisposition to reach either the same or a different decision. ‘Afresh’ means exactly what it says.”

40. The letter went on to refer to certain specific matters among which were:
1. That the tribunal would not make any assumptions, for example, it would not assume that the relevant soldiers had a fear that was both genuine and reasonable, or that a genuine and reasonable fear of reprisals on the part of the soldiers who fired live rounds would have the necessary or likely consequence that those soldiers would be entitled to total or any anonymity.
 2. It was for those who represented the relevant soldiers to make out a case for anonymity by such evidence and submissions as they chose to put forward.
 3. That no one was suggesting that addresses and details of occupations or the like should be revealed. The issue was whether the tribunal should order
 - (a) No anonymity,
 - (b) Full anonymity, or
 - (c) Partial anonymity.
41. It is to be observed that when it came to the making of submissions no one contended for partial anonymity in the sense of surnames only, it being shown that once surnames were released the tracing of the individual would follow for someone who was determined to trace that person’s whereabouts.
4. The tribunal invited the Ministry of Defence to put before it material showing the pattern of terrorist activity from 1969 to the present time and a further assessment of risks that would be faced by soldiers who were on duty in Londonderry on Bloody Sunday and whose identities became known. In particular the tribunal required a new threat or risk assessment expressed in terms which would avoid any possibility of the assessment being misunderstood by the ordinary reader. In addition the tribunal indicated that it would find it helpful to be told whether any threat or risk identified applied equally or differently to different categories of soldiers namely,

1. Serving soldiers generally;
2. Serving soldiers in the Parachute Regiment;
3. Ex soldiers
4. Ex soldiers from the Parachute Regiment
5. Soldiers or ex-soldiers who took part in Bloody Sunday
6. Soldiers or ex-soldiers who fired live rounds on Bloody Sunday.

42. Finally the tribunal invited submissions on the arguments advanced by its counsel to the Divisional Court stating that:

“The Tribunal regards it as its duty to carry out its public investigative function in a way that demonstrates to all concerned that it is engaged in a thorough, open and complete search for the truth about Bloody Sunday and this prima facie involves the giving of evidence by all witnesses under their proper names. The Tribunal may well have to balance this consideration against competing considerations relating to the security of the relevant soldiers. But the Tribunal would like to know whether you [the Treasury Solicitor] contend that the Tribunal has misunderstood its duty and, if so, to explain why.”

43. Written submissions were made on behalf of the 17 soldiers who are the applicants in this proceeding. In addition the Ministry of Defence made a 23 page submission to which were attached four annexes, including a security service threat assessment and a statement by Lt Col Overbury who in 1972 had been the Assistant Director Army Legal Services and had been appointed the legal officer with responsibility for all legal aspects, including questions concerning the obligation and rights of all the army witnesses, including the soldiers who opened fire, at the 1972 inquiry.

44. In that statement Colonel Overbury states that he was informed that both Lord Widgery and the Attorney-General were of the opinion that at least the lower ranks of those involved should be granted anonymity. Moreover that the Attorney-General had stated that if soldiers had been ordered to give evidence to Lord Widgery’s tribunal none of their written or oral statements could be used against them in any subsequent criminal proceedings. As a result all soldiers involved were ordered to attend a meeting at their barracks where Colonel Overbury formally ordered them to make such further statements as were necessary and to give evidence before the tribunal. Colonel Overbury told the soldiers that he had authority to inform them that any statement they made or would

make, or any evidence they gave to the Widgery Tribunal could not and would not be used in evidence against them in any subsequent proceedings arising out of their actions on 30th January 1972. Colonel Overbury also told the soldiers that they would enjoy protection against identification in accordance with the normal practice in force at that time in the Civil Courts in Northern Ireland. That meant that they would be referred to in the proceedings only by the letter or number allocated to them. He told the soldiers that in return they were expected to co-operate fully with the army team and with the civil authorities. Those assurances were repeated collectively and individually to the men concerned.

45. The first annex was a chronological summary of major attacks on military targets by Irish Republican Terrorist organisations in Northern Ireland between 1969 to 1999. Annex B was a summary of such attacks on military targets in Great Britain. Annex C was a schedule of major Irish Republican terrorist attacks on non military targets.
46. Annex D was the new Security Service Threat Assessment sought by the tribunal. It began by explaining the threat assessment process and the basis of threat assessments pointing out that they do not, by their nature, consist of concrete predictions. That part of the assessment also indicated that where there was a specific threat to a specific individual that individual would be at such a high level of threat that the normal response would be to provide him or her with armed police protection. The assessment went on to point out that threat levels rise and fall and that it followed that threat assessments for individuals, sites or events were only valid as long as the circumstances on which they were based remained unchanged; and that the overall threat level had moved up and down a number of times since the most recent Provisional IRA cease fire in July 1997. In a supplement to the assessment it was stated:

“Irish republican terrorists are currently assessed to pose a significant level of threat in Great Britain. We judge that they are actively maintaining their ability to carry out terrorist attacks on the mainland. They have the equipment and personnel to do so, and have carried out planning on a contingency basis.”

47. The supplement went on:

“Military targets are currently at a significant level of threat.”

(It has to be observed that since the date of that supplement, 14th April 1999, the level has reduced to Moderate):

“There remains no specific intelligence that any particular group is currently targeting soldiers involved in the events of ‘Bloody Sunday’. However, whilst Irish republican terrorist organisations retain the capability and intent to mount attacks on the UK mainland, there will continue to be a threat to military targets. Whilst the soldiers involved in the events of Bloody Sunday remain unidentified, the threat to them will be potential rather than actual, since it will not be possible for terrorists to undertake the planning which would be necessary in order to mount an attack against them.”

48. In the body of the assessment the Security Service ranked the categories of soldiers in ascending attractiveness as targets in this order:
1. Current or former soldiers
 2. Current or former soldiers from the Parachute Regiment
 3. Soldiers or ex-soldiers who took part in Bloody Sunday
 4. Soldiers or ex-soldiers who fired live rounds on Bloody Sunday.
49. That ranking was based upon the political and emotive significance of each category to the Republican Movement. All four categories represent military targets in respect of which the threat of attack was significant, although soldiers who had fired live rounds on Bloody Sunday would, in the assessment of the Security Service, stand out from the generality of soldiers and would face a higher likelihood of terrorist attack if they were identified. Their attractiveness as targets did not take the threat to them into a higher category than that of “significant”.
50. There is a formal six tier structure for assessing the different threat levels in which the third level from the bottom is that of “Moderate” and the fourth level is “Significant”. The Security Service finally pointed out that for those witnesses who will attend the hearing before the second tribunal who have already been identified their attendance at the tribunal will not increase the level of threat to them. The assessment then observes:
- “However, if the proceedings focus on the conduct of particular military personnel, and those personnel are identified by name, it is possible that the threat to them will rise.”
51. The Ministry of Defence relied also on parts of the statement of a television reporter, Peter Taylor, who has produced programmes on the troubles in Northern Ireland and on Bloody Sunday in particular. In addition he has written books on the subject as well as

writing articles for various newspapers. In all he has made over 50 documentary programmes on the conflict in Northern Ireland. His statement sets out his reasons for wishing to withhold his working papers from the scrutiny of the Tribunal. With regard to work he has done in respect of Bloody Sunday, which have involved interviews with soldiers directly involved in the operation and others who were serving in Northern Ireland at the time, he gave such persons assurances as to confidentiality. In paragraph 8 of his statement Mr Taylor says; referring to such persons:

"I am also concerned as to their physical safety were their names to be publicly revealed."

52. Later in paragraph 16 of his statement, Mr Taylor states:

"To hand over my notebooks to the Inquiry would not only be a betrayal of trust but would utterly destroy my professional integrity established over almost thirty years and irrevocably compromise my ability to continue to cover Northern Ireland in the way that I have over so many years. Even more seriously, it would put lives at risk."

53. That paragraph deals not only with soldier witnesses but also other persons who Mr Taylor has interviewed and who may have participated anonymously in Mr Taylor's programmes. In that paragraph Mr Taylor is expressing an opinion, but it is of some significance that he states that opinion as though it were a fact. The Ministry of Defence relied on that statement as being the view of a person who has spoken directly to extremists on both sides of the conflict who are or have been members of terrorist organisations.

54. The tribunal also received written submissions from those acting on behalf of the next of kin of the deceased and the wounded. The principal submission was that open justice required that witnesses who had been soldiers on duty on Bloody Sunday, particularly those who had fired their weapons, should give their names at the outset of their evidence. Public confidence in the work of the tribunal would be undermined were that not so. This had been a major problem with the Widgery Inquiry, where anonymity had been granted without submissions from any party. Witnesses would be less inclined to tell lies if their identities were known. It would give the opportunity to others to come forward to contradict an untruthful witness if that witness's name was known. Despite the troubles in Northern Ireland open justice had continued to be observed. It was rare that witnesses who gave evidence, did so without giving their names, even in cases which were controversial or in which the defendants were said to be members of terrorist

organisations. It was rare for such witnesses to be attacked. Members of the RUC and others in Northern Ireland lived in the community despite having to give evidence in criminal cases. The situation in Northern Ireland had changed substantially in the 27 years since the Widgery Inquiry. The present position was much improved by the peace process.

55. In those written submissions it was further argued that the identity of many more than five soldiers who were on duty in Londonderry on Bloody Sunday were known and that with the possible exception of an attempted letter bomb attack on Major General Robert Ford, the Commanding Officer in Northern Ireland at the relevant time, on 26th May 1976, none of those persons had been either threatened or attacked. The main Republican terrorist organisations were honouring the cease fire, and it was known by such organisations that the relatives of the deceased and the wounded sought not revenge but simply the truth. In those circumstances the threat to soldiers or ex-soldiers giving evidence under their own names was substantially less than those representing the soldiers and the Ministry of Defence were suggesting. The tribunal's duty, if it was to establish the truth to the satisfaction and confidence of all parties, could not be discharged if those who played key roles in the events of that day were allowed to remain anonymous.
56. The tribunal heard oral submissions on the 26th and 27th April and on 5th May published the decision which the applicants seek to quash.
57. I shall set out the decision and the reasoning of the tribunal at some length, the more readily to consider the criticisms made of the decision and the tribunal's reasoning.
58. The tribunal having set out the history of the matter in paragraph 11 stated its role in this way:

"The Tribunal has at its fundamental objective the finding of the truth about Bloody Sunday. It regards itself as under a duty to carry out its public investigative function in a way that demonstrates to all concerned that it is engaged in a thorough, open and complete search for the truth about Bloody Sunday."

59. The tribunal went on to record that all interested parties accepted the existence of this duty. Then at paragraph 12 the tribunal said:

"In our view the existence of this duty entails that in the absence of compelling countervailing factors, those who give evidence to the Tribunal should do so under

their proper names. This after all is an Inquiry into events in which people lost their lives and were wounded by British army gunfire on the streets of a city in the United Kingdom. To withhold the names of those in the army who are concerned with that event must detract from an open search for the truth about what happened; and must need justification of an overriding kind.”

60. The tribunal went on to remind itself that it was an inquisitorial body and would itself know the identity of the witnesses but concluded that that did not take the matter much further forward.
61. Turning to the judgment of Otton LJ in the Court of Appeal the tribunal said that it was not going to make its ruling on the basis of who bore the burden of proof but would seek to balance the various relevant factors. The tribunal observed that in their judgment it was not open justice that needed to be justified but rather any departure from open justice.
62. The tribunal went on to consider the anonymity granted by Lord Widgery to military witnesses who gave evidence to his inquiry. The tribunal referred to the statement of Lieutenant Colonel Overbury and reminded itself of the holding of the Divisional Court upheld by the Court of Appeal as to the effect of the assurances given to military witnesses in 1972, namely that:

“... subject to some compelling unforeseen circumstances, so long as there was any danger of reprisals being taken against him or his family because he fired live rounds on Bloody Sunday, no-one in authority would do anything that would enable anyone to attach his name to that of a soldier previously identified only by letter who gave evidence before the Widgery Tribunal in 1972.”

63. The tribunal accepted that that assurance applied to all soldiers who gave evidence before the 1972 tribunal and not merely to those who had fired shots. The tribunal went on to hold that the tribunal itself and the task it was carrying out was a compelling unforeseen circumstance so that the assurance given in 1972 fell away. That had to be so because one reason for the setting up of the present tribunal was the fact that the inquiry conducted by Lord Widgery “so far from restoring public confidence, compounded the crisis” in the opinion of a substantial body of responsible people. Moreover, it was clear from the judgments both of the Divisional Court and the Court of Appeal that although the Widgery assurance was a relevant factor which had to be weighed in the balance when the question of anonymity was considered, it was not a determinative factor. The tribunal said:

“On this basis, it seems to us that although it is an important consideration, it does not of itself, or together with the other matters relied upon by the soldiers, amount to a compelling countervailing factor that should override our duty as we have stated it.”

64. The position at the present time was in no way comparable to the position in 1972 where there was not merely the threat of reprisals but an actual reprisal attack on the Parachute Regiment at their barracks in Aldershot on 22nd February 1972. The tribunal added that it recognised that no one could know what the future might hold and that “the bad days may return”.

65. The tribunal went on to find that the soldiers had grounds for their assertion that they had genuine and reasonable fears. In arriving at that conclusion the tribunal referred to the latest threat assessment provided by the Security Services. The tribunal accepted a submission that the tribunal should concentrate on what the tribunal perceived to be the degree of danger if the soldiers’ names are revealed. The tribunal then said:

“A reasonable fear of reprisals can exist if there is any degree of danger, but the greater the danger the more compelling this factor becomes in the balancing exercise we have to perform.”

66. The tribunal acknowledged the difficulty of the judgement it had to make. It also recorded that no one was now suggesting the solution the tribunal had reached in the first decision, namely that surnames, but not forenames, be disclosed, was an appropriate solution. Consequently the tribunal said that there was no satisfactory way of reconciling the two considerations and one had to give way to the other. Then the tribunal said:

“After the most anxious consideration we have concluded that on the basis of the material presently before us our duty to carry out a public investigation overrides the concerns of the soldiers and does so even if the Widgery assurance continues to apply; and that accordingly the present applications of the soldiers must fail. However, on the same basis as we set out in our ruling in December, we shall consider further the question of anonymity if it is suggested that there are special reasons in any particular cases why we should do so.”

67. The tribunal went on to acknowledge that the removal of anonymity is permanent and that it was possible that the threat to the soldiers might increase in the future, though whether that would happen was necessarily speculative. The tribunal then analysed the latest threat assessment giving a summary of it similar to that which I have given earlier in this judgment. The tribunal then said:

“We accept that on the basis of this assessment and the other material provided to us by the Ministry of Defence, identified soldiers are in greater danger than unidentified soldiers, for the obvious reason that if a soldier is unidentified as such there is only, as the assessment puts it, a potential as supposed to an actual threat. However, we do note that all serving or former soldiers fall within the ‘significant’ category, so all are ‘priority’ targets. It seems that it is only those who fired live rounds on Bloody Sunday who stand out, or stand out significantly, from the generality of soldiers. As to this generality, it seems to us that since there must be many soldiers or ex-soldiers whose names have been publicised or whose identities could readily be discovered ... the danger created by identifying soldiers is one that is borne and has for many years been borne by hundreds, if not thousands, of serving or former soldiers, and is not such as to override our duty to conduct a public investigation.

That leaves those who fired live rounds on Bloody Sunday. As to these there is a further consideration, which we pointed out in our December ruling. This is that the conduct of these soldiers lies at the very heart of this Inquiry. It is the firing on the streets that was the immediate cause of loss of life. It is that loss of life that we are publicly investigating. To conceal the identity of those soldiers would, as it seems to us, make particularly significant inroads on the public nature of the Inquiry. As a group they are assessed as more attractive targets than the generality of soldiers and thus face a higher likelihood of terrorist attack if they were identified, but this increased threat is not considered sufficient, at least at present, to move them from the ‘significant’ to a higher category. On the basis of the general assessment, we have concluded that the danger to the soldiers who fired live rounds on Bloody Sunday does not outweigh or qualify our duty to conduct a public open inquiry.”

68. The tribunal then went on to state that with the two exceptions we have already noticed in the 27 years since 1972 there is no evidence of any soldier involved in Bloody Sunday being the subject of attacks or threats for that reason. The tribunal took account that many of those would have been unidentifiable and that others may have been taking special precautions of which the tribunal knew nothing. The tribunal continued by making it clear that they would consider individual cases where circumstances might indicate a greater danger in which case the question of anonymity would be reconsidered. The tribunal recorded that they had considered whether it would be appropriate to grant anonymity whilst reserving the right to reconsider the position when it came to writing their report. The tribunal rejected that course of action:

“... for to do so would in our view derogate for no good or sufficient reason from our duty not only to report what we believe to be the truth, but also to conduct an open and public investigation.”

69. The tribunal went on to consider the particular case of soldier “H” who had made a separate application and was separately represented by Sir Alan Green, QC. His application was supported by an affidavit sworn by him. His application was rejected on the material presently before the tribunal.
70. At the same time the tribunal considered applications by five RUC officers for anonymity and granted anonymity in respect of three of them. Suffice it to say that the relevant circumstances in their cases were different and the tribunal decided to afford them anonymity not by withholding their names, but by limited screening so that they did not give their evidence in view of the general public. In these three cases the tribunal found that each officer would be “in special danger were they to be recognised” and they were to be regarded as being “under a special threat of personal danger”.
71. Before considering the grounds on which the applicants rely when seeking the quashing of the tribunal’s second decision, it is necessary to set out my view on the approach that should be adopted. This is because significantly different approaches have been urged upon us by Sir Sydney Kentridge QC for the applicants and Mr Clarke QC for the tribunal. Both counsel accept that the tribunal’s decision involves fundamental human rights, those rights being the rights to life, to safety and to live free of fear. Both counsel accept that where such rights are relevant to the decision, this court will exercise the most anxious scrutiny, see Lord Bridge in R v. Home Secretary ex parte Bugdaycay [1987] AC 514 at 531G. Thereafter Mr Clarke submits that the ordinary limitations on the scope of the court’s powers of review still apply, relying upon the same passage from the speech of Lord Bridge. Mr Clarke goes on to submit:

“It is not the function of the Court to substitute its own view of the merits. The threshold of unreasonableness is not lowered. The test remains whether the decision falls within the range of responses open to a reasonable decision-maker. However where fundamental human rights are affected the Court may require more by way of justification before it is satisfied that the decision is reasonable in that sense.”

72. Mr Clarke then cited part of the finding in R v. Secretary of State ex parte Moon [1996] COD 54 at 55 a decision of Sedley J (as he then was):

“The law on close scrutiny amounted today to a doctrine that the court will demand clear justification for an executive decision which interferes with an important right; not, however, so as to persuade the court to agree with the executive view, but simply to demonstrate that there was a sufficient basis on which the view could sensibly be reached.”

73. The submission of Sir Sydney Kentridge is that where important human rights are in issue, the court will adopt a more interventionist role, citing R v. Ministry of Defence ex parte Smith [1996] QB 517 where, at page 554D, Sir Thomas Bingham MR accepted the submission of counsel that:

“The court may not interfere with the exercise of an administrative discretion on substantive grounds save where the court is satisfied that the decision is unreasonable in the sense that it is beyond the range of responses open to a reasonable decision-maker. But in judging whether the decision-maker has exceeded this margin of appreciation the human rights context is important. The more substantial the interference with human rights, the more the court will require by way of justification before it is satisfied that the decision is reasonable in the sense outlined above.”

74. In such cases the question, submits Sir Sydney Kentridge, ceases to be whether the public authority has acted irrationally or perversely and becomes whether a reasonable body on the material before it could reasonably conclude that the interference with or endangering of fundamental human rights which flowed from its decision was justifiable. Sir Sydney Kentridge relied on two of the speeches in R v. Secretary of State ex parte Brind [1991] 1 AC 696, namely that of Lord Bridge at page 748F to 749E and Lord Templeman at page 751E to F.
75. I proceed on these principles: the High Court when exercising its role under Order 53, reviews the procedure by which the public authority has reached its decision, and reviews the decision. In the normal case the review of the decision will involve this court in deciding whether the decision was reasonable or unreasonable in the Wednesbury sense. This court will not and has no jurisdiction to make the decision which is under review. Thus this court may often disagree with the decision taken, but if the decision taken is within the ambit of the decisions which that public authority could reasonably take, then there is no power to overturn the decision taken.

76. Where the decision involves the interference with or possible interference with fundamental human rights, the court's review of the decision is more stringent. In my judgment the law is correctly stated in de Smith, Woolf and Jowell - *Judicial Review of Administrative Action* 5th Edition at para 13-060:

"Reasonableness in such cases is not, however, synonymous with 'absurdity' or 'perversity'. Review is stricter and the courts ask the question posed by the majority in Brind, namely, 'whether a reasonable Secretary of State, on the material before him, could reasonably conclude that the interference with freedom of expression was justifiable'. This test lowers the threshold of unreasonableness. In addition, it has been held that decisions infringing rights should receive the 'most anxious scrutiny' of the courts."

77. As observed in *Fordham* in [1996] *Judicial Review* page 81

"Anxious scrutiny is not judicial rhetoric, but an established doctrine with a discernable shape and direction."

78. I consider that the submissions of Sir Sydney Kentridge more closely represent the present state of the law than those of Mr Clarke. I accept that the question for this court is:

"Given the inquisitorial function of the Tribunal, and given its clear finding that anonymity would not impede it in its fundamental task of discovering the truth, could a reasonable tribunal conclude that the additional degree of openness to be gained by disclosure of the names of the 17 soldiers who fired shots is so compelling a public interest as to justify subjecting them and their families to a significant danger to their lives?"

79. Six grounds of challenge to the tribunal's second decision are advanced. They are:

1. The decision is unreasonable and unjustifiable on the facts as found by the Tribunal itself.

2. The decision to publish forenames, which the Tribunal itself decided by its first decision should properly and necessarily be withheld, is unreasonable.

3. The decision resiles from a substantive legitimate expectation which the Applicants had, and were entitled and intended to have, following the Tribunal's July statement which informed them of the circumstances in which the Tribunal would be prepared to grant anonymity to them.

4. In requiring the Applicants to establish the 'degree of danger' to which they are exposed, the Tribunal repeated the error which it made in its first decision of requiring 'concrete evidence of a specific threat', and, further, for no good reason, departed from its first decision.

5. The Tribunal attached manifestly inappropriate and disproportionate weight to its view of its 'public investigative function' which, if correct, would have rendered its announced intention to grant anonymity to any class of persons nugatory and misleading.

6. The decision repeats the Tribunal's failure in their first decision to give any or any proper weight to the assurance which was given to the Applicants by the Lord Chief Justice in 1972."

80. In his reply Sir Sydney Kentridge indicated that he would not rely upon the third of the six grounds of challenge as a separate ground, having heard the submissions of Mr Clarke with respect to legitimate expectation. In reality, this leaves the first ground of challenge, the other five grounds being particular aspects of the first ground.
81. In my judgment the test formulated by the tribunal in their observations of 24th July 1998 was the correct test to apply. That is not the test applied by the tribunal in May 1999, see paragraphs 12 and 13 of their decision. Despite the tribunal saying that they were not deciding the balancing exercise on the burden of proof, they made it clear in their decision that it was for those applying for anonymity to establish that their need for anonymity outweighed the consideration of achieving public confidence by requiring, as part of open justice, those soldiers who fired their weapons to identify themselves at the outset; that is to say at the stage when witness statements will be circulated to the various parties to the inquiry. That this was the tribunal's approach is, in my view, confirmed by the language in paragraphs 23, 28 and 30 of the second decision, and by paragraph [3] in the letter of 22nd March.
82. Nowhere does the tribunal assess the inroads which withholding the names of the 17 applicants would have made into the public nature of their inquiry. Nor does the tribunal consider the possibility, if the withholding of the name of a soldier who fired his weapon,

were to make an unacceptable inroad into the public nature of the inquiry, the tribunal's power to remove anonymity at that stage. In paragraph 31, the tribunal confined its consideration to withdrawing anonymity at the reporting stage.

83. The lifting of anonymity at the reporting stage is rejected because:

"To do so would in our view derogate for no good or sufficient reason from our duty not only to report what we believe to be the truth, but also to conduct an open and public investigation."

84. Paragraph 31 of the decision. This paragraph in so far as it gives as a reason derogation from the tribunal's duty to report the truth is in conflict with the tribunal's statements on page 14 of its rulings and observations of 24th July 1998, in paragraph 39 of its first decision and in paragraph 12 of the second decision. The tribunal at those places has asserted consistently that the granting of anonymity would not interfere in its fundamental objective of establishing the truth about the events of Bloody Sunday. Indeed the tribunal in its July observations made the point that anonymity might well encourage frankness on the part of witnesses.

85. In so far as there is a reliance on derogation from the tribunal's obligation to conduct an open and public investigation, nowhere does the tribunal assess the extent of such derogation or ask whether such derogation could undermine the confidence of responsible people in the fact finding of the tribunal. Sir Sydney Kentridge submitted that such an assessment would have shown that the granting of anonymity could not have undermined the confidence of responsible people in the fact finding ability of the tribunal. The proceedings will be in public. No soldier witness will be screened. Consequently the demeanour of such witnesses will be observable by all present. Those who were in command on that day will be known if anonymity is confined to those who fired their weapons. The statements of all witnesses will be available to all interested parties in advance. Rigorous cross-examination will be carried out by the tribunal's counsel. Witnesses whose credibility may be in doubt for other reasons will have those reasons brought out by counsel for the tribunal. Effective cross-examination by those representing the families will be possible because those counsel in this inquiry, unlike the Widgery Tribunal, will have had disclosure of relevant documents and the witnesses statements in advance of the hearings. If any evidential or other sufficient reason for withdrawing anonymity emerges during the course of the proceedings anonymity could be withdrawn. The identity of soldiers who the tribunal find may have committed criminal offences will be disclosed to the prosecuting authorities and could appear in the tribunal's report.

86. In my judgment had the tribunal assessed, as opposed to merely asserting the derogation that the granting of anonymity to the 17 applicants at this stage would have made from the openness of the tribunal's proceedings, it would have seen that the derogation was with regard to the tribunal's duty to search for the truth nil and with regard to the duty to hold a public inquiry limited. That was the matter to be weighed against the interference or the potential interference with the fundamental human rights of the applicants.
87. On this aspect of the very difficult task that the tribunal had to perform, it is the unhappy fact that in their first decision the tribunal assessed the risk of interference with the applicants' fundamental human rights to be such that it was appropriate to grant them a degree of anonymity which would in the tribunal's (albeit mistaken) view have made it extremely difficult to locate them and which warranted the tribunal, in a case of a man with an unusual surname, considering allowing him to withhold his surname. That was at a time when the Security Services' assessment was that the threat was Moderate. By the second decision the threat had increased from Moderate to Significant; nothing else had changed but the tribunal concluded that the balance must come down in favour of witnesses giving their full names, which would allow them to be located by anyone wishing to do so.
88. Mr Clarke sought to meet this apparently irrational change in the tribunal's views by two means: first, that the tribunal had in December 1998 rejected total anonymity for soldiers who fired their weapons because their conduct lay at the heart of the inquiry. Second, the December 1998 ruling had been quashed. Consequently it is immaterial to enquire whether there has been a departure from the reasoning of the quashed decision or to seek a good reason for any such departure.

"Provided that the fresh decision is lawful and reasonable in its own terms, and provided that a fair procedure has been followed in reaching it, it does not matter how far its reasoning accords with that of the flawed decision taken in December."

89. I accept that the first decision was quashed and that the matter had to be decided afresh by the tribunal. Further the procedure that preceded the second decision, the receipt of written and oral submissions, was fair. However, the tribunal's view of the degree of danger faced by the soldiers who fired their weapons arrived at in December 1998 and expressed in the first decision is, in my judgment, a relevant factor for this court when giving anxious consideration to the reasonableness of the second decision. As Sir Sydney Kentridge submitted, in the first decision the tribunal accepted that the degree of danger warranted that the applicants should be extremely difficult to locate. No reason is

given for the tribunal's conclusion in the second decision that the identification of these witnesses so that they can be located will not lead to an interference with the fundamental human rights of them and their families. The tribunal do not say that in the first decision they over estimated the degree of danger. Indeed it is quite clear that they did not. The Divisional Court in March of this year clearly thought that the tribunal on that occasion had underestimated the degree of danger.

90. The rights that are at stake are those to life, to security of the person and to respect for private and family life. The danger, were there to be a breach of those rights, would be extreme. In *Fernandez v. Government of Singapore and Others* [1971] 1 WLR, a case to which Sir Sydney Kentridge referred this court, the House of Lords had to consider section 4 of the Fugitive Offenders Act 1967 which provided that a person should not be returned under that Act to a designated Commonwealth country if it appeared that he might, if returned, be prejudiced at his trial or punished, detained or restricted in his personal liberty by reason of his race, religion, nationality or political opinions. In his speech at page 994C Lord Diplock said:

“Paragraph (c) of section 4(1) of the Act, unlike paragraphs (a) and (b), calls upon the court to prophesy what will happen to the fugitive in the future if he is returned. The degree of confidence that the events specified in the paragraph will occur which the court should have in order to justify refusal to return the fugitive is not determined by the mere use of the subjunctive mood of the auxiliary verb ‘may’.

91. It should, as a matter of common sense and common humanity, depend upon the gravity of the consequences contemplated by the section on the one hand of permitting, and on the other of refusing, the return of the fugitive if the court's expectation should be wrong.”

92. Lord Diplock went on to say:

“My Lords, bearing in mind the relative gravity of the consequences of the court's expectation being falsified either in one way or in the other, I do not think that the test of applicability of paragraph (c) is that the court must be satisfied that it is more likely than not that the fugitive will be detained or restricted if he is returned. A lessor degree of likelihood is, in my view, sufficient; and I would not quarrel with the way in which the test was stated by the magistrate or with the alternative way in which it was expressed by the Divisional Court. ‘A reasonable chance,’ ‘substantial grounds for thinking,’ ‘a serious possibility’ ...”

93. The submission made on behalf of the applicants is that the gravity of the consequences in this case should an attack on a witness materialise are so grave that if there was a reasonable chance or substantial grounds for thinking or a serious possibility of such attack then common sense and common humanity required that anonymity be continued.
94. The tribunal following the quashing of its first decision, sought the assistance of the Ministry of Defence and, through them the Security Services, to assess the degree of threat. In responding to that invitation the Ministry of Defence made a 26 page submission supported by the four annexes already specified in this judgment. In the course of that submission the Ministry of Defence informed the tribunal that some of those involved in Bloody Sunday had not revealed that involvement to family, friends or employers. Vulnerability had three broad aspects, namely the ease with which the person could be identified; the ease with which the person could be found and the ease with which the person could be attacked. Vulnerability increases as the ease with which those three objectives could be attained by a potential attacker increases. The Ministry of Defence went on to demonstrate that once a soldier's name was known he would be easy to identify and easy to trace. The submission continued by referring to threats by both wings of the IRA to avenge the 13 deaths which had occurred on Bloody Sunday. The submission referred to the attack on the Paratrooper's Barracks at Aldershot in February 1972. 1972 saw the greatest number of soldiers killed in Northern Ireland in one year. The submission referred to another attack on the Parachute Regiment in Northern Ireland in 1979 which resulted in the greatest number of soldiers killed in a single day, namely 18. The submission set out the attempted terrorist attack on the Parachute Regiment in England on 20th February 1989 which failed because the intruders were detected and barrack buildings evacuated before bombs exploded.
95. The submission went on to identify other incidents, not connected with Bloody Sunday save possibly that in 1976 when a letter bomb was addressed to Major General Ford, the Officer Commanding in Northern Ireland at the time of Bloody Sunday, showing that Republican terrorist organisations do carry out revenge attacks on individuals by indiscriminate means. Further material was provided showing that the threat of terrorist activities in Britain still exists, despite the peace process and the cease fires by some organisations, and that such organisations in the past have renounced their cease fires when it has suited them to do so.

96. The Ministry of Defence submission accepted a point made by Lord Gifford that even at the height of the troubles the principle of open justice had been largely observed in Northern Ireland. The submission nevertheless gave instances of soldiers who had been witnesses in Northern Ireland cases and who had been singled out for attack.
97. The security assessment attached to the Ministry of Defence submission was that the current overall threat of terrorist activity by Republican terrorist groups in Britain was significant. That assessment was based on an assessment of the ability of those organisations to carry out terrorist attacks in Britain and the current intentions of such organisations. That level of threat was the third level in a descending order of six levels of threat. The level of threat could go up or down. In fact the level now is Moderate. Among the categories of soldiers identified by the tribunal, the Security Service said that the applicant's were in the top category, that is to say they are the most attractive targets among those categories.
98. The only evidence the tribunal had of the applicants having any protection against such a threat was their present anonymity.
99. The tribunal found, as they had in their first decision, that these soldiers had grounds for their assertion that they have genuine and reasonable fears.
100. The tribunal saw the force in the submission of Lord Gifford that they should concentrate on what they perceived to be the degree of danger if the soldier's names are revealed. The tribunal then went on to say that there were two conflicting considerations, one of which had to give way to the other, without stating the degree of danger to the applicants that the tribunal perceived. The tribunal merely said:

"After the most anxious consideration we have concluded that on the basis of the material presently before us our duty to carry out a public investigation overrides the concerns of the soldiers and does so even if the Widgery assurance continues to apply; and that accordingly the present applications of the soldiers must fail."

101. I would respectfully agree with the tribunal that if the only countervailing factor to the withholding of anonymity, which the applicants have enjoyed up to the present time, was "the concerns of the soldiers" the tribunal's conclusion would be irresistible. The countervailing factor was not just the soldiers concerns. It consisted of the threat to the lives of them and their families which on the Security Services assessment was real and

the interference with their private and family lives, which would be bound to occur, whether terrorists decided to target them or not.

102. It may be that the submissions made by counsel for the families persuaded the tribunal that the Security Service's assessment of the threat to the applicants overstated the degree of danger to them, so that the tribunal rejected the threat assessment and the submissions made by the Ministry of Defence based on the threat assessment and the history and the pattern of terrorist activities in Northern Ireland and in Britain. If the Tribunal were persuaded to this view, the Tribunal did not say so. The difficulty for this court here, in my view, is that the tribunal dealt with the Ministry of Defence's submissions in the most general way. I am impressed by Mr Burnett's submissions on behalf of the Ministry of Defence that the applicants were entitled to have these matters made clear to them.

103. Another submission made to the tribunal on behalf of the applicants was that the present level of threat to the applicants may well be increased by the taking of evidence by the tribunal, spurring some of that body of individuals which the Ministry of Defence said existed in Northern Ireland:

“who are willing to kill and maim when it suits them; who are ready to use violence if they perceive an advantage to the cause they espouse; and who are not constrained by norms of civilised behaviour and remain well armed.”

104. It was accepted on all sides, as indeed I accept, that members of the families represented before the tribunal and before this court are not among that body of individuals, but there was no evidence to contradict the Ministry of Defence's evidence that such people exist. Again the tribunal has not, in its reasons, mentioned this point and it cannot be seen by those reading the tribunal's decision that this point has been either put in the scales in favour of continued anonymity for the applicants or rejected because the tribunal had, for good reason, decided it had no weight. The same can be said of the statement of Peter Taylor on which the Ministry of Defence and the applicants relied because he was a person who has actually spoken to members of extremist terrorist organisations on both sides of the divide in Northern Ireland.

In R v. Secretary of State for the Home Department ex parte Bugdaycay [1987] AC 514 at page 531 Lord Bridge said:

“The most fundamental of all human rights is the individual’s right to life and when an administrative decision under challenge is said to be one which may put the applicant’s life at risk, the basis of the decision must surely call for the most anxious scrutiny.”

- 105.** In such cases, and this is one of them, the process of review by this court must be more intensive and the court must have a greater readiness to intervene than would ordinarily characterise a judicial review challenge.
- 106.** I return to the duty which we must perform, namely the giving of the most anxious consideration to the decision under review. The test propounded by the tribunal in 1998 was, in my judgment as I have already indicated, the correct test. The authorities to which we have been referred establish that where fundamental human rights will be or may be affected by a decision of a public authority, the law gives those rights precedence. The law is that such rights are to prevail unless either the threat that they will be infringed is slight or there is a compelling reason why they should yield. The July 1998 test recognised and gave effect to those principles.
- 107.** The tribunal in the decision under review departed from this test and in doing so did not accord to the applicants’ fundamental human rights the required weight. It was the consideration of the carrying out of a public investigation to which the tribunal accorded precedence by requiring the departure from public and open justice which the applicants sought to be justified by the applicants.
- 108.** The tribunal did not make a finding that the threat to the fundamental human rights of the applicants and their families was slight. Nor did it say that they were departing from the Security Service’s assessment of that threat, still less did they give any reason for rejecting that assessment. On the other side of the scale the tribunal did not analyse the extent to which the granting of anonymity to those soldiers who fired their weapons at this stage, always subject to review as the inquiry progressed, would detract from the tribunal’s obligation to conduct an investigation which would, in the eyes of responsible people, be public, open and thorough and lead to findings as to the events of that tragic day which could be accepted by such people as accurate.
- 109.** In these respects, in my judgment, the tribunal’s decision is flawed and I would quash it to the extent that it applies to the 17 applicants and other soldiers who also fired their weapons whose identities are not already in the public domain. I would not make the

declaration sought; I would make an order pursuant to Rule 53.9(4) remitting the matter to the tribunal.

110. One final issue remains, namely that raised by Mr Rodgers, counsel for two persons concerned in the inquiry, Michael Bridge and Michael Bradley. Put simply Mr Rodgers' submission is that the tribunal, having been appointed under the 1921 Act, is an organ of Parliament and that the High Court may not interfere with the proceedings of Parliament, consequently this court has no jurisdiction to review the proceedings before the tribunal.
111. I accept immediately that this court has no jurisdiction to interfere with or review proceedings in Parliament. Where the argument of Mr Rogers fails, in my judgment, is in its premise that the tribunal is an organ of Parliament and its proceedings are "proceedings in Parliament". Mr Rogers invited us to read certain passages in the report of the Royal Commission on Tribunals of Inquiry which considered the powers and workings of tribunals set up under the 1921 Act. That report makes it clear that the passing of the 1921 Act came about because prior to that Act matters of urgent public importance into which it was expedient that there should be an inquiry, were normally inquired into by a Select Committee of the House of Commons. That procedure proved to be unsatisfactory because such committees tended to divide along party lines. Consequently it was perceived that it was necessary for Parliament to be able to appoint a tribunal of inquiry which was wholly independent of Parliament.
112. For that reason in my judgment Mr Rodgers' submission must fail. It is not a submission that was supported by any other counsel.

MR JUSTICE MAURICE KAY:

113. I have had the opportunity to read a draft of the judgment of Roch LJ. I am in substantial agreement with it. In view of the importance and sensitivity of this case it is appropriate for me to add a more modest contribution of my own, highlighting the factors which have caused me to reach the same conclusion as my Lord. In so doing I gratefully adopt his exposition of the facts and the relevant legal principles. In relation to the "anxious scrutiny" approach I have also been helped by what Simon Brown LJ said at first instance in R v. Ministry of Defence, ex parte Smith [1996] 1 QB 517, 537-538:

“When the most fundamental human rights are threatened, the court will not, for example, be inclined to overlook some perhaps minor flaw in the decision-making process, or adopt a particularly benevolent view of the minister’s evidence, or exercise its discretion to withhold relief.”

114. Once the Tribunal had come to the conclusion that its fundamental objective of finding the truth about Bloody Sunday would be unlikely to be hampered by anonymity, it had to consider the request for anonymity by reference to a number of factors. The particularly important ones included:
- (i) The need for open justice;
 - (ii) Public confidence in the proceedings and the eventual findings of the Tribunal;
 - (iii) The reasonable fears of the Applicants for their personal safety and that of their families;
 - (iv) The degree of danger;
 - (v) The Widgery Assurance;
 - (vi) The fact (for such it is) that a grant of anonymity at this stage could be reconsidered at later stages in the light of fact-finding needs during the evidence, the need to identify any miscreants in the Report or other supervening factors;
 - (vii) Whereas a grant of anonymity at this stage could be reconsidered later, a refusal of anonymity could not be effectively reversed.
115. As regards the need for open justice, I accept that the disclosure of the name of a witness is a normal requirement of open justice, any departure from which has to be justified. Although it is an element of open justice, it is less important than, say, sitting in public. Moreover, if its importance subsequently intensifies, for example because of evidential considerations or a need to identify miscreants, it can be reconsidered. At the present stage its importance is less intense because anonymity is not seen by the Tribunal to be an obstacle to the attainment of the fundamental objective. This is partly because of the inquisitorial nature of the Tribunal and the fact that the identities of the Applicants are known to the Tribunal and its counsel.

116. Public confidence is obviously important, particularly in an area where the very raison d'être of a Tribunal is to investigate a matter in relation to which public confidence has been undermined. However, the mere fact that the public, or a section of it, expresses a lack of confidence calls for further consideration. A lack of confidence may be reasonable and objectively justifiable or it may not be. Whichever category is the appropriate one in a particular case must necessarily affect the amount of weight to be accorded to it. In the present case the Tribunal does not consider that anonymity would impede its fundamental objective and it would remain able to reconsider anonymity at later stages in the light of developments. In these circumstances the weight to be accorded to public confidence must be less than if the Tribunal were anxious about its ability to achieve its fundamental objective or if a grant of anonymity were irreversible.
117. So far as the reasonable fears of the Applicants and the objective degree of danger are concerned, the fear has been variously described by the Tribunal as “genuine”, “reasonable” and “understandable”. The Tribunal was particularly concerned to engage the assistance of the Ministry of Defence and the Security Services in relation to the degree of danger. The information was that the threat assessment had moved up from “moderate” to “significant” since the purported grant of partial immunity and that, of the five groups considered in the context of significant risk, soldiers who fired live rounds on Bloody Sunday were considered to be at the greatest risk. The Tribunal accepted (paragraph 27) that identified soldiers are at greater risk than unidentified soldiers.
118. The approach of the Tribunal to the Widgery Assurance is put on alternative bases. On the one hand, it concluded that the present Inquiry is a “compelling and unforeseen circumstance” as a result of which the Widgery Assurance “falls away” (paragraph 18). In this context it considered that its ability to restore confidence would be undermined unless it could form a “completely wholly independent judgment”, that is a judgment uninfluenced by the Widgery Inquiry or anything arising from it. On the other hand, it considered that if the present Inquiry is not “a compelling and unforeseen circumstance”, then the Widgery assurance is a factor to be weighed in the balance, in which case it is “an important consideration” but not a “compelling countervailing one”. It seems to me that there is difficulty about the first of the bases. It is implicit in the judgments of the Divisional Court and of Lord Woolf MR in the previous application that the Widgery Assurance had to be taken into account by the present Tribunal. It had not expired. It continued to be an integral part of such security as the soldier witnesses have. It does not bind the present Tribunal but, in the words of the Master of the Rolls (Transcript p. 27C), “they cannot ignore it because it is a relevant matter”. In my judgment, the reality is that they were

bound to consider and weigh it. Having done so, they rightly concluded that it was “an important consideration”.

119. The Tribunal adverted to the fact that a grant of anonymity at this stage might be reconsidered at a later stage. It seems from the wording of paragraph 31 that they had in mind the later stage of the eventual Report but they do not there refer to the possibility of reconsideration in the course of the evidence should circumstances justify it. The conclusion of the Tribunal was that the availability of later reconsideration “would in our view derogate for no good or sufficient reason from our duty not only to report what we believe to be the truth but also to conduct an open and public investigation “. (paragraph31).
120. The Tribunal described its task in coming to a judgement on the issue of anonymity as “very difficult”. It stated (paragraph 23):

“... we have considered with the greatest care that we can muster all the written and oral submissions made to us. On the one side is our duty to carry out a public investigation; on the other the understandable fears for their personal safety and that of their families, which we accept that the soldiers have... The conclusion that we have reached is there is in fact no way of satisfactorily reconciling the two considerations; and that the one must give way to the other. After the most anxious consideration we have concluded that on the basis of the material presently before us our duty to carry out a public investigation overrides the concerns of the soldiers and does so even if the Widgery assurance continues to apply; and that accordingly the present applications of the soldiers must fail. However, ... we shall consider further the question of anonymity if it is suggested that there are special reasons in and particular cases why we should do so.”

121. In considering this application for Judicial Review of the Tribunal’s decision, I start from the position described by Lord Woolf MR in relation to the previous application (transcript, page 13):

“Tribunals such as this often have the most difficult task to perform. They are set up without guidance as to the precise procedures which they have to follow. They have to work out that procedure for themselves. They will inevitably know much more about the problems of the particular area into which they have to enquire than can be known by a supervising court, such as the Crown Office Judge or the Divisional Court on an application for judicial review. Tribunals are entitled to determine their procedure for themselves. The courts should only interfere when there is some very good reason for them to do so.”

122. At the same time, one has to have regard to the fact that the Applicants are seeking to enlist the intervention of the court in circumstances where their fundamental human rights are under threat, in particular the right to life and, to some extent, the right to respect for family life. There is no doubt that this is an “anxious scrutiny” case and I reiterate my agreement with what Roch LJ has said in his judgment about the correct approach to such cases and the formulated question which he has identified as the one which we must address.
123. Reduced to its bare essentials, the decision of the Tribunal is that, although a grant of anonymity would be unlikely to impede the Tribunal in the attainment of its fundamental objective of finding out the truth about Bloody Sunday, it ought to be refused because of the interests of open justice and the maintenance of public confidence, notwithstanding the risks to the personal safety of the Applicants and their families. In reaching this decision the Tribunal must have considered that the particular interests of open justice and the particular fragility of public confidence were of such magnitude as to outweigh the fundamental human rights of the Applicants. I have come to the conclusion that such a decision was unreasonable and incapable of justification, notwithstanding the eminence of those who made it. My reasons for this are as follows:
1. The particular aspect of open justice from which anonymity would be a derogation is not its most important aspect, especially in an inquisitorial context in which the Tribunal does not consider that it would be impeded in its task of discovering the truth.
 2. If circumstances should arise during the evidence which call for a reconsideration of anonymity in the light of evidential developments and the need to find the truth, then the question could be reconsidered; likewise if there arose in relation to any particular Applicant a public interest need to name him in the Report.
 3. Although the Tribunal adverted to the possibility of reconsideration in relation to the contents of the Report, it does not seem to have done so in relation to evidential developments.
 4. Once the ability to reconsider is acknowledged, one has to ask: just what facet of open justice and public confidence would be undermined by a grant of anonymity at this stage? If the Tribunal considers it likely that after a public hearing it will be able to find the truth about Bloody Sunday, with or without a reconsideration of anonymity during the evidence, it cannot be the view of the Tribunal that the main functions

of open justice are under threat. I accept that the Tribunal was entitled to have regard also to the perceptions of the families of the deceased and wounded when considering public confidence, even if those perceptions concerning this Tribunal are objectively unjustified or erroneous. However, the weight to be attached to such perceptions must surely vary with the degree to which the Tribunal considers them reasonable and justifiable. If it is confident in its fact finding potential and mindful of its ability to reconsider anonymity in the light of future developments, I do not consider that it can be Wednesbury reasonable to elevate the perceptions of other interested parties above the fundamental human rights of the Applicants. The consequences of a refusal of anonymity are potentially devastating for those rights and irreversibly so. A grant of anonymity, on the other hand, need not be permanent.

124. In my judgment, to the extent that the Tribunal did not approach or rationalise its decision on anonymity in this way, it cannot be said to be a reasonable decision. That, it seems to me, is a sufficient basis to allow this application for Judicial Review. However, I am also troubled by another aspect of the case. The Tribunal made it clear in paragraph 22 of the decision that it was acceding to a submission made on behalf of the families that the Tribunal should concentrate on “what we perceive to be the degree of danger if the soldiers’ names are revealed”. No doubt the Tribunal was entitled to take that view. What troubles me, is that the decision does not proceed to quantify that degree of danger save, and with a degree of circularity, by concluding that it was insufficient to outweigh the interests of open justice and public confidence. In fact, the Tribunal had sought and had been provided with a great deal of material by the Ministry of Defence. It is submitted by Mr Burnett QC on behalf of the Ministry of Defence that, in round terms, the Tribunal simply did not do justice to the Ministry of Defence material. In my judgment there is considerable force in this submission and I agree with what Roch LJ has said about it.
125. At the commencement of his submissions, Mr Clarke QC suggested that if we were to conclude that the May decision is unreasonable and unjustified we would effectively be saying that the only reasonable decision open to the Tribunal is to permit anonymity at this stage. If that is correct, and it may well be, we should not shirk it. The fact that a question admits of two or more answers does not necessarily mean that, in particular circumstances, there is more than one reasonable answer.
126. I would quash the decision of the Tribunal in the manner indicated by Roch LJ.

127. In conclusion, I wish to add that I yield to no one in my sympathy towards the families of the deceased and the wounded. They are entitled to be reasonably satisfied that Lord Saville's distinguished Tribunal will conduct a rigorous public investigation so as to discover and report on the truth about Bloody Sunday. However, I am convinced that such proper expectations cannot reasonably be said to be imperilled by anonymity for the Applicants at this stage.

MR JUSTICE HOOPER:

128. I adopt with gratitude the summary of the facts by Roch LJ. I give my reasons for reaching different conclusions to those of Roch LJ and Maurice Kay J.

The Law

129. This Court may only interfere with a decision of the kind with which this case is concerned if, in the absence of procedural unfairness, the decision maker has made an error of law, has taken into account matters which he ought not to have taken into account, has not taken into account matters which he ought to have taken into account or, in the words of Sir Thomas Bingham MR in R v Ministry of Defence ex parte Smith [1997] QB 517 at 554, has reached a decision which is "unreasonable in the sense that it is beyond the range of responses open to a reasonable decision-maker".
130. It is not suggested that there was any procedural unfairness. Whereas the decision by Lord Widgery CJ to grant anonymity was, it appears, reached without having sought or received any representations from the families, those involved before this Tribunal have been given every opportunity to make representations, both written and oral. Nor is there any suggestion that the Tribunal has misdirected itself as to the law.
131. It is not disputed that a decision to refuse anonymity may (at the least) imperil not only the life of a soldier but also that of his family. In those circumstances, the Court must give the "most anxious scrutiny" to the decision. See R v Home Secretary ex parte Bugdaycay [1987] AC 514 at 531 and 537. Whereas, normally, the court will only interfere if it is satisfied that the decision is unreasonable, "[t]he more substantial the interference with human rights, the more the court will require by way of justification before it is satisfied that the decision is reasonable", in the sense that it is beyond the range of responses open to a reasonable decision-maker (Smith, page 554). I see very little, if any, difference between this test and the general test being proposed by Sir Sydney Kentridge and set out by my Lord, Roch LJ.

132. It follows that, in my judgment, the question that this Court has to answer can be expressed in the following way:

“Given that the decision to refuse anonymity may (at the least) imperil life or liberty, is the court satisfied that the Tribunal’s decision is reasonable in the sense that it is within the range of responses open to a reasonable decision-maker?”

133. In effect the burden is on those who seek to uphold the decision (see *Judicial Review of Administrative Action*, de Smith, Woolf and Jowell, 5th Ed., First Supplement, paragraph 13-060). The greater the risk to life and liberty the more the Court will require by way of justification and the more anxious scrutiny it must give.

134. In answering that question it is important to bear in mind the words of Lord Woolf, MR, when this matter was previously before the Court of Appeal (Transcript page 13):

“Tribunals such as this often have the most difficult task to perform. They are set up without guidance as to the precise procedures which they have to follow. They have to work out that procedure for themselves. They will inevitably know much more about the problems of the particular area into which they have to enquire than can be known by a supervising court, such as the Crown Office Judge or the Divisional Court on an application for judicial review. Tribunals are entitled to determine their procedure for themselves. The courts should only interfere when there is some very good reason for them to do so.”

135. This Tribunal is not only chaired by Lord Saville, but he is assisted uniquely by two retired judges from the Commonwealth. It can, in one sense, properly be described as an international tribunal. There can also be no doubt that the Tribunal gave the most anxious consideration to the issue which it had to resolve (see, for example, paragraph 23). By the time it made the ruling now under review the Tribunal had had over a year in which to familiarise itself with the background to the enquiry. The Tribunal was in a position, for example, to describe as “responsible” the substantial body of public opinion to the effect that the Widgery Enquiry “so far from restoring public confidence” had “compounded the crisis” (paragraph 19). Counsel for the families explained to us the procedures adopted in the Widgery Enquiry which would, in their submission, not have restored public confidence.

136. In this case Mr Clarke QC, on behalf of the tribunal, supported by counsel for the families has submitted that the decision is one within the range of responses open to a reasonable decision maker. Sir Sydney Kentridge submits that the decision reached was one which, on the evidence before it and against the history of this matter, is one which was beyond the range of responses open to a reasonable decision maker. The Tribunal, he said, should have granted anonymity to those who fired live rounds, at least at the present stage. He does not invite this Court to send the matter back for further consideration.
137. ***The balancing exercise-general observations***
138. Mr Burnett submitted that the decision of the Tribunal was one that was “unique in the annals of British justice”, a phrase about which Mr Harvey QC made complaint. Although Sir Sydney Kentridge did not use those word, the effect of his submissions was to convey to me, at least, a similar message.
139. Although the decision of this Tribunal may appear to many to be “unique”, these kind of decisions are made day in and day out, particularly in criminal trials. In deciding whether or not to grant anonymity or whether to make restrictions on what may be published, courts have to undertake a balancing exercise. (For an example of the balancing exercise being carried out in quite another context, see R v. Chief Constable of the North Wales Police and others, ex parte AB and another [1998] 3 All ER 310.)
140. The tribunal in this case had to weigh up various competing factors or considerations in deciding whether or not to grant anonymity:
1. The risk to a soldier and his family of not granting anonymity (“the risk factor”);
 2. The necessity to find the truth about Bloody Sunday described by the Tribunal as a “fundamental objective” (paragraph 11);
 3. The requirement of “open justice” (“the open justice factor”).
141. In many criminal trials courts have to balance similar competing factors, albeit that the second would normally be described in terms of achieving a fair trial.
142. In criminal trials the open justice factor may take precedence over the first, however great the risk. A person who has been charged and is either awaiting trial or being tried may have a strong argument for saying that his life is at serious risk should his identity become known. It is clear, however, that a Court cannot make an order on these grounds

for maintaining the anonymity of the defendant, see for example R v. Newtownabbey Magistrates Court ex parte Belfast Telegraph Newspapers Limited [1997] TLR at 476 (Queen's Bench Division (Crown Side) of the High Court in Northern Ireland). In deciding not to grant anonymity to a defendant the Court is protecting "open justice".

143. As Lord Diplock said in Attorney-General v. Leveller Magazine Limited [1979] AC 440 at pages 449H:

"As a general rule the English system of administering justice does require that it be done in public: Scott v. Scott [1913] AC 417. If the way that courts behave cannot be hidden from the public ear and eye this provides a safeguard against judicial arbitrariness or idiosyncrasy and maintains the public confidence in the administration of justice. The application of this principle of open justice has two aspects: as respects proceedings in the court itself it requires that they should be held in open court to which the press and public are admitted and that, in criminal cases at any rate, all evidence communicated to the court is communicated publicly. As respects the publication to a wider public of fair and accurate reports of proceedings that have taken place in court the principle requires that nothing should be done to discourage this."

144. Such is the importance attached to open justice in criminal cases that there is a specific right to appeal against an order of the Crown Court derogating from the principle of open justice, a right which the media exercise from time to time and often successfully (see Blackstone's Criminal Practice 1999 paragraph D2.56).

145. In criminal trials a party, more usually the prosecution, may seek an order that a witness should remain anonymous. There are many witnesses who have a realistic prospect of serious injury if not death should they give evidence. These include "super grasses" and "participating informants". Only very rarely, if at all, will they be granted anonymity. In paragraph 40 of its submissions to the Tribunal dated 15th April 1999 the Ministry of Defence wrote this:

"As Lord Gifford QC remarks, in paragraph 15 of his submissions of 3 December 1998 on behalf of the Wray family [Volume 1/223]:

'even at the height of the Troubles, the principle of public justice [in Northern Ireland] was largely observed.'

146. There is some truth in this proposition, despite the IRA's having murdered two judges (Judge Doyle in 1983 and Lord Justice Gibson in 1987), and it may go a long way to accounting for the reasons why soldiers who have been prosecuted for murder and the like have not been traced, tracked down and killed by republican terrorists."

147. Mr Clarke referred us to the decision of the Court of Appeal of New Zealand in R v Hughes [1986] 2 NZLR 129. In particular he referred us to passages in the judgment of Somers J, a member of this Tribunal. He said (page 155) that it can hardly be doubted that as a general rule a witness must give his true name, address and occupation. There is no suggestion that, in this case, anything other than the name should be disclosed. He went on to say:

"There is more than one reason for this. First, it is an important element in the open administration of justice. The public interest requires, and the law normally demands, that the whole of a trial is open to public scrutiny." (at page 155)

148. He went on to give other reasons which relate to a defendant's right to "a fair trial".

149. ***The necessity to find truth***

150. As to three numbered factors to which I have made reference, the second may be dealt with shortly. In paragraph 12 of its ruling of 21st May the Tribunal wrote:

"It is of course correct to bear in mind (as we said in December) that it is unlikely that the Tribunal would be hampered in its objective of finding the truth about Bloody Sunday by granting anonymity (since the Tribunal is an inquisitorial body and would itself know the identity of the witnesses) ..."

151. In its earlier observations of 24th July, to which Roch LJ has already referred, the tribunal said that "we think that there are likely to be circumstances in which granting anonymity will positively help us in our search for the truth". The fact that the Tribunal would not be so hampered does not, as the Tribunal said: "really take the matter much further forward" (paragraph 12). It also bore in mind the real possibility that, at least in some cases, "anonymity would have the effect of encouraging greater candour". However: "... this factor, alone or taken with others, is not sufficient to override our duty to carry out a public investigation" (paragraph 34).

152. ***The open justice factor***

153. The Tribunal said about this:

“It regards itself as under a duty to carry out its public investigative function in a way that demonstrates to all concerned that it is engaged in a thorough, open and complete search for the truth about Bloody Sunday.” (paragraph 11)

154. These words reflect the terms of the letter sent out by the Tribunal on 22nd March 1999 to those involved.

“The Tribunal regards it as its duty to carry out its public investigative function in a way that demonstrates to all concerned that it is engaged in a thorough, open and complete search for the truth about Bloody Sunday and that this prima facie involves the giving of evidence by all witnesses under their proper name. The Tribunal may well have to balance this consideration against competing considerations relating to the security of the relevant soldiers. But the Tribunal would like to know whether you contend that the Tribunal has misunderstood its duty and, if so, to explain why.”
(2/408)

155. No such representations were made. As the Tribunal said:

“All interested parties accept the existence of this duty, which [in the mind of the Tribunal] stems ... from the more fundamental principle of open justice in a democratic society.” (Paragraph 11)

156. With all respect to Sir Sydney Kentridge and Mr Burnett, their criticisms of the manner in which the duty was articulated and of the alleged failure to describe in more detail what the duty was, overlooks not only the obvious importance of the duty but the fact that its existence and ambit were not in dispute. It is, in these circumstances, not necessary for me to rehearse the arguments for the need for “open justice” put forward by counsel who opposed these applications. What was in dispute was how that consideration should be balanced against the competing consideration “risk to the soldiers”. On behalf of the applicants it is submitted that no reasonable decision-maker could resolve the balancing exercise, on the facts of this case, other than by coming down against “open justice”.

157. The Tribunal described this duty as the “duty laid on the Tribunal as to the manner in which it should seek” its fundamental objective, namely the finding of the truth about Bloody Sunday. (paragraph 12)

158. Sir Sydney Kentridge and Mr Burnett stressed the fundamental objective and submitted rightly that the fundamental objective, seen as the finding of the truth, could be achieved with the witnesses remaining anonymous. However, the finding of what the Tribunal believes to be the truth is a finding which, to be accepted must, according to the Tribunal, be the result of an “open” search for the truth, as well as a “thorough” and “complete” search. The Tribunal stressed the need to restore public confidence where a crisis in public confidence had occurred:

“Indeed, there is a substantial body of responsible public opinion to the effect that the Widgery Inquiry, so far from restoring public confidence, compounded the crisis. We consider that our ability to restore confidence will be undermined unless”
(Emphasis added, paragraph 19)

159. Having defined the duty on the Tribunal as to the manner in which it should seek its objective, the Tribunal went on to say:

“... the existence of this duty entails that in the absence of compelling countervailing factors, those who give evidence to the Tribunal should do so under their proper names...” (paragraph 12)

160. In a later passage the Tribunal said that the conduct of the soldiers who fired live rounds was “at the very heart of this enquiry”:

“It is that loss of life that we are publicly investigating. To conceal the identity of those soldiers would, as it seems to us, to make particularly significant inroads on the public nature of the Inquiry.” (Paragraph 28)

161. The Tribunal also said:

“... it is not open justice that needs to be justified, but rather any departure from open justice. If justice cannot be done if it is open or if there are other matters that mean that open, justice would cause a greater injustice, then of course a departure would be justified, for these would be compelling countervailing factors.” (Paragraph 13)

162. When the Tribunal came to consider an RUC application for anonymity in respect of three officers it found “compelling countervailing factors ... sufficient to displace our duty as we have described it.” (Paragraph 39)

163. Sir Sydney Kentridge submits that the Tribunal was wrong to conclude that any departure from open justice had to be justified. He points to a passage in the judgment of Otton LJ in the Court of Appeal referred to by the Tribunal in paragraph 13 of the decision. In my judgment the approach adopted by the Tribunal is consistent with the approach generally adopted when issues of this kind have to be decided. I see no reason why the fact that the Tribunal is conducting an inquiry under the 1921 Act should alter that position. As the Tribunal said:

“The Tribunal must conduct what Lord Justice Salmon described in his Report (1966 Cmnd 3121 at paragraph 28) as a ‘public investigation’” (Paragraph 12)

164. ***The risk factor***

165. Having described in paragraph 21 the “basic submission” made on behalf of the soldiers and the increase in the level of threat from moderate to significant, in paragraph 22 the Tribunal went on to conclude that “the soldiers have grounds for their assertion that they have genuine and reasonable fears.” In paragraph 23 it referred to the understandable fears of the families for their safety.
166. The Tribunal then said that it should concentrate on “what we perceive to be the degree of danger if the soldiers’ names are revealed.” It concluded paragraph 22 with these words:
- “... the greater the danger the more compelling this factor becomes in the balancing exercise we have to perform.”
167. As Roch LJ said in argument, what is being referred to in that passage is the “reality” of danger.
168. There can, in my judgment, be no proper criticism of this approach. The recognition that “the greater the danger the more compelling becomes this factor” reflects the requirement of “anxious scrutiny” in judicial review applications of this kind.
169. The Tribunal made it clear that it appreciated that “the removal of anonymity is permanent” and “that it is possible that in the future the threat to the soldiers may increase” although “whether this will happen is necessarily speculative” (paragraph 24). In paragraph 20 a similar point had been made:

“Of course no one knows what the future may hold, and the bad days may return, but whether or not they will is at best a matter of speculation.”

170. In paragraph 25, the Tribunal summarised, accurately in my view, the threat assessment. I shall not repeat that summary to which Roch LJ has already referred in his judgment. In paragraph 26 the Tribunal made the obvious but important point that “identified soldiers are in greater danger than unidentified soldiers.”

171. The Tribunal considered the position of what it described as the “generality of soldiers”, that is, those soldiers who did not fire live rounds. As to this “generality”, the Tribunal stated:

“... it seems to us that since there must be many soldiers or ex-soldiers whose names have been publicised or whose identities could readily be discovered ... the danger created by identifying soldiers is one that is borne ... by hundreds, if not thousands, of serving or former soldiers ...” (Paragraph 27)

172. As to those who fired live rounds, they stand out “significantly” from the “generality of soldiers” (paragraph 27). The Tribunal wrote:

“As a group they are assessed as more attractive targets than the generality of soldiers and thus face a higher likelihood of terrorist attack if they were identified, but this increased threat is not considered sufficient, at least at present, to move them from the ‘significant’ to a higher category.” (Paragraph 28)

173. In paragraph 29 the Tribunal wrote:

“There is a further consideration that it seems to us we can properly take into account. Immediately after Bloody Sunday, as we have already noted, a reprisal attack was carried out on the Aldershot Barracks of the Parachute Regiment. After this, and with the possible exception of General Ford, there is (at least on the material before us) no evidence to suggest that over the following 27 years any of the soldiers involved in Bloody Sunday has been the subject of attacks for that reason, though of course large numbers of soldiers (and civilians) have been attacked and killed or injured. The names of a number of soldiers involved in Bloody Sunday are known (though not necessarily any of those who fired live rounds), or could have been identified without undue difficulty from public records, so that on any view the general anonymity of the

soldiers does not provide a full explanation for the fact that (with the possible exception noted above) none of them has been the subject of an attack because of involvement in Bloody Sunday. Of course we appreciate that some at least of those whose names are or could be known may have been taking special precautions, but the fact of the matter is that (so far as we are presently aware) the danger they have been under as the result of Bloody Sunday has not resulted in any deaths or injuries.”

174. *The balancing exercise as carried out by the Tribunal: “risk factor” v. “open justice factor”*

175. In paragraph 22 the Tribunal posed the question it considered that it had to answer: namely, whether the grounds put forward by the applicants for retaining anonymity:

“... amount to such a compelling countervailing factor that it would be right for us to depart from our duty...”

176. I have already pointed out that the Tribunal appreciated that “the greater the danger the more compelling becomes this factor”.

177. The Tribunal concluded that there was “no way of satisfactorily reconciling the two considerations” and that:

“After the most anxious consideration we have concluded that on the basis of the material presently before us our duty to carry out a public investigation overrides the concerns of the soldiers...”. (Paragraph 23)

178. It retained the right to:

“... consider further the question of anonymity if it is suggested that there are special reasons in any particular cases why we should do so” (Paragraph 23).

It said:

“... consideration of individual circumstances may lead to the conclusion that in particular cases the danger is greater, and if that is so then of course we shall reconsider the question...” (Paragraph 30)

179. We were told that it is anticipated that a number of soldiers who fired live rounds are making such applications.

180. As to the “generality” of soldiers, the Tribunal concluded that, in the light of its conclusions that “the danger created by identifying soldiers is one that is borne by hundreds, if not thousands, of serving or former soldiers” and was not such as to override its duty to conduct a public investigation. (Paragraph 27)

181. As to the soldiers who fired live rounds, the Tribunal wrote:

“This after all is an Inquiry into events in which people lost their lives and were wounded by British army gunfire on the streets of a city in the United Kingdom. To withhold the names of those in the army who were concerned with that event must detract from an open search for the truth about what happened; and must need justification of an overriding kind.” (Paragraph 12)

182. In the passage cited from paragraph 28, the Tribunal concluded that these soldiers are more attractive targets than the generality of soldiers and thus face a higher likelihood of terrorist attack if they were identified and that “this increased threat is not considered sufficient, at least at present, to move them from a ‘significant’ to a higher category”. The Tribunal concluded:

“On the basis of the general assessment , we have concluded that the danger to soldiers who fired live rounds on Bloody Sunday does not outweigh or qualify our duty to conduct a public open enquiry”. (Paragraph 28) (Emphasis added)

183. The “general assessment” is the threat assessment which the Tribunal had earlier summarised.

184. The Tribunal considered whether to delay any decision about anonymity until the report stage. It said, as to this:

“We have considered whether it would be appropriate to grant anonymity at the present stage, whilst reserving the right to reconsider the position when we came to make our report. In this connection it is accepted that if we were to conclude that any particular soldier was at fault, that consideration would be a relevant factor to take into account in deciding whether or not to withdraw anonymity from that soldier. We have decided not to take that course, for to do so would in our view derogate for no good or sufficient reason from our duty not only to report what we believe to be the truth, but also to conduct an open and public investigation.” (Paragraph 31)

185. The Tribunal also considered the particular position of Soldier “H”:

“A further point was advanced by Sir Allan Green QC, Counsel for Soldier “H”. This was based on the fact that at the previous Inquiry the justification given by this soldier for firing a large number of rounds was expressly disbelieved by Lord Widgery and that the account given by this soldier, which in a recent affidavit he has maintained is the truth, has been the subject of extremely unfavourable comment in a number of published works about the Widgery Inquiry. It is suggested that these circumstances make Soldier “H”, were his name to be revealed, particularly vulnerable.”

“We are not persuaded by this submission. It seems to us to be speculative, especially in view of the fact that accusations of serious wrongdoing have been made against all or virtually all the soldiers who fired live rounds. On the material presently before us, we would not regard the danger to Soldier “H” as being in a significantly different category from that of the other soldiers who fired live rounds.” (Paragraphs 32 and 33)

186. ***Is the conclusion of the Tribunal that the “risk factor” is outweighed by the “open justice factor” within the range of responses open to a reasonable decision maker?***

187. The principal submissions made on behalf of the applicants (other than those which I have already considered) can, I hope, fairly be summarised in the following way:

1. Having concluded in its first decision that its duty to ensure “open justice” could be met by the soldiers using only their surnames (absent any special circumstances) and thus ensuring as far as possible that those who fired live rounds would not be traced, it was irrational to reach a conclusion that anonymity should be lost.
2. No proper weight was given to the Widgery assurance.
3. The Tribunal failed to take into account or attached insufficient weight to the evidence put forward by the Ministry of Defence.
4. In all the circumstances, there is only one answer to the question posed by the Tribunal: “The risk factor in this case must, at least at this stage of the proceedings, outweigh the open justice factor.”

188. As to that first submission, Mr Clarke submits that the answer to that submission may be found particularly in paragraph 23 of the May ruling. In that paragraph, the Tribunal explained that it had attempted in its December ruling:

“... to square the circle by suggesting that those who had the greatest reason to fear reprisals (the soldiers who fired live rounds on Bloody Sunday) could give their surnames only ... but this attempt has failed ... No one now suggests that this is an appropriate solution. The conclusion that we have reached is there is in fact no way of satisfactorily reconciling the two considerations; and that the one must give way to the other.”

- 189.** In my judgment, that is a complete answer to this first submission. In performing the balancing exercise in its December ruling the Tribunal found a solution which, in its view, balanced the two factors: “open justice” and “risk”. If that solution is no longer open to it and there is no way of satisfactorily reconciling the two factors, then it cannot become irrational simply because the Tribunal reached a different conclusion. Nor do I find any merit in the argument that, given that the security assessment had changed from “moderate” to “significant”, that this, in some way, automatically must make the conclusion irrational because of the previous ruling. There remains the argument, of course, that it was unreasonable to decide that the open justice factor overrides the risk factor. That argument, in my judgment, receives no support from the fact that the Tribunal had achieved a balance which later turned out to be insupportable. I shall return to that argument under heading 4.
- 190.** I turn to the second submission. In paragraphs 15-20 the Tribunal considered whether the Widgery assurance, as it has become known, was a compelling countervailing factor to “open justice”. There is no dispute that the assurance cannot bind subsequent courts or tribunals charged with investigating the events of that day. We were told that the matter would probably have to have been considered in civil proceedings brought by the families, but for the fact that they were settled. Notwithstanding the conclusion in the Widgery Report, for example, that shots fired at four men “were fired without justification”, that in the case of one soldier 19 out of the 22 shots “were wholly unaccounted for” and that in one area “firing bordered on the reckless” (1/124 and 134), no-one was prosecuted. If a soldier or soldiers had been prosecuted then the issue of anonymity would have had to be resolved and it is likely that it would have been resolved against any defendant. The assurance was therefore of a limited kind. Nonetheless it can properly be said that the soldiers have had the benefit of it since 1972. Furthermore, if the soldiers are required to give evidence other than anonymously, then the statements made by them for the purposes of the Widgery Enquiry will lose their anonymity.

191. The Tribunal concluded that “our ability to restore confidence” “will be undermined, unless we can form a wholly independent judgment, based on the facts before us, on the question of anonymity” (paragraph 19). Assuming that this was contrary to what Lord Woolf MR said in the Court of Appeal (2/446), the Tribunal reached the conclusion that the assurance was not “a compelling countervailing factor” for the reasons it gave (paragraph 20). In my judgment, that conclusion is one that the Tribunal was reasonably entitled to reach and there is no merit in this submission.
192. I turn to the third submission. Sir Sydney Kentridge and Mr Burnett submit that the Tribunal failed to take sufficiently into account the Ministry of Defence material. It is not necessary for a decision-maker to summarise all the evidence. It cannot be argued that the Tribunal did not consider the evidence simply because it did not refer to it. The Tribunal specifically mentioned the general threat assessment, as I have already shown. The Tribunal referred to the history of terrorist attacks in paragraph 29. As Mr Clarke submitted, the Tribunal was “entitled to (and ought to have) considered any evidence of terrorist attacks motivated by the events of Bloody Sunday, and conversely the lack of any such evidence” (paragraph 61 of his Skeleton Argument).
193. It is submitted that the Tribunal was requiring concrete evidence of threats against the soldiers. I do not accept this submission.
194. The Tribunal is criticised for not, it is said, having calculated “the degree of danger” to which the soldiers who had fired live rounds would be subject so as to decide whether it outweighed the open justice factor, as I have called it. The threat assessment described the general threat of reprisals in Great Britain as, at that time, “significant” and, as the Tribunal reminded itself, the soldiers who fired live rounds were obviously more attractive targets than the other categories of soldiers (paragraphs 26 and 28). Consideration of individual circumstances may lead, as the Tribunal said, to the conclusion that in particular cases the danger is greater (paragraph 30). The thrust of the MOD’s submission before the Tribunal as to danger may be found in paragraph 41 of the submissions and in its conclusions:

“During the hearings of the Inquiry some of the soldiers will face grave accusations. The Ministry of Defence believes that there is a real danger that these men, if named, will be identified as potential targets whatever the outcome of the Inquiry, and that terrorists may feel justified in taking retributive action of their own if, for whatever reason, the men against whom the most serious allegations are made are not charged

with criminal offences. The Tribunal's deliberations, which are likely to extend over many months, will cause intense public interest. The risks to those perceived by terrorists to have been directly or indirectly responsible for the loss of life on Bloody Sunday [described in the next paragraph as 'unique'] will rise as a result of the increased attention which those events will receive." (2/506A)

195. The reference to those who "are not charged" has to be understood against the contents of paragraph 39 of the submissions in which reference is made to the apparent absence of reprisals against soldiers who have been tried on serious charges arising out of their service in Northern Ireland. Those who have been tried have been "subject to the due process of law", which may, according to the Ministry of Defence, explain the apparent absence of reprisals.
196. In its conclusions the Ministry of Defence wrote that:
- "a. There remains a threat to members of the security forces from republican terrorism. It has increased since the Tribunal's last consideration of the issue.
- b. That threat is far greater when the soldiers, past or present, have been involved in incidents of exceptional controversy. Soldiers who were involved in Bloody Sunday, and especially those who fired shots, if identified, would be exposed to a significant risk of attack by republican terrorists."
197. Summarising these submissions, the Tribunal is being told by the Ministry of Defence that terrorists may feel justified in taking retributive action of their own if, for whatever reason, the men against whom the most serious allegations are made are not charged with criminal offences, particularly in the light of the unique character of Bloody Sunday and that soldiers who were involved in Bloody Sunday, and especially those who fired shots, would, if identified, be exposed to a significant risk.
198. The Tribunal made it clear that it was concerned with the "degree of danger" to which the soldiers would be exposed if they were identified (paragraph 22). It noted that all former soldiers fall within the "significant category" so all are "priority targets", that the applicants were "more attractive targets" and "face a higher likelihood of terrorist attack if they were identified", but that "this increased threat is not considered sufficient, at least at present, to move them from the 'significant' to a higher category". It also, rightly in my judgment, took account of what is set out in paragraph 29.

199. This was, in my judgment a quite sufficient description and analysis of the danger in which the soldiers would find themselves for the purposes of carrying out the balancing exercise and the MOD submissions do not take the matter significantly further. In this context I agree with Mr Clarke that the case of Fernandez v. Government of Singapore and others [1971] 1 WLR 987 does not materially assist in the resolution of the issues before the court.
200. Although as the danger increases so must more weight be given to the risk factor, the practice in the criminal courts to which I have already referred both in England and, more importantly in Northern Ireland, shows that anonymity may not be granted even where risks are much higher than in this case.
201. I do not agree that the evidence of Mr Taylor (summarised by Roch LJ) to the effect that revealing his sources “would put lives at risk” adds anything of significance to the other material before the Tribunal.
202. Criticism is also made of the Tribunal’s failure to mention the fact that the hearings might well inspire renewed hostility. The Tribunal was conscious that things might change and, in any event, and as Mr Clarke submitted, this was an obvious point. I therefore reject the third submission.
203. I turn therefore to the fourth principal submission:
- “In all the circumstances, there is only one answer to the question posed by the Tribunal: “The risk factor in this case must, at least at this stage of the proceedings, outweigh the open justice factor.”
204. I shall start with that part of the ruling that relates to soldiers other than those who fired live rounds. The Ministry of Defence in its submissions supported anonymity for all soldiers who were to give evidence, but accepted that its arguments had greater force in respect of the soldiers who fired (2/488-489). Mr Burnett did not concede that these soldiers should not have anonymity but in very large measure the submissions were concerned with those who fired live rounds. In my judgment for the reasons particularly expressed in paragraph 27 of the ruling, I am satisfied that the ruling on anonymity in so far as it relates to these soldiers, is within the range of responses open to a reasonable decision maker.
205. Any soldier is entitled to make what the Tribunal described as a “special reason application.” Although the Tribunal does not specifically say so, I, for my part would think that this could include a reason why the balancing exercise in his case should come down

in favour of anonymity given, say, his very limited and uncontroversial role. As Mr Harvey said in argument, that is, in practice, often done in Northern Ireland by agreement between the court and the parties.

- 206.** I turn then to the soldiers who fired live rounds. It is submitted that the Tribunal laid too much emphasis on open justice. This is an inquisitorial Tribunal. There are to be no screens to protect the faces of these witnesses. They can be cross-examined. Truth can be ascertained without revealing identities. Anonymity can be lifted at the report stage for those found by the Tribunal to have acted wrongly. It follows, so it is submitted, given the danger to the soldiers, that the only rational conclusion was to maintain anonymity at this stage.
- 207.** I cannot agree. The Tribunal anxiously considered the matter at a time when it had had over a year to familiarise itself with the background to the enquiry. It came to the conclusion that open justice was more important than the other factors, including, particularly, the degree of danger to the soldiers from terrorists (not, I stress, from the families). There are many reasons for open justice. In its Ruling the Tribunal stressed the importance of there being public confidence in the work of this Tribunal (see the passage which I have already cited from the Leveller Magazine case). It highlighted the lack of confidence in the Widgery Enquiry. I, for my part sitting here in London, would be most reluctant to interfere with the conclusion of such a distinguished and “international” Tribunal investigating for the second time the deaths of citizens of this country many if not all of whom appear to have been unarmed. As the Tribunal said: “... accusations of serious wrongdoing have been made against all or virtually all the soldiers who fired live rounds” (paragraph 33). I certainly cannot describe the conclusion as irrational.
- 208.** I am satisfied therefore that these applications should be refused.

A2.46: Court of Appeal (Civil Division) (London, 28th July 1999): anonymity for soldiers (item 8 above)

[1999] EWCA Civ 3012

Case No: QBCOF 1999/0653/4

In the Supreme Court of Judicature
On appeal from the Queen's Bench Division (Crown Office List)
(Lord Justice Roch and Maurice Kay and Hooper JJ)

Royal Courts of Justice
Strand, London, WC2A 2LL

28th July 1999

Before:
The Master of the Rolls
(Lord Woolf)
Lord Justice Robert Walker
Lord Justice Tuckey

In the matter of an application for judicial review

Regina

-v-

The Right Honourable Lord Saville of Newdigate
Sir Edward Somers
Mr Justice William Hoyt
(Sitting as the Saville Inquiry)
(Ex parte A and Ors)

(Transcript of the handed down judgment of Smith Bernal Reporting Limited, 180 Fleet Street, London EC4. Telephone No: 0171 421 4040. Official Shorthand Writers to the Court)

Mr Christopher Clarke QC with Mr A Roxburgh and Mr J Grierson (instructed by Mr John Tate, Solicitor to the Inquiry, London SW1Y 4WG) appeared on behalf of the Appellant.

Sir Sydney Kentridge QC with Mr D Lloyd Jones QC and Mr M Bools and Miss M Gray (instructed by AD Lawton, Treasury Solicitor, London SW1H 9JS) appeared on behalf of the Respondents.

Mr Ian Burnett QC and Mr W Hoskins (instructed by the Treasury Solicitor, London SW1H 9JS) appeared on behalf of the Ministry of Defence as an interested party.

Mr J Coyle (instructed by Messrs Desmond J Doherty & Co, Derry BT48 7EP) appeared on behalf of the family of B McGuigan; MacDermott & McGurk on behalf of the family of A & W Nash; McCartney & Casey on behalf of the family of J Wray; and Madden and Finucane on behalf of most of the remainder of the deceased and injured.

Judgment

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Wednesday 28th July 1999

LORD WOOLF, MR:

1. This is the judgment of the court on an appeal from a decision of a majority of the Divisional Court (Roch LJ and Maurice Kay J, Hooper J dissenting).

The Background

2. The order of the Divisional Court, made on 17 June 1999, partially quashed a decision of the tribunal sitting as The Bloody Sunday Inquiry (“the Tribunal”). The Tribunal was established under the Tribunals of Inquiry (Evidence) Act 1921 (“the 1921 Act”) following a statement made by the Prime Minister in the House of Commons on 29 January 1998, and a resolution adopted by both Houses of Parliament. The members of the Tribunal are the Rt Hon Lord Saville of Newdigate (a Lord of Appeal in Ordinary), the Rt Hon Sir Edward Somers (a retired judge of the Court of Appeal of New Zealand) and the Hon William L Hoyt (a former Chief Justice of the Supreme Court of New Brunswick).

3. The resolution establishing the Tribunal referred (following the language of s. 1(1) of the 1921 Act) to:

“a definite matter of urgent public importance, namely the events on Sunday, 30 January 1972 which led to the loss of life in connection with the procession in Londonderry on that day, taking account of any new information relevant to events on that day.”

4. In the course of those events, thirteen persons (none of them a member of the British armed forces) were shot and killed and at least that number were shot and wounded on the streets of Londonderry. 30 January 1972 has become known as ‘Bloody Sunday’. In the words of the written submission made to this court on behalf of the Tribunal,

“It is not in dispute that the majority, at least, of the casualties were the result of shooting by the British Army, but the circumstances of the shootings are, and always have been, acutely controversial. In broad terms, the Army version of events has been that soldiers fired only aimed shots at identified gunmen and nail and petrol bombers. The relatives of the dead and the injured, and many civilian witnesses, have maintained that the victims were innocent of any wrongdoing and that the shootings were unjustified and criminal.”

5. Immediately after this very grave incident both Houses of Parliament resolved to establish a tribunal of inquiry under the 1921 Act, and Lord Widgery, then the Lord Chief Justice of England and Wales, was appointed to conduct the inquiry. He held public hearings at Coleraine (which is about 30 miles from Londonderry) during February and March 1972, and later heard submissions in London. During the hearings in Coleraine, 114 witnesses gave oral evidence and were cross-examined. The witnesses fell (as Lord Widgery recorded in his report):

“into six main groups; priests; other people from Londonderry; press and television reporters, photographers, cameramen and sound recordists; soldiers, including the relevant officers; doctors, forensic experts and pathologists.”

6. Forty soldiers gave oral evidence to Lord Widgery. Five were senior officers who gave evidence under their own names, without making any application for anonymity. The others were permitted to identify themselves, and were referred to throughout the inquiry, by a system of code names. 28 soldiers admitted that they had fired live rounds on that day (rubber bullets were also fired) and 23 of them gave oral evidence; all these 28 were

designated by letters of the alphabet (“lettered soldiers”). Other soldiers who gave evidence or were referred to in evidence were designated by numbers (“numbered soldiers”).

7. The anonymity accorded to the lettered and numbered soldiers does not appear to have been regarded by Lord Widgery as particularly controversial. He stated in his report:

“Since it was obvious that by giving evidence soldiers and police officers might increase the dangers which they, and indeed their families, have to run, I agreed that they should appear before me under pseudonyms. This arrangement did not apply to the senior officers, who are well known in Northern Ireland. Except for the senior officers, the individual soldiers and police officers are referred to in my Report by the letter or number under which they gave evidence in the Tribunal.”

8. As a result of observations made when an earlier application was considered by this court, further enquiries have been made about the original grant of anonymity and an affidavit has been sworn by Lieutenant Colonel Overbury, who then held the post of Assistant Director Army Legal Services (ADALS1) and was closely involved in the Army’s preparations for Lord Widgery’s inquiry. Colonel Overbury makes clear that soldiers were ordered to give evidence.
9. Under s. 1(1) of the 1921 Act the Tribunal presided over by Lord Saville has all the powers of the High Court in respect of enforcing the attendance of witnesses and compelling the production of documents. Under s.2(a) the Tribunal “shall not refuse to allow the public or any portion of the public to be present unless in the opinion of the tribunal it is in the public interest expedient so to do for reasons connected with the subject matter of the inquiry or the nature of the evidence to be given”.
10. Because of the way in which this matter has evolved, it is necessary to set out in some detail the course of the Tribunal’s proceedings since its establishment. The Tribunal delivered an opening statement in Londonderry on 3 April 1998. It has established an office in London and has instructed solicitors and counsel to the Tribunal. It has been engaged on the very onerous task of gathering and analysing documentary and written evidence (including films, sound recordings and still photographs), locating and interviewing witnesses (both civilian and military) and selecting and instructing expert witnesses. The Tribunal has also had to deal with various preliminary matters, including applications for anonymity. The public hearing was due to commence in September 1999 but has now been postponed.

11. The Tribunal held a preliminary hearing in Londonderry on 20 and 21 July 1998, having first circulated a memorandum listing and commenting on the matters to be addressed at the preliminary hearing. The memorandum covered representation of interested parties, documentary evidence and witness statements. Paragraphs 20, 21 and 22 dealt with applications for anonymity, for immunity from prosecution and for evidence to be heard in camera. Paragraph 20 was in the following terms:

“20.1 If any potential witness wishes to give evidence without revealing publicly his or her name and/or from behind a screen in order to conceal his or her face, an application should be made to the Tribunal in writing, explaining the reasons why this is considered necessary.

20.2 Each such application will be considered on its merits and, if anonymity is granted, the Tribunal will state the reasons in public.

20.3 If the interested parties have any general observations or submissions to make as to the circumstances in which such applications should or should not be granted, they are invited to do so in their written summaries.”

Paragraph 22 was in the following terms:

“22.1 It would only be in exceptional circumstances that the Tribunal would accede to an application by a witness or interested party for evidence to be given in camera. If the Tribunal were to accede to any such application, its reasons for doing so would be publicly stated.

22.2 The parties are again asked to set out in their written summaries any general submissions they may wish to make on this matter.”

12. On 24 July 1998 the Tribunal issued an 18 page document (“the preliminary ruling”) containing its rulings and observations on the matters raised at the preliminary hearing. The Tribunal rejected the suggestion that it should approach its task on the footing that the inquiry should be regarded as ordinary adversarial litigation between the families of the dead and the wounded (on the one hand) and the soldiers and the Ministry of Defence (on the other hand). The preliminary ruling quoted from the Report of the Royal Commission on Tribunals of Inquiry chaired by Lord Justice Salmon (1966, Cmnd 3121) and from a paper by Professor Walsh which was very critical of Lord Widgery’s inquiry. The Tribunal agreed with Professor Walsh’s general views on the function of an inquiry of this kind:

“The Tribunal of Inquiry by contrast is set up specifically to find the truth. It is expected to take a positive and primary role in searching out the truth as best it can. Certainly, it will seek the assistance of any interested party who has evidence to give or who has an interest in challenging the evidence offered by another party. It must be emphasised, however, that it is the Tribunal, and not the parties, which decides what witnesses will be called to give evidence. Indeed, strictly speaking there are no parties, no plaintiff and defendant, no prosecutor and accused, only an inquiry after the truth. It is the Tribunal which directs that inquiry. All the witnesses are the Tribunal’s witnesses, not the witnesses of the parties who wish them to be called. Whether any individual witness will be called is a matter for the Tribunal. Moreover, the Tribunal can be expected to act on its own initiative to seek out witnesses who may be able to assist in the quest for the truth. Ultimately, the task facing the Tribunal is to establish the truth, not to make a determination in favour of one party engaged in an adversarial contest with another.”

13. The preliminary ruling explained in some detail how the Tribunal intended to act on its own initiative - for instance in instructing experts in different fields, publishing both the instructions and the expert’s reports as they were received. It then addressed the issue of anonymity, noting that the Treasury Solicitor and the Ministry of Defence had already indicated that applications for anonymity were likely to be made on behalf of soldiers who had been serving in Londonderry on Bloody Sunday. The Tribunal’s observations on this issue in the preliminary ruling are of such importance that they must be set out at length.

“It should be remembered that there are various different forms of anonymity. Depending on the circumstances, it might be appropriate to allow a witness to give evidence without stating his or her name and address in public, or perhaps to give evidence from behind a screen in order to conceal his or her physical appearance. It might also be necessary to preserve the anonymity of individuals by substituting letters or numbers for names in witness statements and other documents.

Mr Treacy [counsel for a group of families and wounded] referred to us a number of authorities in this field, including *Scott v Scott* [1913] AC 417, *A - G v Leveller Magazine Ltd* [1979] AC 440 and *R v Murphy & Maguire* [1990] NI 306. He also annexed to his written submissions a copy of an article by Gilbert Marcus, “Secret Witnesses” (1990) PL 207. Mr Treacy argued that the granting of any form of anonymity was a very grave step that should only be taken if justified on compelling grounds.

In adversarial procedure, great importance is rightly attached to the principle of open justice. In particular, the courts require very strong grounds indeed before departing from the rule that a person charged with a criminal offence is entitled to know the identity of prosecution witnesses and to see them give their evidence. One of the reasons for this is to enable the opposing party to investigate and assess the credibility of those witnesses.

The position in relation to an Inquiry such as this one is, in our view, rather different. Nobody is being prosecuted before this Tribunal, nor is it our function to do justice between parties competing in an adversarial contest. Our task is to do justice by ascertaining, through an inquisitorial process, the truth about what happened on Bloody Sunday. The proper fulfilment of that task does not necessarily require that the identity of everyone who gives evidence to the Inquiry should be disclosed in public. The Tribunal will know the identity of all witnesses and, unlike a court, will itself take responsibility for investigating their credibility if there is reason to think that such an investigation is necessary.

Indeed we think that there are likely to be circumstances in which granting anonymity will positively help us in our search for the truth. Witnesses are unlikely to come forward and assist the Tribunal if they believe that by doing so they will put at risk their own safety or that of their families. Moreover it would be a mistake to suppose that the grant of anonymity would always operate to protect soldiers who are alleged to have been guilty of serious offences on Bloody Sunday. There may well be witnesses who wish to give evidence that is favourable to the interpretation of events for which the families and the wounded contend, but who will not co-operate with the Tribunal without assurances as to their anonymity. We are aware, for example, of certain television programmes in which people describing themselves as ex-soldiers present on Bloody Sunday have criticised the conduct of the Army on that day, but have done so anonymously, presumably for fear of reprisals by their former comrades.

Accordingly, we will be willing to grant an appropriate degree of anonymity in cases where in our view it is necessary in order to achieve our fundamental objective of finding the truth about Bloody Sunday. We will also be prepared to grant anonymity in cases where we are satisfied that those who seek it have genuine and reasonable fears as to the potential consequences of disclosure of their personal details, provided that the fundamental objective to which we have referred is not prejudiced. As to the degree of anonymity that is appropriate, our current view is that restricting the disclosure of names and addresses ought to be sufficient in most, if not all, cases. We would regard the use of a screen as a wholly exceptional measure.

The obligation nevertheless remains firmly on those who seek anonymity of any kind to justify their claim.”

14. Following on the preliminary ruling Mr Anthony Lawton, an Assistant Treasury Solicitor, applied by letter dated 2 September 1998 for anonymity on behalf of three lettered and four numbered soldiers, asking that:

“no information tending to disclose their identities, occupations, addresses or telephone numbers should be disclosed to any person other than members of the Tribunal and its staff.”

15. A similar application was made by the Ministry of Defence, by letter dated 23 October 1998, on behalf of soldiers not then represented before the Tribunal. Since then the number of the Treasury Solicitor’s clients (that is, those for whom the Treasury Solicitor is acting in the Tribunal) has grown considerably. It is a much larger number than the 17 applicants for judicial review for whom the Treasury Solicitor is acting in these proceedings. Of the 28 soldiers who admitted firing live rounds on Bloody Sunday, five have died. All but one of the remaining 23 have left the Army. Each of the 17 applicants is one of these 23 lettered soldiers. All but three of them were serving in the First Battalion of the Parachute Regiment.
16. The Tribunal notified the other interested parties of the soldiers’ applications for anonymity, and two rounds of written submissions and supplementary submissions were made to the Tribunal in November and early December 1998. The Tribunal also had a written threat assessment dated 22 October 1998 provided by the Security Service. It is convenient to note at this point that none of the soldiers has applied for his evidence to be heard in camera, or for it to be given from behind a screen. Nor have any of the objectors to anonymity suggested that any soldier or ex-soldier should be required to disclose his present address, telephone number or occupation. The controversy has been limited to the issue of disclosure of witnesses’ true names.
17. On 14 December 1998 the Tribunal decided to grant only a limited form of anonymity, and on 17 December it published a written statement of further rulings and observations on venue and anonymity. The Tribunal decided not to give any general permission for the military witnesses to give evidence in London (rather than Londonderry). The Tribunal stated its reasons as follows:

“Whatever the rights and wrongs of what occurred on Bloody Sunday, in our view the natural place to hold at least the bulk of the hearings is, in these circumstances, where the events in question occurred.

We have concluded on the information presently available to us that this factor, so far as the soldiers generally are concerned, outweighs personal convenience and the expenditure required to make appropriate security and accommodation arrangements.”

18. However the Tribunal recognised that changing circumstances or particular matters affecting individuals might call for reconsideration of this general conclusion.
19. The Tribunal’s statement then set out its decision on anonymity. Since that decision has been quashed by the Divisional Court on an earlier application for judicial review, it is not necessary to set out the decision and the stated reasons in detail. It is sufficient to summarise it as follows:
 - (a) The Tribunal did not accept that the grant of anonymity before Lord Widgery’s inquiry raised a presumption in favour of anonymity.
 - (b) The Tribunal accepted that the military witnesses’ fears of reprisals were both genuine and reasonable, but saw “no concrete evidence of a specific threat”.
 - (c) The Tribunal did not see anonymity as an encouragement to perjury : “there is a real possibility that it would, at least in some cases, have the opposite effect of encouraging greater candour.”
 - (d) The Tribunal saw weight in the argument that the families of the dead and the injured were entitled to know the names of those who accused the dead and injured of having been armed with firearms, nail-bombs or petrol-bombs; but regarded that factor as significantly offset by the inquisitorial nature of the proceedings.
 - (e) The Tribunal attached great weight “to another factor, which appears in the submissions only in the form of an argument that to grant anonymity would diminish public confidence in the Inquiry by creating the impression that the true facts are being concealed. We see the point of substance as being not the maintenance of public confidence as such, but rather the proper fulfilment of our public duty to ascertain what happened on Bloody Sunday ... we are satisfied that, if anonymity in the strict sense were to be allowed on a widespread or blanket basis, that would represent a material derogation from the Tribunal’s public investigative function.”

Essentially the same reasoning lies at the heart of the Tribunal's later decision which is now under review.

- (f) The Tribunal's decision was, subject to further applications based on particular circumstances, to grant to the lettered soldiers only a limited form of anonymity under which a witness's surname would be published (unless particularly unusual) but not his forenames.

20. On 5 February 1999 the Treasury Solicitor applied for leave to move for judicial review of the Tribunal's decision on anonymity. The application was made on behalf of four lettered soldiers (B,O,U and V). On 16 March 1999 the Divisional Court (Kennedy LJ and Owen and Blofeld JJ) unanimously quashed the decision and remitted it to the Tribunal for redetermination. The Divisional Court reached its conclusion on five grounds, the first of which was that the Tribunal had misunderstood the nature and extent of the anonymity granted by Lord Widgery in 1972. The judgment of the court concluded:

"We should however make it clear that we express no view whatsoever as to whether there should be any grant of anonymity of any kind. That is not our function. It is clear from the information before us that there are powerful arguments both ways. How those arguments should be resolved the Inquiry must decide."

21. The Divisional Court refused leave to appeal. The members of the Tribunal applied to this court for leave to appeal on one point only, that is the Tribunal's understanding of the grant of anonymity by Lord Widgery. The application was expedited and on 30 March 1999 this court (Lord Woolf MR and Otton and Ward LJJ) granted permission to appeal but unanimously dismissed the appeal.

22. So the question of anonymity was remitted to the Tribunal for redetermination. The Tribunal had already (before the hearing in this court) written to the Treasury Solicitor (with copies to all interested parties) indicating that it would reconsider the whole question of anonymity "entirely afresh" and inviting further submissions, especially on particular issues identified in the letter. These included the issue of derogation from the Tribunal's public investigative function. The letter stated:

"The Tribunal regards it as its duty to carry out its public investigative function in a way that demonstrates to all concerned that it is engaged in a thorough, open and complete search for the truth about Bloody Sunday and that this prima facie involves the giving of evidence by all witnesses under their proper name. The Tribunal may

well have to balance this consideration against competing considerations relating to the security of the relevant soldiers. But the Tribunal would like to know whether you contend that the Tribunal has misunderstood its duty and, if so, to explain why.”

23. The letter also asked the Treasury Solicitor and the Ministry of Defence to arrange for a new threat (or risk) assessment in unambiguous terms.
24. The response of the Security Service was that the threat posed “to the UK mainland has risen since the previous assessment was made”. It added that “the military has long been regarded as a legitimate target by Republican terrorists and numerous military personnel have been attacked on the mainland. Military targets are currently at a *significant level of threat*” (emphasis supplied). The assessment concluded by saying:

“Whilst the soldiers involved in the events of Bloody Sunday remain unidentified, the threat to them will be potential rather than actual, since it will not be possible for terrorists to undertake the planning which would be necessary in order to mount an attack against them”.

25. In answer to a response for clarification under the heading Different Categories of Military Personnel, it was stated:

“In relation to the categories of soldiers identified by the Inquiry, we would expect their attractiveness as targets to rank as follows (beginning with the least attractive):

1. Current or former soldiers,
2. Current or former soldiers from the Parachute Regiment,
3. Soldiers or ex soldiers who took part in Bloody Sunday, and
4. Soldiers or ex soldiers who fired live rounds on Bloody Sunday.

This ranking is based upon the political and emotive significance of each category to the Republican Movement.

In order to assess the threat to any particular soldier it would be necessary to carry out an individual assessment, on the basis of detailed personnel information provided by him. The names of the soldiers who fired live rounds on Bloody Sunday are not currently available to terrorists. Therefore there has been no possibility of terrorists attempting to target them. In the event of their being identified, they would be more

likely, currently, to be at a significant level of threat, with the possibility of this rising in the event of the overall mainland threat also rising. In the event of the provisional IRA returning to violence, then the overall level of threat on the mainland would certainly rise.

When an individual is assessed to be at a particular level of threat, this is of more consequence than an assessment that the threat to a category of individuals is at that level. When the threat to military targets is assessed as significant, this means there is a significant chance of an attack taking place on any (unspecified) military target. When the individual is assessed to be as at significant threat, this means that there is a significant chance of him or her personally being targeted for attack”.

26. Further lengthy written submissions were made to the Tribunal by the Treasury Solicitor, the Ministry of Defence, counsel acting for soldier H (who had been singled out for criticism by Lord Widgery) and counsel acting for the family of James Wray (one of those killed on Bloody Sunday), counsel acting for the family of Bernard McGuigan (one of those killed on Bloody Sunday), counsel for the family of Alexander Nash who is now dead but was wounded, and William Nash (one of those killed on Bloody Sunday), counsel for two of the injured Mr Michael Bradley and Mr Michael Bridge and counsel on behalf of the remainder of the deceased and injured. The Tribunal held oral hearings in Londonderry on 26 and 27 April to consider the renewed applications for anonymity. It reached a decision on 5 May and published its ruling on 7 May. The general effect of the ruling was to require all military witnesses to be identified by their true names (both forenames and surnames).
27. After rejecting applications on behalf of a wider class the Tribunal expressed its essential conclusion in relation to the lettered soldiers in paragraph 28 of the written decision:

“That leaves those who fired live rounds on Bloody Sunday. As to these there is a further consideration, which we pointed out in our December ruling. This is that the conduct of these soldiers lies at the very heart of this Inquiry. It is the firing on the streets that was the immediate cause of loss of life. It is that loss of life that we are publicly investigating. To conceal the identity of those soldiers would, as it seems to us, make particularly significant inroads on the public nature of the Inquiry. As a group they are assessed as more attractive targets than the generality of soldiers and thus face a higher likelihood of terrorist attack if they are identified, but this increased threat is not considered sufficient, at least at present, to move them from the “significant” to a

higher category. On the basis of the general assessment, we have concluded that the danger to the soldiers who fired live rounds on Bloody Sunday does not outweigh or qualify our duty to conduct a public open inquiry.”

28. The Treasury Solicitor (by then acting on behalf of 17 lettered soldiers) again applied for leave to move for judicial review and Collins J granted permission on 26 May 1999. On 17 June the Divisional Court by a majority quashed the Tribunal’s decision that the names of military witnesses should be disclosed, to the extent that that decision applied to the 17 applicants and other soldiers who fired live rounds in Londonderry on 30 January 1972. The Tribunal has appealed to this court with the permission of the Divisional Court.

The Task of the Tribunal

29. It is impossible to overestimate the difficulty of the task on which the Tribunal is engaged. The issues which are involved are ones of great sensitivity. They are issues on which very entrenched but different opinions are held by those who have an interest in its outcome. There are undoubtedly among the public those who will be prepared to misinterpret any action of the Tribunal. They will seize on any decision that they dislike as indicating that the Tribunal is lacking in impartiality. The Tribunal has the problem of overcoming the immense handicap of exploring events which have taken place over 27 years ago. The task is made immeasurably more difficult because of there having been a previous enquiry, which, instead of dissipating, may have increased the controversy which surrounds the events of Bloody Sunday.
30. The Tribunal has however the great advantage of its uniquely distinguished membership. It has also the advantage of the quality of the Tribunal’s own legal team and the fact that it has been able to make legal representation available to those likely to be directly affected by its activities. The Tribunal has already been able to demonstrate the thoroughness and the openness of the enquiry which it is undertaking.

The Role of the Court

31. It is accepted on all sides that the Tribunal is subject to the supervisory role of the courts. The courts have to perform that role even though they are naturally loath to do anything which could in any way interfere with or complicate the extraordinarily difficult task of the Tribunal. In exercising their role the courts have to bear in mind at all times that the members of the Tribunal have a much greater understanding of their task than the courts. However subject to the courts confining themselves to their well-recognised role on

applications for judicial review, it is essential that they should be prepared to exercise that role regardless of the distinction of the body concerned and the sensitivity of the issues involved. The court must also bear in mind that it exercises a discretionary jurisdiction and where this is consistent with the performance of its duty it should avoid interfering with the activities of a tribunal of this nature to any greater extent than upholding the rule of law requires.

32. One aspect of the courts' role in this case has been controversial. That is as to the intensity of the scrutiny which the courts are required to adopt when reviewing the reasonableness of the Tribunal's decision as to anonymity. Is the role limited to ascertaining whether the decision is rational or does it involve adopting some other test? Is it correct to say that because a fundamental right of the soldiers is involved the threshold of irrationality is lowered? In answering these questions, it is as well to start by remembering that the reason for the usual *Wednesbury* standard being applied is because the body whose activities are being reviewed has the responsibility of making the decision and not the courts. In addition that body in the majority of situations is going to be better qualified to make decisions than the courts. It is only where the decision is unlawful in the broadest sense that the courts can intervene. The courts have the final responsibility of deciding (whether a decision is unlawful) and not the body being reviewed. The courts therefore can and do intervene when unlawfulness is established. This can be because a body such as a tribunal has misdirected itself in law, has not taken into account a consideration it is required to take into account or taken into account a consideration which it is not entitled to take into account when exercising its discretion. A court can also decide a decision was unlawful because it was reached in an unfair or unjust manner.
33. However, there are some decisions which are legally flawed where no defect of this nature can be identified. Then an applicant for judicial review requires the courts to look at the material upon which the decision has been reached and to say that the decision could not be arrived at lawfully on that material. In such cases it is said the decision is irrational or perverse. But this description does not do justice to the decision maker who can be the most rational of persons. In many of these cases, the true explanation for the decision being flawed is that although this cannot be established the decision-making body has in fact misdirected itself in law. What justification is needed to avoid a decision being categorised as irrational by the courts differs depending on what can be the consequences of the decision. If a decision could affect an individual's safety then

obviously there needs to be a greater justification for taking that decision than if it does not have such grave consequences.

34. As to the appropriate test in this case, both Mr Clarke and Sir Sydney Kentridge QC on behalf of the soldiers were agreed. It is the test adopted by Lord Bingham CJ in the Court of Appeal in *R v Ministry of Defence ex parte Smith* [1996] QB 517. The test was based on submissions of Mr David Pannick QC in that case. They were in these terms:

“The court may not interfere with the exercise of an administrative discretion on substantive grounds save if the court is satisfied that it is beyond the range of responses open to a reasonable decision maker. But in judging whether the decision maker has exceeded this margin of appreciation the human rights context is important. The more substantial the interference with human rights, the more the court will require by way of justification before it is satisfied that the decision is reasonable in the sense applying above.”

35. Lord Bingham indicated that he regarded this statement as “an accurate distillation of the principles laid down by the House of Lords in *R v Secretary of State for the Home Department, ex parte Bugdaycay* [1987] AC 514 and *R v Secretary of State for the Home Department, ex parte Brind* [1991] 1 AC 696” and we would respectfully agree with him.
36. In the Divisional Court in *ex parte Smith*, Lord Justice Simon Brown (at p 538) expressed agreement with what Neill LJ had said in *Ex parte National and Local Government Officers Association* [1992] 5 Admin LR 785 at 797-798 in regard to the impact of the European Convention on Human Rights before that Convention became part of our domestic law in the context of proportionality. Simon Brown LJ said:

“In short, I respectfully conclude with Neill LJ that even where fundamental human rights are being restricted, “the threshold of unreasonableness” is not lowered.”

However, Simon Brown LJ added:

“On the other hand, the Minister on judicial review will need to show that there is an important competing public interest which he could reasonably judge sufficient to justify the restriction and he must expect his reasons to be closely scrutinised.”

37. Again we would respectfully agree with the second quotation from the judgment of Simon Brown LJ. What is important to note is that when a fundamental right such as the right to life is engaged, the options available to the reasonable decision maker are curtailed. They

are curtailed because it is unreasonable to reach a decision which contravenes or could contravene human rights unless there are sufficiently significant countervailing considerations. In other words it is not open to the decision maker to risk interfering with fundamental rights in the absence of compelling justification. Even the broadest discretion is constrained by the need for there to be countervailing circumstances justifying interference with human rights. The courts will anxiously scrutinise the strength of the countervailing circumstances and the degree of the interference with the human right involved and then apply the test accepted by the Lord Chief Justice in *Smith* which is not in issue.

38. Turn to the role of the courts on judicial review to ensure procedural fairness. This need for fairness was a matter central to the report of the Royal Commission on Tribunals of Inquiry under the chairmanship of Lord Justice Salmon in 1966. The Commission having come to the conclusion that the 1921 Act type of tribunal should be retained subject to the qualification set out in the Report went on to consider in detail how to improve the safeguards for witnesses and interested parties. Because of the needs for fairness, many of the recommendations of the Commission are now conventionally adopted, not only by statutory tribunals, but in the case of other inquiries, including departmental inquiries. The Royal Commission made it clear that they did not believe that it could ever be right for an inquiry of this kind to be held entirely in secret (para. 39). In *Re Pergamon Press Ltd* [1971] Ch. 388 Lord Denning MR, said of Board of Trade inspectors, that they must act fairly. He went on to indicate that inspectors have a duty to protect witnesses. He recognised that inspectors “must be masters of their own procedure” but subject to the overriding requirement that “they must be fair”. Although we are here concerned with a very different type of inquiry from that being considered in the *Pergamon* case, it can equally be said of this Tribunal that while it is master of its own procedure and has considerable discretion as to what procedure it wishes to adopt, it must still be fair. Whether a decision reached in the exercise of its discretion is fair or not is ultimately one which will be determined by the courts. This is because there is an implied obligation on the Tribunal to provide procedural fairness. The Tribunal is not conducting adversarial litigation and there are no parties for whom it must provide safeguards. However the Tribunal is under an obligation to achieve for witnesses procedures which will ensure procedural fairness. (See *Lloyd v MacMahon* [1987] AC 625 at pp. 702H-703A per Lord Bridge of Harwich and *R v The Secretary of State for the Environment, ex parte Hammersmith and Fulham LBC* [1991] 1 AC 521 at p. 598F.) As to the content of the requirement of procedural fairness, this will depend upon the circumstances and in particular on the nature of the decision to be taken (see *Council of the Civil Service*

Unions v Minister of Civil Service [1985] AC 374 at p. 411H per Lord Diplock and at p. 415A/B per Lord Roskill relied upon by Mr Clarke on behalf of the Tribunal in further submissions which he made to the court at its request.) The requirement of procedural fairness for witnesses is well recognised in the courts by allowing witnesses to give evidence behind screens. A defendant opposing the evidence being given in this way could make this a ground of complaint on appeal. At this inquiry where there are no defendants the requirement of procedural fairness surely involves an obligation to be fair to witnesses, including, for example, protecting them when necessary or giving them notice in a Salmon letter of proposed findings of improper conduct.

39. After the conclusion of the hearing, it occurred to the court that an alternative approach to the issue on this appeal from that argued was, in addition to considering the reasonableness of the decision to which the Tribunal had come, to also consider the fairness of that decision. The court therefore sought the assistance of the parties as to whether or not to grant anonymity to the soldiers was a question involving the fairness of the procedure which the Tribunal was proposing to adopt and, if so, what was the court's role in relation to this? In answer to the court's questions, in addition to the helpful submissions from Mr Clarke the court also received helpful submissions from Mr Coyle on behalf of the families and Sir Sydney Kentridge QC and his team on behalf of the soldiers. Mr Burnett QC on behalf of the Ministry of Defence indicated by letter that he did not dissent from this approach and accepted it would be for the courts to rule upon the question of unfairness as a matter of law, but he made it clear that the Ministry of Defence still maintained that the decision of the Tribunal was unreasonable.
40. Mr Coyle in his submissions stressed that procedural fairness must be viewed in the round and fairness to the former military witnesses was only one dimension of the question posed; it was also necessary to consider the interests of the dead and injured and the public interest. With this submission we are in agreement.
41. The additional submissions on behalf of the soldiers relied upon the decision of this court in *R v The Panel on Takeovers and Mergers, ex parte Guinness* [1990] 1 QB 146. In that case Lord Donaldson MR said at pp 178-9:

"As I have already indicated, I think that, at least in the circumstances of this appeal, it is more appropriate to consider whether something has gone wrong of a nature and degree which require the intervention of the court, rather than to approach the matter on the basis of separate heads of *Wednesbury* unreasonableness and unfairness or

breach of the rules of natural justice: see *Associated Provincial Picture Houses Ltd v Wednesbury Corporation* [1948] 1 KB 223. In passing I would, however, accept that whether the rules of natural justice have been transgressed is not to be determined by a *Wednesbury* test: “Could any reasonable tribunal be so unfair?” On the other hand, fairness must depend in part on the tribunal’s view of the general situation and a *Wednesbury* approach to that view may well be justified. If the tribunal’s view should be accepted, then fairness or unfairness falls to be judged on the basis of that view rather than the court’s view of the general situation.”

At p184 Lloyd LJ said:

“Mr Buckley argued that the correct test is Wednesbury unreasonableness, because there could, he said, be no criticism of the way in which the panel reached its decision on 25 August. It is the substance of that decision, viz, the decision not to adjourn the hearing fixed for 2 September, which is in issue. I cannot accept that argument. It confuses substance and procedure. If a tribunal adopts a procedure which is unfair, then the court may, in the exercise of its discretion, seldom withheld, quash the resulting decision by applying the rules of natural justice. The test cannot be different, just because the tribunal decides to adopt a procedure which is unfair. Of course the court will give great weight to the tribunal’s own view of what is fair, and will not lightly decide that a tribunal has adopted a procedure which is unfair, especially so distinguished and experienced a tribunal as the panel. But in the last resort the court is the arbiter of what is fair. I would therefore agree with Mr Oliver that the decision to hold the hearing on 2 September is not to be tested by whether it was one which no reasonable tribunal could have reached.” (Emphasis supplied)

At pp. 193-194 Woolf LJ added:

“On the application for judicial review it is appropriate for the court to focus on the activities of the panel as a whole and ask with regard to those activities, in the words of Lord Donaldson of Lynton MR, “Whether something has gone wrong” in nature and degree which requires the intervention of the courts. Nowadays it is more common to test decisions of the sort reached by the panel in this case by a standard of what is called “fairness”. I venture to suggest that in the present circumstances in answering the question which Lord Donaldson of Lynton MR has posed it is more appropriate to use the term which has fallen from favour of “natural justice”. In particular in considering whether something has gone wrong the court is concerned as

to whether what has happened has resulted in real injustice. *If it has, then the court has to intervene, since the panel is not entitled to confer on itself the power to inflict injustice on those who operate in the market which it supervises.*" (Emphasis supplied)

42. Mr Clarke, in his submissions, argues that while there is an entitlement to procedural fairness, this does not encompass a right to anonymity. Fairness requires no more than that the soldiers can apply for anonymity and be given a decision on the merits of their application reached by a fair procedure. Mr Clarke's approach to the decision whether to grant or withhold anonymity is that it is not an issue of a procedural nature. He submits that this conclusion is supported by the fact that a decision to withhold anonymity could not result in the ultimate decision of the Tribunal being quashed.
43. We cannot accept Mr Clarke's approach. The fact that a court would not quash the final decision of a Tribunal on a procedural ground does not mean that a preliminary decision would not be quashed. The unfair refusal of an interpreter or an adjournment are very much the type of decisions which, if the subject of an immediate application for judicial review, will be reversed by the courts although the final decision would not be. The concern of the court is whether what has happened has resulted in real injustice.
44. It may well be that in the majority of cases the decision will be the same whether the approach propounded by Lord Bingham in *Smith* is adopted or whether the issue is regarded as one of fairness. However it is still important to recognise that a decision not to grant anonymity to the soldiers could result in their being treated in a manner which is genuinely unfair. Unfair because it requires them to undergo an unnecessary risk.

The Decision of the Divisional Court

45. Roch LJ gave a judgment with which Maurice Kay J was in substantial agreement. Roch LJ considered the Tribunal had adopted the right test. He accepted that Sir Sydney Kentridge had posed the right question for the court by asking:

"Given the inquisitorial function of the Tribunal, and given its clear finding that anonymity would not impede its fundamental task of discovering the truth, could a reasonable Tribunal conclude that the additional degree of openness to be gained by disclosure of the names of the 17 soldiers who fired shots is so compelling a public interest as to justify subjecting them to a significant danger to their lives".

46. In answering this question he pointed out that the Tribunal in its decision did not assess the inroads which withholding the names of the soldiers would make into the public nature of the inquiry and added that if it had assessed the inroad it would have found “that the derogation was with regard to the Tribunal’s duty to search for the truth, nil and with regard to the duty to hold a public inquiry, limited”.
47. Roch LJ went on to indicate that the Tribunal had departed from the correct test which they had propounded in July 1998. Instead they had adopted a different approach, which did not “accord to the applicants’ fundamental human rights the required weight”. This coupled with the failure of the Tribunal to analyse the extent to which granting anonymity to the soldiers would detract from the Tribunal’s obligation to conduct an investigation which would, in the eyes of responsible people, be public, open and thorough and lead to accurate findings meant the decision was flawed.
48. Maurice Kay J for similar reasons came to the same conclusion. He added, however, that he saw considerable force in the submission that the Tribunal had not done justice to the material which the MOD had provided as to risk.
49. Hooper J, in his dissenting judgment, pointed out that what was involved here was a balancing exercise in which the Tribunal had to weigh up various competing factors in deciding whether or not to grant anonymity. In particular, the risk to a soldier and his family of not granting anonymity had to be weighed as against the necessity to find the truth about Bloody Sunday and the requirements of open justice. He then compared the situation before the Tribunal with that which arises before the Criminal Courts from time to time and he concluded that the Tribunal had anxiously considered the matter and that sitting in London he would be most reluctant to interfere with the conclusion of such a distinguished and “international” Tribunal.
50. In the course of his judgment, Hooper J stated:
- “Although the greater the danger the more weight must be given to the risk factor, the practice in the Criminal Courts to which I have already referred both in England and, more importantly, in Northern Ireland, shows that anonymity may not be granted even where risks are much higher than in this case”.
51. For this statement he does not cite any authority and it does appear that he may be under a misapprehension since at least an examination of the authorities which were put before this court indicates that wherever there was risk to life anonymity was granted both in this

jurisdiction and in Northern Ireland and the parties were unaware of any case where anonymity had not been so granted. The qualification that may be necessary is that where someone is a defendant to a criminal charge, his identity will be made known.

The Second Decision

52. Although all three judgments in the Divisional Court gave very careful consideration to the issues which are before us, in a case of this sort, the outcome of this appeal involves our having to analyse the second decision of the Tribunal afresh. We have to form our own judgment as to whether it is flawed on the grounds of unfairness or lack of reasonableness. We therefore propose to consider the relevant paragraphs of the second decision in turn. In doing so we will single out particular passages of that decision for comment but we are at all times mindful that it is essential when engaging in an exercise of this kind to look at the decision as a whole.
53. We can start at paragraph 11 where the Tribunal states that it “has as its fundamental objective the finding of the truth about Bloody Sunday. It regards itself as under a duty to carry out its public investigative function in a way that demonstrates to all concerned that it is engaged in a thorough, open and complete search for the truth about Bloody Sunday”. To this statement of its duty it adds a reference to having to conduct the inquiry in accord with “the principle of open justice in a democratic society”.
54. The Tribunal is undoubtedly right in identifying that it has these duties. However having regard to what we have already said, it is clear that the Tribunal is also under a further duty and that is a duty to be fair to the soldiers.
55. In the next paragraph the Tribunal indicates that:

“in the absence of compelling countervailing factors, those who give evidence to the Tribunal should do so under their proper names. This after all is an Inquiry into events in which people lost their lives and were wounded by British army gunfire on the streets of a city in the United Kingdom. To withhold the names of those in the army who were concerned with that event must detract from an open search for the truth about what happened; and must need justification of an overriding kind. It is of course correct to bear in mind (as we said in December) that it is unlikely that the Tribunal would be hampered in its objective of finding the truth about Bloody Sunday by granting anonymity (since the Tribunal is an inquisitorial body and would itself know the identify of the witnesses), but this does not really take the matter much further

forward, since what is presently at issue is the question of the duty laid on the Tribunal as to the manner in which it should seek that objective. The Tribunal must conduct what Lord Justice Salmon described in his Report as a “public investigation”.

56. In relation to this paragraph it is important to note the reference to “compelling countervailing factors”. It is difficult to envisage a more compelling factor than that the withdrawal of anonymity could subject the soldiers to risk of a fatal attack. Furthermore, it is important not to overstate the extent to which the failure to name the soldiers would detract from the open search for truth. The soldiers would still give evidence openly in public. The Tribunal and counsel for the Tribunal would know their names. If any investigation as to their credibility was required, the Tribunal could carry out this investigation. Having carefully considered Mr Clarke’s submissions we are left with the clear impression that not only would the Tribunal not be hampered in its objective of finding the truth, but in fact the open search for the truth would only be restricted in a marginal way. Like Roch LJ, we are concerned that the Tribunal has not assessed what would be the real disadvantage of the soldiers giving their evidence under labels rather than in their own names.
57. In the next paragraph of their decision (paragraph 13) the Tribunal reject the suggestion of Lord Justice Otton on the previous appeal to this court that “it might be fairer to impose the obligation on those seeking to remove the anonymity (rather than those seeking to sustain it)”. The Tribunal then state that while they are not making their decision on the basis of who has the burden of proof, they are bound to say that in their judgment “it is not open justice that needs to be justified but rather any departure from open justice”. Again, this paragraph does appear to play down the significance which should be attached to the risk to the soldiers. Surely it could be said equally that the need for increasing the risk to the soldiers has to be justified.
58. The Tribunal then proceeds to consider the effect of Lord Widgery’s agreement to afford anonymity. As to this the Tribunal concludes that the assurance falls away because of the compelling unforeseen circumstance that the second inquiry could not be anticipated. The Tribunal goes on to say “we consider that our ability to restore confidence will be undermined, unless we can form a wholly independent judgment, based on the facts before us, on the question of anonymity and indeed on any other question that we have to consider”.

59. This approach of the Tribunal is inconsistent with the first decision of this court. However, it is not necessary to do more than note the position because the Tribunal proceeded to consider what would be the situation if they were wrong in the approach they had adopted as to the assurance. As to this they say that “although it is an important consideration, it does not of itself or together with any other matters relied upon by the soldiers, amount to a compelling countervailing factor that should override our duty as we have stated it”. The Tribunal then compares the security position at the time of the Widgery Inquiry with that at the present time and points out that the present position is no way comparable. The Tribunal concludes by saying “of course no-one knows what the future may hold, and the bad days may return, but whether or not they will is at best a matter of speculation”. Again it may be said that this approach is not fair to the soldiers. The problem about the risk to which they are subjected is that once their identify is revealed, the die is cast and it is too late for the protection provided by anonymity to be restored. The increased risk referred to earlier has subsequently receded. It could again increase. This is a matter which the Tribunal could be expected to have in the forefront of its mind.
60. It is to the degree of danger to the soldiers to which the Tribunal then turn. Having stated that they considered that the soldiers have “grounds for their assertion that they have genuine and reasonable fears” the Tribunal indicates that this was a matter which they have considered with the greatest care. It says that “on the one side is our duty to carry out a public investigation: on the other the understandable fears for their personal safety and that of their families which we accept the soldiers have”. Reference is then made to the fact that in their December ruling they had “attempted to square the circle by suggesting that those who had the greatest reason to fear reprisals (the soldiers who fired live rounds on Bloody Sunday) could give their surnames only, thus providing both openness and a measure of security, but this attempt has failed on the grounds that security of surnames only was speculative”. They then indicate their conclusion that there is in fact “no way of satisfactorily reconciling the two considerations”. They then go on to set out their conclusions, which we should set out in full. Before doing so, it is right to point out that in setting out the conflicting interests there is no express reference to the Widgery assurance. Furthermore while the Tribunal is right to say that no-one is now advocating the use of surnames only, the previous decision implicitly recognised that the soldiers’ identities should be protected. That is clear because the previous ruling accepted that if a soldier could be traced by his surname, because it was unusual, then the Tribunal would consider the use of a different label. A surname which is so common that it would not result in a soldier being traced is no more revealing than a letter A, B or C. The reason why “surnames only” is no longer regarded as a method of squaring the

circle is because since the previous decision it has been shown that even common names can result in the person concerned being traced. What the Tribunal have not expressly referred to in this paragraph is the fact that although the real risk to the soldiers has increased and the Widgery assurance has now been held to be a relevant factor which should be taken into account, the soldiers now find themselves in a worse position than they were in relation to the first decision although they have been successful in having the first decision set aside. Of course, this always can be the consequence of obtaining the quashing of any decision. You lose the benefit of the good as well as avoiding the bad. However soldiers and their families would be less than human if they did not perceive this as an unfairness.

61. The way the Tribunal expressed its conclusion is as follows:

“After the most anxious consideration we have concluded that on the basis of material presently before us our duty to carry out a public investigation overrides the concerns of the soldiers and does so even if the Widgery assurance continues to apply; and that accordingly the present application of the soldiers must fail”.

62. It will be noted that in their conclusion, the Tribunal do refer to taking into account the Widgery assurance. The Tribunal also indicate that they are prepared to consider applications for anonymity on special grounds; that they fully appreciate that the removal of anonymity is permanent and it is possible that the threat to the soldiers may increase; that the soldiers attractiveness as targets can be divided into four categories:

1. current or former soldiers.
2. current or former soldiers from the Parachute Regiment.
3. soldiers or ex-soldiers who took part in Bloody Sunday.
4. soldiers or ex-soldiers who fired live rounds on Bloody Sunday.

63. However all serving or former soldiers fall within the significant category and are “priority” targets and that the danger created by identifying soldiers is one that is borne and has for many years been borne by hundreds if not thousands of serving or former soldiers and is not such as to override the Tribunal’s duty to conduct a public investigation.

64. In relation to soldiers who fired the live rounds, the Tribunal says that these soldiers lie at the heart of the Inquiry. It therefore considers that not to reveal the identity of those soldiers would make “particularly significant inroads on the public nature of the Inquiry”. The Tribunal concludes that the danger to the soldiers who fired live rounds on Bloody

Sunday does not outweigh or qualify their duty to conduct a public open inquiry. The Tribunal refers to the fact that while there had been a reprisal attack immediately after Bloody Sunday there was no evidence to suggest that any of the soldiers involved in Bloody Sunday had been subject to an attack for that reason though a number of the soldiers involved are known or could have been identified.

65. The Tribunal then acknowledges it could have deferred its decision on anonymity until it was making its report. It rejects that course because the Tribunal regards it as its “duty not only to report what we believe to be the truth, but also to conduct an open and public investigation”. The Tribunal state that they have not forgotten their previous ruling in which they indicated that it was a real possibility that anonymity would have the effect of encouraging greater candour but again they say that this “is not sufficient to override our duty to carry out a public investigation.” Finally they state that, in accordance with their ruling, the names of the soldiers were to be given but their addresses, telephone numbers and other personal details apart from their names would not be published without the consent of the soldiers. This however it is accepted will not prevent their being recognised.
66. Having dealt with the soldiers’ application, the Tribunal went on to deal with five applications for anonymity by officers of the RUC. In their case, the Tribunal indicates that they regard the officers fears as being genuine and reasonable and having “very considerable substance” and that the limited degree of screening which is sought was justified in their case.

Our Conclusions

67. Having considered in detail the decision of the Tribunal and made our comments on the detail, before reaching our conclusion, we regarded it as important to look at the situation as a whole. When doing this, we repeat that we are conscious of the fact that the members of the Tribunal start with the considerable advantage of being continually immersed in investigating the available evidence as to what happened on Bloody Sunday. We also attach importance to the fact that Hooper J in a most carefully crafted judgment in the Divisional Court dissented from the views expressed by Roch LJ and Maurice Kay J. We are mindful of the submission of Mr Christopher Clarke directed to the majority of the Divisional Court but equally capable of being directed to this court (if we come to the same conclusion) that we would be acting unlawfully by usurping a decision which it was for the Tribunal to take and not the courts.

68. Nonetheless, we are satisfied that the decision of the majority of the Divisional Court was right for the reasons they gave and Hooper J's conclusion was wrong. We come to that view, not primarily because of the points of criticism which can be made as to the reasoning of the Tribunal. Those criticisms would not in our judgment in themselves entitle the court to interfere. As is to be expected, the reasoning in general is of a high order and indicates that the members of the Tribunal were as they indicated struggling to reconcile the conflicting considerations. Notwithstanding this it appears to us:

1. The Tribunal has failed to attach sufficient significance to the fact that by carrying out a meticulous investigation and, being prepared to reconsider every issue, the Tribunal is manifestly not only performing its primary role of discovering the truth in so far as this can be ascertained, but also establishing public confidence in the result of its deliberations. Here it should be remembered that the 1921 Act in section 2 itself recognises that there can be circumstances where the public are excluded because it is "in the public interest expedient to do so". The statute itself is, therefore, acknowledging that an Inquiry can perform its primary duty even though the public are excluded in part from its investigation.
2. The Tribunal having acknowledged in its July preliminary hearing and to a lesser extent in its first ruling in December 1998 that there can be in-roads on openness in an Inquiry of this sort, surprisingly seems to have lost sight of the fact that the inroad on openness involved in allowing the soldiers to use letters instead of names is limited. This is because: (i) the evidence would still be given in public with the soldiers capable of being observed while giving their evidence; (ii) the Tribunal know their names and as Mr Clarke accepted could investigate any matters going to credibility; (iii) their officers who were in charge and should have been controlling events will be named; (iv) if there was any reason for naming a particular soldier this could still be done; (v) the ability for the Tribunal to reach the truth was as the Tribunal acknowledged not going to be undermined.
3. In such a situation, the Tribunal would certainly be still conducting an inquiry in public. (If authority is needed, it is provided by *R v The Newcastle Upon Tyne Coroner, ex parte A* [January 19, 1998] Times Law Report). Reasons why it is important for a court to sit in public which were identified in *The Attorney General v Leveller Magazine Limited* [1979] AC 440 at p. 449H and *R v Socialist Worker ex parte The A-G* [1975] 1 QB 637 at p.651 - 652 would not be contravened. The supervision by the public would still be present, providing the safeguard against arbitrariness or idiosyncrasy. The evidence would be communicated publicly; full reports of the

proceedings would be possible. The names of the witnesses might be of interest but they would be of no real concern to the onlookers and if they became of concern then they could still be named. Hooper J attached importance to the analogy of criminal proceedings. However, in criminal proceedings there is a defendant and a defendant is entitled to know who is accusing him but this consideration does not arise here. Furthermore, in many criminal cases including rape cases and blackmail cases the identity of the victim is routinely concealed.

4. The Tribunal are obviously concerned about the perception of the families and their supporters. It is true that it is their concerns which have led to the establishment of the Tribunal. However, while of course the Tribunal had fully in mind the risk to the soldiers they do not seem to have paid sufficient attention to the fact that to deny the soldiers anonymity would certainly affect their perception of the fairness of the inquiry. It is here that the importance of the requirement of fairness to the soldiers and their families becomes significant. From the point of view of the families of the dead and wounded, the harm of concealing the names is objectively of no great significance. To the soldiers and their families it is of great significance. It is to be noted that Mr Coyle in his argument on behalf of the relatives of the late Bernard McGuigan indicates:

“The names of the principal military personnel including those who fired live rounds have been known by the family of Barney McGuigan for some considerable time, and by others with a common interest in the Inquiry.”

If this be right and it is a matter which is in issue, then it is difficult to understand why they should object to the soldiers not being named. The soldiers on the other hand with one exception are no longer in the army. Some of their families do not even know they were involved in Bloody Sunday. For them to find themselves in a situation where it is accepted that they have reasonable grounds for being in fear for their safety, 27 years after the events, will clearly be immensely worrying. From their point of view it is what they reasonably fear which is important not the degree of risk which the Tribunal identifies. The Ministry of Defence considers there are significant risks and if the Tribunal can properly perform its primary duty of finding the truth if they are not named, from the point of view of their perception, what is the justification for increasing the risk to which they are to be subjected? They can fairly ask whether the Tribunal has taken into account the effects of withdrawal of anonymity upon their perception of and confidence in the Inquiry.

5. The Tribunal did not agree with the approach indicated by Lord Justice Otton but we would endorse his approach. We agree with the Tribunal that the issue is not to be determined by the onus of proof. However, in our judgment the right approach here once it is accepted that the fears of the soldiers are based on reasonable grounds should be to ask is there any compelling justification for naming the soldiers, the evidence being that this would increase the risk. It is here that Sir Sydney Kentridge rightly relies on Lord Diplock's opinion in *Fernandez v The Government of Singapore and Ors* [1971] 1 WLR 987. The case was concerned with a different situation from that being considered here namely should a person be returned under s.4 of The Fugitive Offenders Act 1967. However, Lord Diplock's words as to the prejudice a fugitive might be subjected to (not involving a risk to his life but a risk of his being inappropriately tried or punished) are nonetheless relevant. At p.994C Lord Diplock said:

"The degree of confidence that the events specified in the paragraph will occur which the courts should have in order to justify refusal to return the fugitive is not determined by the mere use of the subjunctive mood of the auxiliary verb "may". It should, as a matter of common sense and common humanity, depend upon the gravity of the consequences contemplated by the section on the one hand of permitting, and on the other hand of refusing, the return of a fugitive if the courts' expectation should be wrong".

Later Lord Diplock added:

"My Lords, bearing in mind the relative gravity of the consequences of the court's expectation being falsified in one way or in the other, I do not think the test of applicability of paragraph (c) is that the court must be satisfied that is more likely than not that the fugitive will be detained or restricted if he is returned. A lesser degree of likelihood is, in my view, sufficient; and I would not quarrel with the way in which the test was stated by the Magistrate or with the alternative way in which it was expressed by the Divisional Court. "A reasonable chance," "substantial grounds for thinking," "a serious possibility"".

When what is at stake is the safety of the former soldiers and their families, adopting Lord Diplock's approach, the risk is extremely significant. After all the individual's right to life is, as Lord Bridge stated in *R v The Secretary of State for the Home Department, ex parte Bugdaycay* [1987] AC 514 at p. 531, the most fundamental

of all human rights. It does appear that the Tribunal may well have failed to attach sufficient significance to this.

6. The Tribunal may not have attached to the Widgery assurance the weight which we consider it should. Sir Sydney Kentridge did not pursue the contention contained in his respondent's notice that the soldiers were entitled to say that the assurance gave them a substantive legitimate expectation. However we would attach more importance to it than the Tribunal appears to have done. The more time that elapsed without the soldiers' expectation being contradicted, the greater the significance of the assurance. For 27 years they had enjoyed anonymity. To take away that anonymity after that period of time is a very significant event. The Tribunal pointed out the period of time which had elapsed without a serious incident. However it is inevitable that the holding of the Tribunal with soldiers giving evidence will re-kindle the flames of anger which have been smouldering for so long.

69. Examining the facts as a whole, therefore, we do not consider that any decision was possible other than to grant the anonymity to the soldiers. In referring to the soldiers we have been confining our conclusions to those soldiers who are most at risk namely the soldiers who either admitted firing rounds or are alleged to have fired rounds. While they are the soldiers who Sir Sydney represented, there are other soldiers who do not fall within this category. We were asked to indicate our views as to the position of other soldiers. We would like to do so because we are conscious that more attention has already been given to this issue than is desirable and further disputes should if possible be avoided. However, reluctantly we have come to the conclusion that it would not be right to say more than that we cannot say on the material before us that it would be unlawful for the Tribunal to insist on other soldiers being named.

We dismiss this appeal.

Order: Appeal dismissed. No order as to costs.

A2.47: High Court of Justice, Queen's Bench Division (Administrative Court) (London, 16th November 2001): venue (item 19 above)

[2001] EWHC Admin 888

Case No: CO3742-01

In the High Court of Justice
Queen's Bench Division
Administrative Court

Royal Courts of Justice
Strand, London, WC2A 2LL

16th November 2001

Before:
The Right Hon Lord Justice Rose
and
The Hon Mr Justice Sullivan

In the matter of an application for permission to apply for Judicial Review against a decision of the Bloody Sunday Inquiry made on 1 August 2001 concerning the venue for evidence of soldiers and former soldiers

The Queen on the application of Widgery Soldiers:

A, B, C, D, F, H, J, K, M, N, O, P, Q, R, S, U, V, 006, 017, 018, 019, 033, 042, 104, 112, 150, 162 and 229 and INQ Soldiers: 404, 748, 768, 1237, 1579, 1581, 1918 and 2047 Claimants

-v-

The Rt Hon The Lord Saville of Newdigate

The Hon Mr William Hoyt

The Hon Mr John Toohey

(The Members of the Tribunal sitting as the Bloody Sunday Inquiry) Defendants

List of Counsel

Claimants

David Lloyd Jones QC

Michael Bools

Nicholas Moss

Defendants

Christopher Clarke QC

Dinah Rose

Alan Roxburgh

Interested Parties

Ministry of Defence

Ian Burnett QC

William Hoskins

Families of the Dead and Wounded

Clients of Madden & Finucane

Michael Lavery QC

Seamus Treacy QC SC

Karen Quinlivan

The Family of James Wray

Lord Gifford QC

Richard Harvey

On behalf of Michael Bridge; Michael Bradley

Declan Morgan QC

Brian Kennedy

The Family of B McGuigan, the Nash Family, Daniel Gillespie & Michael Quinn

Michael Mansfield QC

John Coyle

Kieran Mallon

The Family of Patrick Doherty

Eilis McDermott QC

Northern Ireland Civil Rights Association

Sir Louis Blom-Cooper QC

Paddy O'Hanlon

Judgment (As approved by the Court) © Crown copyright

LORD JUSTICE ROSE:

This is the judgment of the court.

1. There is before the court, as a matter of urgency and with the permission of Sullivan J, a challenge by judicial review to a ruling of the Bloody Sunday Inquiry made on 1st August and published on 2nd August 2001. It ruled that the soldiers and former soldiers, whom, for convenience, we shall refer to as “the soldier witnesses”, between two hundred and four hundred in number, who are to give oral evidence before the Tribunal over a period of some six months or more starting in the Autumn of next year, should do so in Londonderry Guildhall where, hitherto, for the most part the Tribunal has sat, rather than in London or some other part of Great Britain.
2. The circumstances in which the Tribunal was established under the Tribunals of Inquiry (Evidence) Act 1921 are well known. They are set out, together with the history of the Tribunal and the nature and course of two previous applications for Judicial Review, in paragraphs 2 – 28 of the Court of Appeal’s judgment in **R v Lord Saville of Newdigate ex parte A** [2000] 1 WLR 1855. These matters need not be repeated here. The Court of Appeal held that the soldier witnesses who were alleged to have fired rounds were entitled to anonymity. Subsequently, the Tribunal granted anonymity to all the soldier witnesses, (save four senior officers who were well known), whether they were said to have fired rounds or not. Since the Court of Appeal decision in July 1999 there has been one change in the constitution of the Tribunal. The Right Honourable Sir Edward Somers has retired and has been replaced by the Honourable Mr John Toohey.
3. The Tribunal has been sitting for the best part of 3½ years. It is therefore exceptionally well qualified to make case management decisions as to how its proceedings should be conducted. Furthermore, its members are of the highest judicial standing. There is accordingly, at first blush, a degree of unreality in this court being invited to quash one of its decisions by means of a remedy developed, historically, for the control of inferior courts and tribunals. That said, save for the written submissions by Sir Louis Blom-Cooper QC on behalf of Northern Ireland’s Civil Rights Association, to which in a moment we shall come, it is common ground before us, as it was in the earlier proceedings

culminating in the Court of Appeal's decision in **ex parte A**, that this court has, properly, a reviewing jurisdiction in relation to decisions of the Tribunal.

4. Sir Louis Blom-Cooper's submission was that only in exceptional circumstances will the court exercise its supervisory role over Public Inquiries, which are of an inquisitorial nature. He referred, among other authorities, to **Notts CC v S of S for the Environment** [1986] AC 240 per Lord Scarman at 250 to 251 and Sir Richard Scott's report on the Arms to Iraq Inquiry, Volume IV Section 1.5. Tribunal witnesses, as such, have no rights or interests that require legal protection (**Lawlor v Flood** [1999] 3 IR 107 per Murphy J at 138 to 144). He accepted, however, that a tribunal under the 1921 Act has an overriding duty to act fairly (**NSW v Canellis** [1994] 181 CLR 309 at 330). The anonymity issue considered in **ex parte A** was an exceptional circumstance justifying the courts' jurisdiction by way of Judicial Review. He also submitted that the tribunal is not a public authority within the meaning of s6 of the Human Rights Act 1998, being neither a court or tribunal within ss6(3) and 21, as legal proceedings may not be brought before it, nor a public authority, as it possesses no powers to determine how others should act (see **Aston Cantlow PCC v Wallbank** [2001] 3 AER 393 at paragraphs 29, 35 and 36). The Tribunal exercises functions in connection with proceedings in Parliament and is therefore within the exemption in s6. Accordingly, none of the articles of ECHR has direct applicability. In any event, Article 2 of the Convention envisages operational not procedural safeguards – see **Osman v UK** 22 EHRR CD 137.
5. We reject these submissions. A possible threat to life which arises from a Tribunal decision is an exceptional circumstance requiring, when appropriate, the court's intervention. The Tribunal is master of its own procedure but the requirements of fairness are for determination by the courts (see **ex parte A** at 1868B) and procedural fairness involves an obligation to be fair to witnesses (**ex parte A** at 1868E). The Tribunal's preliminary decisions can be quashed if they cause real injustice (**ex parte A** at 1870C). The Tribunal is, plainly in our view, a public authority within s6(3)(b) of the Human Rights Act. We accept Mr Lloyd Jones QC's written submission that the Tribunal's functions are those of public not mutual governance, its relationship with witnesses is created by rules of law independently of the volition of the Tribunal or the witnesses, and the Tribunal possesses powers to determine how others should act (see **Aston Cantlow PCC v Wallbank**). Furthermore, the Tribunal was not created by Parliament under the 1921 Act but by the Secretary of State for Northern Ireland. The fact that it reports to Parliament does not mean it is exercising functions in connection with proceedings in Parliament: there are no proceedings in Parliament in connection with which the Tribunal exercises

functions. A similar argument was rejected by Roch LJ in the Divisional Court in **ex parte A** on 17th June 1999 (transcript 47H-48D).

6. Accordingly, the Tribunal has to comply with the Human Rights Act and this court has jurisdiction to entertain the present application.
7. Before turning to the rival submissions, it is convenient to refer to the terms of the Tribunal's ruling. In paragraph 5 they affirm the correctness of their preliminary view "that the natural place to hold an inquiry of the present kind was where the events in question occurred". They go on:

"events of that day although of great national and international concern have undoubtedly had their most serious and lasting effects on the people of that city. It is there that the grief and outrage that the events occasioned are centred. It seems to us that the chances of this inquiry restoring public confidence in general and that of the people most affected in particular (which is the object of public inquiries of this kind) will be very seriously diminished (if not destroyed) by holding the inquiry or a major part of the inquiry far away and across the Irish sea, unless there were compelling reasons to do so. It is for similar reasons that public inquiries generally are held in or near to the place where the events to be investigated occurred."

In paragraph 8, they refer to the central importance to local people of the Inquiry coming to where Bloody Sunday took place and, at paragraph 9, they say

"in our judgment, since the oral evidence of the soldiers will form a major part of the inquiry the starting point is that this evidence should be given at the Guildhall where all or virtually all the other oral evidence will be heard, unless indeed there are compelling reasons to take a different course".

They refer to Article 2 of the European Convention and the dictum of Lord Phillips MR in **R (Mahmood) v Secretary of State for the Home Department** [2001] 1 WLR 840 at 857:

"interference with human rights can only be justified to the extent permitted by the Convention itself. Some articles of the Convention brook no interference with the rights enshrined within them."

At paragraph 15, they speak of the Tribunal making a decision "on venue by reference to the events which may or may not occur though of course the past may throw light on the likelihood of such events taking place in the future". They point out that the safety of the

soldiers is in the hands of state agencies rather than the Tribunal. "However that does not relieve the Tribunal of the obligation to assess as best it can on the material available to it the risk to the soldiers in hearing their evidence in one place rather than another".

At paragraph 16 they say

"the most helpful judgment is that of **Osman v United Kingdom**"

They cite from paragraph 116 of the judgment of the European Court of Human Rights in that case and refer also to **Ergi v Turkey** ECtHR 28th July 1998 and **Chahal v United Kingdom** 23 EHRR 413. They refer at paragraph 21 to the assessments, provided to the Tribunal by the RUC and the Security Service, of the threat to soldier witnesses giving oral evidence to the Inquiry.

"The threat was assessed as moderate both in Northern Ireland and Great Britain. However as the Security Service pointed out the threat is only one of the two factors to be taken into account when considering the risk to a person, the other being the vulnerability of the person in question."

They then refer to a meeting on 18th June 2001, to which later we shall return, at which senior representatives of all the relevant security agencies gave their views to the Tribunal on the security of soldier witnesses. A summary of that meeting was distributed to the parties and further submissions were made to the Tribunal.

8. It is necessary to set out paragraphs 23, 24 and 25 of the Tribunal's ruling in full:

"23. As will be seen from the summary, it is the view of the concerned security agencies that the risk to soldier witnesses of terrorist reprisals would be higher in Northern Ireland than in Great Britain. The soldiers submit that accordingly it would be an infringement of their rights for the Tribunal to require them to give evidence at the Guildhall rather than in Great Britain. Their case is that the Tribunal is bound to take all feasible precautions to avoid or minimise, to the greatest extent possible, any risk to the life of the individual; and that this can only be done by hearing the evidence of the soldiers in Great Britain, where the risk is lower.

24. It seems to us that the fact that the risk is greater in the one place rather than the other is not of itself determinative of the matter. On the basis of the **Osman** decision, it is incumbent on the authorities (which in the present case include both the Tribunal and the agencies responsible for the protection of witnesses) to do all that can reasonably be expected of them to avoid a real and immediate risk to life of which they ought to have knowledge. We are satisfied on the basis of the security advice that we have received, that the security authorities in Northern Ireland can provide, for soldiers giving evidence at the Guildhall, a level of protection sufficient to avoid any such risk. In such circumstances we consider that the Tribunal would not be acting incompatibly with the rights of the soldiers by requiring them to give evidence at the Guildhall rather than in London, for in neither place would there be a real and immediate risk to them. Neither the MoD nor the RUC (the state authorities who have a duty to protect the soldiers while giving evidence and who must accordingly deploy the proper resources to do so) have advised us that, notwithstanding the security precautions that they could and would put in place for soldiers giving evidence at the Guildhall, the level of risk would be so high that it could be described as real and immediate or in terms to the same or similar effect.

25. We have of course borne in mind the history of terrorist attacks on military and other targets in Northern Ireland, particularly those that have recently taken place in and around the city, and the present situation with regard to terrorist organisations. We have also borne in mind that over at least the last thirty years, it appears that the protection afforded by state authorities to those required to attend courts in Northern Ireland, often in circumstances of the greatest controversy where the risk of terrorist attacks has clearly been high, has been sufficient to avert any loss of life or injury from terrorist organisations. In our judgment the authorities will have done all that could reasonably be expected of them by providing, as they say that they can, a level of security commensurate with what has regularly (and successfully) been provided for trials in Northern Ireland where persons at risk such as soldiers, security officers, informers and others have been required to attend.”

The Tribunal went on in paragraph 26 to consider the procedural aspects of Article 2. They referred to **Jordan v UK** Application No 246/94 4th May 2001 and concluded that, as the Inquiry was concerned with the use of lethal force by state authorities, it should be conducted where the events in question occurred and that the soldiers' rights would not be infringed by requiring them to give evidence at the Guildhall with the protection that can be given. They went on:

“it seems to us that it would be unreasonable and indeed in contravention of the Article 2 procedural requirements for the Tribunal to conduct a central part of the inquiry at somewhere other than the natural and proper place for it”

Having referred to **R v Governor of Pentonville Prison ex parte Fernandez** [1971] 1 WLR 987, **R v Lord Saville ex parte A** and **Mahmood** the Tribunal concluded in paragraph 34 that there was no difference between the common law and Convention obligations, referred again to **Osman** “ and the need for awareness actual or imputed of the existence of a real and immediate risk to life” and said

“since none of the concerned agencies has suggested that such a real and immediate risk exists notwithstanding the precautions that would be put in place, it seems to us that to require the soldiers to give their oral evidence at the Guildhall would not offend their common law rights....We consider that we are justified in requiring of the soldiers no more than what has been required on many occasions of others who have had to give evidence of killings in Northern Ireland, namely to appear and testify where the events took place, with the security authorities doing all that can be reasonably expected of them to provide a safe environment. Clearly the soldiers would prefer to give their evidence in Great Britain but this does not demonstrate, nor do we accept, that they have reasonable fears for their safety while going to or from the Guildhall or actually giving their evidence there in view of the security precautions...The soldiers (with few exceptions) have the advantage of anonymity and all have the right to require the state security services to protect them. They have our assurance that they will not be required to give oral evidence here if anything occurs that means they cannot do so in proper calm and quiet conditions...we can see nothing unfair (let alone unlawful) in requiring the soldiers to give their oral evidence at the Guildhall.”

They went on to consider whether there was a real danger of public disorder while the soldiers gave evidence at the Guildhall, repeated that the Inquiry was conducted in a calm and quiet manner, and said that witnesses would have a proper and fair opportunity to be heard and any attack on those providing protection for witnesses would be treated as calculated to destroy the necessary environment for the Inquiry to be conducted at the Guildhall. They said in paragraph 40

“we have nothing which suggests that political expediency would lead to protests or the like disrupting the orderly progress of the Inquiry...We reject the suggestion...there is a serious risk of public disorder...which to our minds is neither supported by the

May 2000 threat assessment made by the RUC nor by the views expressed at the meeting of 18th June nor indeed by anything else.”

9. As to procedural fairness to the soldiers, they accepted that the Inquiry was “likely to engender or re-kindle very strong feelings” and that the soldiers are “likely to find it an unpleasant and intimidating experience to give evidence” but this was unavoidable and the Guildhall was not “an especially hostile or intimidating environment for the soldiers”. There were no grounds for supposing that proceedings could not continue to be conducted in a quiet and calm manner. In paragraph 47 they concluded that none of the arguments for the soldiers “is sufficient to provide a compelling reason for not hearing the oral evidence of the soldiers at the Guildhall which we regard as the proper place for this Inquiry”.
10. The transcript of 18th June shows that the threat to the soldiers was assessed by the security agencies as moderate on the mainland and in Northern Ireland but the risk to the soldiers was agreed to be higher in Derry (93,94) where there was also a reduced or slightly reduced prospect of a successful outcome in relation to the protection of witnesses and security force personnel (96,97,98). There was the capability to protect soldiers giving evidence at the Guildhall comparable to that for others giving evidence in high profile cases for 30 years but a question as to maintaining the protection for 6 months or more (95,97). Lord Saville referred more than once to an “acceptable degree of security” and asked (99) “can you do the job or are you going to say no we can’t do the job, these people are likely to get shot if we try it. Now I gather the answer to both London and Northern Ireland is yes we think we can do the job”. But it would remain riskier in Northern Ireland (101).
11. We turn to the claimants’ grounds. Ground 9 has not been pursued and ground 8 is in our judgment, of comparatively little substance. Grounds 1 to 7, in different ways, advance 3 principal complaints. First, the Tribunal misdirected itself in law and applied the wrong test when assessing the risk to the soldiers if they gave evidence in Londonderry. Secondly, it was not open to the Tribunal to conclude that the soldiers have no reasonable fears for their own safety as witnesses in Northern Ireland because security precautions would be taken. Thirdly, the Tribunal’s approach was flawed in starting from a presumption that the soldiers should give evidence in Londonderry unless they produced a compelling reason to the contrary and in concluding that only if the soldiers did give evidence in Londonderry could the Tribunal restore public confidence.

12. As to the first complaint, Mr Lloyd Jones submitted that the Tribunal mis-directed itself, by reference to **Osman v UK**, 29 EHRR 245, that the test at common law as well as in relation to a breach of the right to life protected by law under Article 2 of the Convention, was whether there existed a real and immediate risk to the life of the soldiers. **Osman** was concerned with the limits of a public authority's duty to act to protect individuals from a third party. But, in the present case, as it was the Tribunal's own decision which exposed the soldiers to risk, the correct test, derived from Lord Diplock's speech in **ex parte Fernandez** at 994, a case involving extradition, is whether there is a "reasonable chance", "substantial grounds for thinking", or "serious possibility" that the soldiers' right to life would be put at risk by requiring them to testify in Londonderry (see per Lord Woolf in **ex parte A** at 1877B-H). The test adopted by Lord Woolf at 1877B in relation to anonymity, Mr Lloyd Jones submitted, is equally apt here: once it is accepted that the soldiers' fears for their safety are based on reasonable grounds, is there any compelling justification for them to be required to give evidence in Londonderry, the evidence being that this would increase the risk to them? The Tribunal could only properly require the soldiers to give evidence in Londonderry if either (a) the contemplated security measures would so reduce the risk to them that there is no reasonable chance or serious possibility of life threatening attack on them or (b) there is a compelling justification for requiring the soldiers to run the additional risk in Londonderry. In relation to (a) the Tribunal wrongly applied the **Osman** test and, having concluded that there was no real and immediate risk, did not consider (b). Further, in referring to an acceptable degree of risk and to the state's obligation to take care of people to a reasonable or proportionate degree (transcript 75) the Tribunal adopted the wrong approach and the security agencies were never asked if there was a real and immediate risk.
13. As to the second complaint, Mr Lloyd Jones submitted that the existence of even the highest security precautions would not render the soldiers' fears for their safety unreasonable. The Tribunal accepted in paragraphs 23 and 24 of its ruling that the risk to the soldiers in Northern Ireland is higher than in Great Britain, but concluded that security measures would avoid a real and immediate risk to them. That conclusion, submitted Mr Lloyd Jones, was contrary to the evidence of the security agencies that complete protection could not be provided against a real and unpredictable risk of attack. And, in any event, in the light of the material at the 18th June meeting, it could not be said that security would eliminate a reasonable chance or serious possibility of attack. Soldiers are regarded as a legitimate target by terrorists and 46 terrorist incidents, which the security services were powerless to prevent, took place between February 2000 and 20th July 2001, including a bomb at Shackleton Barracks Ballykelly in February 2000 and a mortar

attack on Ebrington Barracks, Londonderry, in January 2001, and showed a specific terrorist intention and ability to kill soldiers. The soldiers involved in Bloody Sunday are particularly attractive targets to terrorists, many of them having already been categorised as murderers. Londonderry is a small city where secure accommodation and the scope for variation of routes to the Guildhall is limited. The Guildhall is situated on the west bank of the River Foyle and approached from the east by only two bridges. Close quarters assassination, remote control bombs and sniper attacks are possible and the core vulnerability of the soldiers is irreducible (Ministry of Defence assessment core bundle 493). There is significant vulnerability to witnesses and those seeking to safeguard the witnesses in the Guildhall (transcript page 56). In these circumstances, Mr Lloyd Jones submitted, it is impossible to say that the soldiers' fear for their safety is other than reasonable. These fears would necessarily be increased by the requirement for all witnesses to be in Londonderry for at least two days, for many who were likely to be questioned for many days and for some who would have to make more than one visit to Northern Ireland or stay for an extended period. They will require accommodating and escorting under armed guard with armoured transport and armed uniformed RUC officers would be needed in the Guildhall during their evidence. Military support would be necessary. There would be collateral risk to those protecting them. Giving evidence in such circumstances would be prejudicial to them and therefore procedurally unfair. The Tribunal did not take into account the soldiers' perception of and confidence in the Inquiry.

14. As to the third complaint, Mr Lloyd Jones submitted that the Tribunal erred, first, in starting from the proposition, in paragraphs 5 and 9, that the soldiers needed to establish a compelling reason why their evidence should not be heard in Londonderry and in concluding, in paragraph 47, that they had failed; secondly, in concluding that public confidence in the Tribunal was dependent on the soldiers giving evidence in Londonderry. Although Londonderry, as the scene of the events and the home of the victims and their families, may be the natural place to hold much of the Inquiry and to hear evidence from the families and other witnesses living there, it does not follow that it is the natural place to hear the evidence of hundreds of witnesses living on the mainland. And the Tribunal did not consider whether any loss of confidence arising from where the soldiers gave evidence would be reasonable or would exist in the minds of responsible people, (see **ex parte A** Divisional Court 17th June 1999 per Roch LJ at 37A and Maurice Kay J at 47B), bearing in mind that the crucial purpose of the Inquiry was to establish the truth, that such a result is most likely if proceedings are fair to all witnesses, that the families would be legally represented at temporary mainland hearings of the soldiers' evidence which would

be in public and relayed to Londonderry and followed by final submissions in Londonderry. None of these matters was properly taken into account by the Tribunal. Only two reasons appear to have been given. First, the importance of the Inquiry to local people: this could properly be no more than a factor to be considered together with others and symbolism is not a justification for exposing the soldiers to risk of death. Secondly, to conduct a central part of the Inquiry elsewhere would be a breach of Article 2 procedural requirements: nothing in **Jordan v UK** or **McCann v UK** 21 EHRR 1997 suggests that Article 2 requires an Inquiry to be held where fatal events occurred. What is required is an independent, effective investigation, securing evidence with reasonable expedition, subject to public scrutiny and involving the next-of-kin to the extent necessary to safeguard their legitimate interests (see **Jordan** paragraphs 105 to 109). None of these features of open justice would be undermined by the soldiers giving evidence in Great Britain. The Tribunal had a duty to be fair to the soldier witnesses as well as to the families.

15. For the Ministry of Defence, Mr Burnett QC in submissions which echoed and in some respects adopted Mr Lloyd Jones's argument submitted first that the Tribunal misdirected itself in applying the higher **Osman** test rather than the lower **ex parte A** test and in holding that the procedural obligations under Article 2 told in favour of the soldier witnesses giving evidence in Londonderry. Secondly, there was no compelling reason why the soldiers should face the higher risk in Londonderry even after all precautions had been taken. Thirdly, it could not properly be concluded that the soldiers' fears if they gave evidence in Londonderry were not reasonable: elaborate security has not been and will not be sufficient to protect soldiers from terrorist attack and the real risk to soldiers only becomes immediate when an attack is implemented. In any event the position of the Bloody Sunday soldiers is different from that of other soldier witnesses in ordinary trials (transcript 94).
16. On behalf of the defendants, Mr Christopher Clarke QC confirmed that the Tribunal's ruling was based upon the proposition that the Osman test was applicable; Article 2 was not engaged unless it was demonstrated that the risk to life was "real and immediate". He submitted that there was no difference in substance between this formulation and that set out by Lord Diplock in Fernandez.
17. Article 2.(1) places three obligations on a public authority: a negative obligation to refrain from intentionally depriving a person of their life; a positive obligation to protect the right to life, and a procedural obligation effectively to investigate killings resulting from state action. The negative obligation to refrain from taking life intentionally is absolute, and is a

fundamental provision of the Convention which admits of no derogation in peacetime. The only circumstances in which a public authority may intentionally take a life are those set out in Article 2(2) which are exhaustive, and must be narrowly interpreted: **Stewart v UK** [1984] 7 EHRR 453, para. 13. However, the ambit of this absolute prohibition is relatively narrow. The word “intentionally” in Article 2.(1) must be given its natural and ordinary meaning: the purpose of the prohibited action must be to cause death: **In re A (conjoined Twins: surgical separation)** [2001] 2 WLR 480, **NHS Trust A v M** [2001] 2 WLR 942. This absolute negative obligation has no application to the present case. The positive obligation is not absolute. It requires state authorities to do all that can reasonably be expected of them to avoid a real and immediate risk to life of which they have or ought to have knowledge, whether this risk arises from criminal acts of third parties, or any other factor: **Osman** at pp. 277-8, paragraphs. 89 and 91, and p. 306, paragraphs 115-116. He said this means that Article 2 permits the state deliberately to expose an individual to any risk to life provided that risk cannot be demonstrated to be “real and immediate”. Article 2 is not engaged unless the “real and immediate” threshold is crossed. He suggested that a decision by the state to expose an individual to a lesser degree of risk to life might well be reviewable on rationality grounds.

18. **Chahal** and **Soering** are concerned with the state’s non-derogable obligations (in relation to torture, etc.) under Article 3. They are of no assistance in determining the ambit of the qualified, positive, obligation under Article 2(1). **Ergi**, at paragraphs 79-81, is an application of the **Osman** duty - to do all that can reasonably be expected - to particularly dramatic circumstances. Depending on the circumstances, the **Osman** duty may place a heavy burden on the state; but the underlying test of “real or immediate risk” does not alter merely because the state authorities are deliberately exposing the individual to a risk to life.
19. The state cannot reasonably be expected to do everything that can possibly be done to avoid exposing an individual to any risk, however small or insignificant, to life. To impose such an obligation would be a disproportionate response in the context of a qualified duty: see the balancing exercise carried out by the court in **Van Mechelen v. Netherlands** 25 EHRR 647, at page 674, paragraphs 56 & 57.
20. He submitted that the Tribunal was right to conclude that the “real and immediate risk” test is, for all practical purposes, the same as the approach adopted in **Fernandez**, namely, are there “substantial grounds for thinking”, is there a “reasonable chance” or “a serious possibility”. In **Soering** the court referred in paragraph 88 of its judgment both to “substantial grounds for thinking he would be in danger...”, and to “a real risk of exposure

to inhuman or degrading treatment". In **Bensaid v. UK** 6 February 2001 the court noted, with approval, the test applied by Simon Brown L.J. in **R v. Secretary of State for the Home Dept ex parte Turgut** [2001] 1 All ER 719: "the right not to be exposed to a real risk of article 3 treatment". A similar approach was found in **HLR v. France** 26 EHRR 29, page 50, paragraph 40. In **Secretary of State for the Home Department v. Rehman** [2001] 3 WLR 877, Lord Hoffmann referred in paragraph 54 to "a substantial risk", and pointed out, in paragraph 56, that the concept of a standard of proof is not particularly helpful when assessing the extent of a future risk. The question is one of evaluation and judgment. In **ex parte A** it was common ground that the soldiers' fears (if anonymity was withheld) were based on reasonable grounds. It is not enough for the claimants to assert that there is some risk. Whether the level of risk is sufficient to bring Article 2 into play is a question of degree, for the evaluation and judgement of the Tribunal: see **Rehman**, paragraph 56.

21. Turning to the implied procedural obligation under Article 2, Mr Clarke referred to **Jordan v. UK** 4 May 2001, paragraphs 105-109, and to **McKerr v UK** 4 May 2001, paragraphs 159-161. The Tribunal correctly concluded that it would be in contravention of the Article 2 procedural requirement to conduct a central part of the Inquiry anywhere other than in Londonderry. Remaining in Londonderry would retain public confidence in the state's willingness to maintain the rule of law, prevent any appearance of collusion in the unlawful use of force, ensure that the investigation was transparent and accessible to the families of the deceased and the local community and enable the next of kin of the victims to be involved in the proceedings to the extent necessary to safeguard their legitimate interests. There was a particular need not to repeat the errors of the past. The fact that the Widgery inquiry had been held in Coleraine, rather than in Londonderry, had led to the widespread belief that the venue had been chosen for the convenience of army witnesses and to disadvantage local people.
22. In deciding whether the soldiers' fears for their safety were reasonable, the Tribunal was required to assess, on an objective basis, whether the available evidence led to the conclusion that there was a sufficient likelihood of the risk occurring. The Tribunal was not dealing with the soldiers' subjective fears. On an objective basis, a real and immediate risk was not established, so the soldiers' fears could not be regarded as reasonable in the context of Article 2; which was simply not engaged. Since Article 2 was not engaged it had not been necessary for the Tribunal to carry out a balancing exercise to decide whether there was any "compelling justification" (see **ex parte A** at p.1877 A) for exposing the soldiers to the increased risk. In deciding that the witnesses should be

heard in Londonderry unless there were “compelling reasons” not to do so, the Tribunal was not placing a burden of proof on the soldiers. It was merely following “a logical progression of thought”. The end result would be the same if one approached the question on the basis: if Article 2 is not engaged, Londonderry is the natural place to hold the Inquiry. The Tribunal’s conclusion that the soldiers’ fears were not reasonable, given the level of protection that would be provided by the state security services, was a finding of fact, arrived at by a uniquely experienced tribunal following detailed enquiries of all the relevant services. All those at the 18th June meeting were well aware of its purpose. The Tribunal was concerned to ascertain not merely the means of protection that would be employed, but their outcome, namely, what degree of safety would be achievable in practice? Because of the inherent lack of precision in such concepts as “moderate risk”, “increased vulnerability”, “secure environment”, the Tribunal looked for a practical, objective, standard, namely the level of protection that the security services had been able to provide for vulnerable witnesses in Northern Ireland over many years. If, as a result of that protection, the risk to the soldiers could not be described as “real and immediate” it is irrelevant that it was higher in one place, Londonderry, than in another.

23. Although the Tribunal had not reached the stage of being required to consider whether there was a compelling justification for requiring the soldiers to accept an increased degree of risk, such justification could be found in the Tribunal’s conclusions in paragraphs 5 and 26: moving a major part of the inquiry out of Londonderry would seriously damage public confidence, and be in breach of the Article 2 procedural requirements. The Tribunal was particularly well qualified to assess the former. They were well aware of the fact that restoring public confidence was not the sole object of the Inquiry, but it was a vital part of the Tribunal’s role, given the lack of confidence, particularly amongst those most affected by Bloody Sunday, as to the willingness of the British state to carry out a genuinely thorough and impartial investigation. To render the hearing inaccessible to those most affected, the families of the victims, and other members of a tightly knit local community, would shatter their confidence. Their position, as victims in the context of Article 2, should not be equated with the position of ordinary members of the public having an interest in, and wishing to attend, an ordinary public inquiry.
24. Substantial security precautions would be required at any venue on the mainland. The risk is greater in Londonderry, but the Tribunal had been advised by the security agencies that an acceptable level of security could be provided in both places. Against this background the balance tipped decisively in favour of a hearing in Londonderry.

25. The Tribunal had been entitled to reject, in paragraph 40, the suggestion that there would be a serious risk of public disorder should the soldiers give oral evidence at the Guildhall. The Tribunal was advised on 18th June that with such measures as segregation, public order could be maintained (transcript pp. 35-40). The Tribunal took account of the past incidents relied upon by the soldiers (paragraph 38) but some of these incidents were relatively old, and many had been associated with the Marching Season and other sectarian activities, all of which had no connection with the conduct of the Inquiry.
26. In terms of procedural fairness, security arrangements will have to be made wherever the soldiers give evidence. Those likely to be provided in Londonderry would effectively insulate the witnesses, so they will be well able to do justice to themselves. There are collateral risks, albeit of a different character, whether the Inquiry is held in Londonderry or on the mainland. Since the Tribunal has not accepted that the soldiers' fears for themselves are reasonable, concern for the safety of those protecting them cannot result in any procedural unfairness. The job of the security forces necessarily involves their being required to take risks.
27. For the families we received written and oral submissions from four leading counsel. Mr Lavery QC stressed that the families are acting in good faith and want no more deaths. Their wish is to see the Inquiry finished not jeopardised. The Tribunal has gained the trust and confidence of the people of Northern Ireland but discovery of the truth will be a waste of time if the Tribunal does not continue to enjoy that confidence. The families do not believe there is a risk to the soldier witnesses in Londonderry and for the Tribunal to hear their evidence in England would be perceived as a step to protect the soldiers. There is no evidence that any particular group from those involved in the Inquiry has been singled out by terrorists because of the role it plays. It is purely speculative and dependent on a reading of the Republican psyche to say the risk to soldiers is greater in Northern Ireland than on the mainland. The Ministry of Defence views are not detached. The Tribunal is in as a good position as any observer to assess the risk. It is not open to this court to read the transcript of 18th June and take a different view. He referred to **Bensaid** 33 EHRR 205 and the approval in paragraphs 55 and 56 of the English judicial review procedures and, in particular, (paragraph 28) of the judgment of Simon Brown LJ in **ex parte Turgut** [2001] 1 All ER 719 that an irrationality challenge under Article 3 will only succeed if consideration of the underlying factual material compels a court to a different conclusion.

28. Lord Gifford QC adopted Mr Clarke's analysis of the authorities and expressed mystification at Mr Lloyd Jones's criticism of the Tribunal's approach to the law. He submitted that the law before the Tribunal was agreed, namely that Article 2 would only be engaged if the authorities could not eliminate a real risk. The present circumstances are to be distinguished from those considered in **ex parte A**, particularly as absence of anonymity would remove protection forever whereas the risk arising from giving evidence in Londonderry would be of only short duration. Londonderry should be regarded as the safest, not the least safe, place for the soldiers to give evidence. He relied on the statement of Liam Wray explaining his family's wish to be present at the hearing, to see the witnesses, which would be impossible if they are heard on the mainland. The process by which the truth is reached is of great importance and full healing and reconciliation will not take place if the witnesses are not seen and heard by the families. On 18th June, the Tribunal had taken great care to obtain appropriate advice and had taken all appropriate matters into account.
29. Miss McDermott QC adopted the submissions of Mr Clarke and Lord Gifford. Hearing soldiers' evidence on the mainland would render the Inquiry inaccessible to the Docherty family, which includes six children. Hearing evidence in Londonderry would cause the Tribunal to continue being seen as independent, transparent and unbiased. It presently enjoys the full confidence of the people most affected.
30. Mr Mansfield QC submitted that there would be no real risk to soldiers in Londonderry whether the risk was described as immediate or a serious possibility: for all practical purposes the tests are synonymous. Neither threshold is crossed because of the thirty-year history of non-interference with witnesses and because of the measures which can be put into place. The Tribunal's crucial conclusions, in paragraphs 23 to 25, were within the range of options open to them. The security agencies provided no concrete material showing real risk. The threat assessments, which were originally made in relation to anonymity, had not addressed the thirty-year history (transcript page 94) and no soldier had been attacked when giving evidence at the 1972 Inquiry.
31. In addressing these rival submissions it is as well to begin by setting out the approach which we have adopted. This is in accordance with the judgment of Lord Woolf in **ex parte A** at 1865H to 1868H.

“31. The Tribunal is subject to the supervisory role of the courts. The courts have to perform that role even though they are naturally loath to do anything which could in any way interfere with or complicate the extraordinary difficulty task of the Tribunal. In exercising their role the courts have to bear in mind at all times that the members of the Tribunal have a much greater understanding of their task than the courts. However, subject to the courts confining themselves to their well recognised role on applications for judicial review, it is essential that they should be prepared to exercise their role regardless of the distinction of the body concerned and the sensitivity of the issues involved. The court must also bear in mind that it exercises a discretionary jurisdiction and where this is inconsistent with its performance of its duty it should avoid interfering with the activities of a Tribunal of this nature to any greater extent than upholding the rule of law requires.”

When reviewing the reasonableness of a Tribunal's decision:

“33....If a decision could affect an individual's safety then obviously there needs to be a greater justification for taking that decision than if it does not have such grave consequences.

34. The appropriate test...is the test adopted by Sir Thomas Bingham MR in the Court of Appeal Civil Division in **Reg v Ministry of Defence ex parte Smith** [1996] QB 517, 554E-F.” The test was based on submissions of Mr David Pannick in that case. They were in these terms:

“The court may not interfere with the exercise of an administrative discretion on substantive grounds save where the court is satisfied that the decision is unreasonable in the sense that it is beyond the range of responses open to a reasonable decision-maker. But in judging whether the decision-maker has exceeded this margin of appreciation the human rights context is important. The more substantial the interference with human rights, the more the court will require by way of justification before it is satisfied that the decision is reasonable in the sense outlined above. ”

“35...Sir Thomas Bingham MR indicated that he regarded this statement as “an accurate distillation of the principles laid down by the House of Lords in **Reg v Secretary of State for the Home Department ex parte Bugdaycay** [1987] AC 514 and **Reg v Secretary of State for the Home Department ex parte Brind** [1991] 1 AC 696” and we would respectfully agree with him....

“37...When a fundamental right such as the right to life is engaged the options available to the reasonable decision maker are curtailed. They are curtailed because it is unreasonable to reach a decision which contravenes or could contravene human rights unless there are sufficiently significant countervailing considerations. In other words it is not open to the decision-maker to risk interfering with fundamental rights in the absence of compelling justification. Even the broadest discretion is constrained by the need for there to be countervailing circumstances justifying interference with human rights. The courts will anxiously scrutinise the strength of the countervailing circumstances and the degree of the interference with the human right involved and then apply the test accepted by Sir Thomas Bingham MR in **Reg v Ministry of Defence ex parte Smith**.

“...38 Turning to the role of the courts on judicial review to ensure procedural fairness...While [this Tribunal] is master of its own procedure and has considerable discretion as to what procedure it wishes to adopt, it must still be fair. Whether a decision reached in the exercise of its discretion is fair or not is ultimately one which will be determined by the courts. ...The requirements of procedural fairness for witnesses is well recognised in the courts...At this Inquiry where there are no defendants the requirement of procedural fairness surely involves an obligation to be fair to witnesses...

40..Procedural fairness must be viewed in the round and fairness to the former military witnesses [is] only one dimension of the question posed: it [is] also necessary to consider the interests of the dead and injured and the public interest. ”

32. In our judgment the Tribunal misdirected itself in law as to the test to be applied when assessing the threshold of risk to soldier witnesses from terrorist reprisals. In paragraph 23 the Tribunal accepted that that risk would be higher in Northern Ireland than in Great Britain. They were right to say in paragraph 24 that the fact that the risk was greater in one place rather than the other was not of itself determinative. But in proceeding to apply the **Osman** test the Tribunal in our judgment fell into error. The **Osman** and **ex parte A** tests are, as it seems to us, conspicuously different in purpose and effect. In **Osman** the European Court of Human Rights limited the obligation of the state to intervene to protect against the activities of third parties to those circumstances in which there is a real and immediate risk to life. In **ex parte Fernandez** the House of Lords and in **ex parte A** the Court of Appeal defined the obligation of a public authority more broadly as being not to make a decision exposing anyone to the real possibility of a risk to life in the future. This misdirection fundamentally flaws the Tribunal’s decision Whether their decision would

have been the same or different if the correct test had been applied is a matter for the Tribunal rather than this court to determine. They will, no doubt, wish to bear in mind: that the need to seek advice from all the security agencies on 18th June demonstrated that, whatever the degree of risk, it was by no means fanciful; that likelihood of being shot was not, as we have sought to explain, the correct approach; that the security agencies were not asked whether there was a real possibility of risk; and that the question of whether the necessary security could be maintained for 6 months or more was never resolved.

33. Furthermore, the Tribunal's conclusion that the soldiers had no reasonable fears for their own safety, in the light of the protection the security services would afford, was erroneous and gave rise to procedural unfairness in relation to the soldier witnesses. As we have said, the correct test to be applied was whether there was a real possibility of risk. Also, as it seems to us, it was not reasonably open to the Tribunal to conclude that the soldier's fears were not reasonable. The security agencies will of course do their best to ensure an adequate level of protection. But it does not follow that the people to be protected do not have reasonable fears for their safety notwithstanding the existence of that protection. The recent history of events in the province, including the attacks on barracks at Ballykelly and Ebrington demonstrate that, despite intensive security precautions, terrorist activity puts soldiers' lives at risk. And the Tribunal's emphasis on the quiet and calm manner of proceedings at the Guildhall ignores the impact on middle aged witnesses, many of whom have been civilians for many years, of the extensive security measures required in relation to accommodation, transport and close protection. The Tribunal said that the Guildhall itself is not an especially hostile or intimidating environment but this, in our judgment, ignores both the security precautions in relation to soldier witnesses before reaching the Guildhall and after leaving it and the necessity, indicated by the security agencies on 18th June, for uniformed armed personnel in the Guildhall while evidence is being given. Accordingly, when re-considering the matter, the Tribunal must in our judgment take into account that the soldier witnesses' fears for their own safety must properly be characterised as reasonable.

34. We also accept that Mr Lloyd Jones's third principal criticism of the Tribunal is well founded. The Tribunal should not, as they did in paragraph 9, have started from the proposition that the soldier witnesses' evidence should be given at the Guildhall unless they showed compelling reasons for a different course. It is common ground that the primary purpose of the Tribunal is to find the truth. It is also vital that the Inquiry commands public confidence. The confidence of the families in the Tribunal's findings is obviously of great importance. So too, as it seems to us, is the confidence of the soldier

witnesses, some of whom are accused of murder. Equally although the confidence of the people of Northern Ireland is of high importance, so too is the confidence of people in other parts of the United Kingdom. It is the Prime Minister of the United Kingdom whose announcement in Parliament gave rise to the setting up of the Tribunal. All of these matters must be taken into account by the Tribunal when carrying out the balancing exercise, properly for their determination, as to where the soldier witnesses should give evidence. In our judgment the Tribunal in its present ruling does not appear to have taken these matters into account. Accordingly, the Tribunal's conclusion that the confidence of the people in Londonderry would be very seriously diminished if not destroyed if soldier witnesses gave evidence on the mainland should not properly have been regarded as determinative of the outcome without due consideration of wider public confidence including that of the soldier witnesses themselves. In any event, in our judgment, once the risk of death is a serious or real possibility it was for the Tribunal, as decision maker, to find some compelling justification for interference with the soldiers' Article 2 rights rather than to require the soldiers to provide a compelling justification for giving their evidence elsewhere. (see **Soering v UK** 11 EHRR 439 paragraph 88, **Chahal v United Kingdom** 23 EHRR 413 at paragraph 80 and **Ergi v Turkey** European Court of Human Rights 28th July 1998 paragraph 79).

35. Finally, we do not accept the Tribunal's conclusion, at the end of paragraph 26, that conducting a central part of the Inquiry somewhere other than Londonderry would contravene the Article 2 procedural requirements for the Tribunal, which we take to be a reference to the families' Article 2 rights. The Tribunal sitting in Great Britain would be equally independent from those implicated in the events, transparent and subject to public scrutiny, non-collusive in unlawful acts and would involve the victims and next-of-kin (who would all continue to be legally represented) to the extent necessary to safeguard their legitimate interests (see **Jordan v United Kingdom** European Court of Human Rights 4th May 2001 paragraphs 105-109).
36. Accordingly, the Tribunal's decision that the soldier witnesses must give evidence in Londonderry is quashed. We remit the matter to the Tribunal for reconsideration in the light of the terms of this judgment.

THE ASSOCIATE: Judgment in *The Queen on the application of A and Others v Members of the Tribunal sitting as the Bloody Sunday Inquiry*.

LORD JUSTICE ROSE: For the reasons given in the judgment of the Court handed down, the Tribunal's decision in relation to the soldier witnesses is quashed and we remit the matter to the Tribunal for reconsideration in the light of the terms of this judgment.

MR BOOLS: My Lord, simply on the matter of costs, we ask that there be no order as to costs.

LORD JUSTICE ROSE: Does anybody resist that? Then there will be no order as to costs.

MISS ROSE: On behalf of the Tribunal we do apply for permission to appeal. As your Lordship is well aware, the test for permission is twofold under CPR part 52. First of all, whether or not there is a real prospect of the appeal succeeding and, secondly, regardless of your Lordships' view of the merits of the appeal, if there is in any event a compelling reason why the appeal should be heard. In our submission there are two compelling reasons why this matter ought to go to the Court of Appeal. The first is, as your Lordships have acknowledged in your judgment, that your Lordships are differing from the views of very senior members of the judiciary. The second is that it is patent that the matter is a matter of very considerable public importance and warrants consideration at appellate level.

In any event we submit that there is a real prospect of the appeal succeeding. In particular your Lordships have ruled that the Tribunal misdirected themselves in law in relation to the question whether Osman and ex parte A set a different test. That is a matter on which there is currently no appellate authority and it is obviously a matter on which senior members of the judiciary may take different views, as is apparent from the history of these proceedings.

My Lords, finally we would submit that there are very good case management reasons why permission to appeal ought to be granted at this stage by this court. As your Lordships will be aware from our acknowledgement of service, we sought expedition at the outset. As your Lordships know, the inquiry has been sitting for three and a half years. The costs are enormous. Any delay is going to cause very significant inconvenience in costs as well as being adverse to the interests of justice. We would very much like, if it were possible for us to be accommodated, for any appeal to come on before Christmas. If permission is not granted at this stage, inevitably there will have to be a rolled-up hearing for permission and a substantive appeal which means there will be no saving in costs or

time if permission is refused by this court, simply an added procedural complexity. I would ask your Lordships to avoid that by granting permission at this stage.

MR MANSFIELD: My Lord, as you may recall I represent in fact, for the purposes of this hearing, four families instead of three. But I would associate myself with those observations and also seek leave on behalf of those families. I will not repeat arguments I put forward on paper and orally before but your Lordships will recall that we have a specific point we wish to pursue in relation to the definition and threshold test.

MR HARVEY: Richard Harvey on behalf of the Wray family. I adopt my learned friends' arguments.

MR BOOLS: It is simply a matter for the Court. We have no submission.

(The Court conferred)

LORD JUSTICE ROSE: We shall grant permission, not because we think there is a real prospect of success, but because there is a compelling other reason, namely the public interest.

A2.48: Court of Appeal (Civil Division) (London, 19th December 2001): venue (item 19 above)

**Lord Saville of Newdigate & Ors v Widgery Soldiers & Ors [2001]
EWCA Civ 2048 (19th December 2001)**

**[2001] EWCA Civ 2048
Case No: C/2001/2538**

**In the Supreme Court of Judicature
Court of Appeal (Civil Division)
On appeal from the Administrative Court
The Rt. Hon. Lord Justice Rose
The Hon. Mr Justice Sullivan**

**Royal Courts of Justice
Strand, London, WC2A 2LL**

19th December 2001

**Before:
Lord Phillips MR
Lord Justice Jonathan Parker
and
Lord Justice Dyson**

Lord Saville of Newdigate and Others (Appellants)

and

Widgery Soldiers and Others (Respondents)

(Transcript of the handed down judgment of Smith Bernal Reporting Limited, 180 Fleet Street, London EC4A 2AG. Tel No: 020 7421 4040, Fax No: 020 7831 8838. Official Shorthand Writers to the Court)

Christopher Clarke QC, Dinah Rose, and Alan Roxburgh (instructed by The Treasury Solicitors) for the Tribunal.

David Lloyd Jones QC, Michael Bools and Nicholas Moss (instructed by The Treasury Solicitor) for various soldiers and former soldiers

Iain Burnett QC and William Hoskins for the Ministry of Defence

Michael Lavery QC, Seamus Treacy QC and Karen Quinlivan (instructed by Messrs Madden & Finucane) for the various bereaved and wounded represented by Madden & Finucane

Michael Mansfield QC (instructed by Messrs Desmond Doherty & Co) for the relatives of Bernard McGuigan, Alexander Nash & William Nash, deceased and Daniel Gillespie and Michael Quinn

Eilis MacDermott QC (instructed by Messrs Brendan Kearney Kelly & Co) for the relatives of Patrick Doherty deceased

Declan Morgan QC and Brian Kennedy (instructed by Messrs Frances Keenan) for Michael Bradley and Michael Bridge

Sir Louis Blom-Cooper QC and Henrietta Hill (instructed by Messrs Frances Keenan) for the various former officers of the Northern Ireland Civil Rights Association represented

Judgment (as approved by the Court)

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Lord Phillips MR:

This is the judgment of the court.

Introduction

1. Once again retired and serving soldiers, who are due to give oral evidence in the Bloody Sunday Inquiry ('the soldier witnesses'), have sought judicial review in order to challenge a procedural order of the Tribunal. In *R v Lord Saville of Newdigate ex p. A* [2000] 1 WLR 1855 a number of soldiers, who had fired live rounds on Bloody Sunday, successfully challenged a decision of the Tribunal that soldier witnesses would be identified by their full names, subject to the right to apply for anonymity on special grounds. That decision,

insofar as it related to soldiers who had fired live rounds, was quashed by the Divisional Court, whose decision was upheld on appeal. The Court of Appeal held that these soldiers had reasonable grounds for fearing for their lives if they were identified and that in those circumstances the Tribunal had to demonstrate that there were compelling reasons for naming them. This they had failed to do. In the light of that judgment the Tribunal decided to grant anonymity to all soldier witnesses.

2. On this occasion the decision that is challenged is that the soldier witnesses must give evidence in the Guildhall in Londonderry, rather than in London or in some other venue in Great Britain. Once again the primary ground of challenge is that the soldiers have reasonable grounds for fearing for their lives if they go to Londonderry to give evidence and that the Tribunal has failed to show that there are compelling grounds for requiring them to do so.
3. The Administrative Court has granted the soldier witnesses' application, quashed the Tribunal's decision and remitted the matter to them for further consideration. That Court held that the Tribunal misdirected itself in law, with the result that their decision was fundamentally flawed. Against that decision the Tribunal now appeals. It is supported in its appeal by a number of families of people who were killed or wounded on Bloody Sunday. These families are desperately concerned that the soldier witnesses should give evidence in the city where the tragedy occurred and where the families will be able to listen to their evidence. The respondents, for their part, are supported by the Ministry of Defence ('MoD'), which contends that to make the soldier witnesses give their evidence in Londonderry will be to expose them to lethal danger and to consequent stress for which there can be no justification.
4. The hearing of this appeal has been expedited and our judgment is urgently awaited. In these circumstances we propose to follow the example of the Administrative Court and to refer anyone who is unaware of the background to this appeal to the account that is given in the first 28 paragraphs of the judgment of this court in *ex parte A*. Indeed there are so many parallels between that appeal and this that we would recommend anyone unfamiliar with it to read the judgment in that case as a precursor to our own.
5. Most of those before the court submitted that at the heart of this appeal lie the duties that are imposed on a public authority by virtue of Article 2 of the Human Rights Convention ("the Convention"); not everyone, however. We gave permission to intervene to the Northern Ireland Civil Rights Association. On their behalf Sir Louis Blom-Cooper Q.C.

sought to persuade us that the Tribunal was not a public authority and therefore not subject to the Convention, as applied by the Human Rights Act 1998.

6. This argument was presented to the Administrative Court by written submission. It received short shrift – see paragraphs 4 and 5 of the judgment. We endorse the conclusions of the Administrative Court for the reasons given by it. The Tribunal is undoubtedly a public authority within section 6(3) of the 1998 Act, being a court or tribunal whose functions are of a public nature. In any event the Tribunal has founded its decision very largely on the premise that it is governed by the Convention and that decision falls to be reviewed in the light of the Convention obligations.
7. Sir Louis advanced a second submission. What was in play on this appeal was a matter of procedure. The Tribunal was the master of its own procedure. This was not an appropriate area for judicial review – see *Lawlor v Flood* [1999] 3 IR 107 per Murphy J. at p.139. We accept that, in general, the court will not interfere with procedural decisions of a tribunal. Here, however, what is in issue is the fairness of the Tribunal’s procedure. Furthermore it is in issue in an extreme form, for what is alleged is that the procedure of the Tribunal will expose witnesses to the fear of lethal danger, a fear that is both subjectively and objectively justified. As this court observed in *ex parte A* at p.1868, while the Tribunal “is master of its own procedure and has considerable discretion as to what procedure it wishes to adopt, it must still be fair. Whether a decision reached in the exercise of its discretion is fair or not is ultimately one which will be determined by the courts”.
8. An allegation of unfairness which involves a risk to the lives of witnesses is pre-eminently one that the court must consider. It is also one which calls for the most anxious scrutiny, as all parties to this appeal have recognised. The decision under review has been reached by a tribunal of pre-eminent distinction and experience, not merely general judicial experience but, by now, personal experience of conditions, attitudes, emotions and reactions in the venue where the Inquiry is being held that extends over a period in excess of three years. These considerations call for particular care on our part when deciding whether to interfere with the decision that the Tribunal has made.

The manner in which Article 2 is engaged

9. Article 2 of the Convention provides:

“1. Everyone’s right to life shall be protected by law. No one shall be deprived of his life intentionally save in the execution of a sentence of a court following his conviction of a crime for which this penalty is provided by law.

2. Deprivation of life shall not be regarded as inflicted in contravention of this article when it results from the use of force which is no more than absolutely necessary:

(a) in defence of any person from unlawful violence;

(b) in order to effect a lawful arrest or to prevent the escape of a person lawfully detained;

(c) in action lawfully taken for the purpose of quelling a riot or insurrection.”

10. The European Court of Human Rights (“the Strasbourg Court”) has accepted as admissible applications involving the right to life in a number of different circumstances and its jurisprudence gives guidance as to the appropriate approach of a public authority in each of these circumstances. The Inquiry is, of course, concerned with the question of whether there was a breach of Article 2 by the deliberate taking of life resulting from the use of force by soldiers that was more than absolutely necessary. That issue is not, however, in play in this appeal. The circumstances in which the Strasbourg Court has found that the right to life was engaged that are relevant to this appeal are as follows.

The requirement to have an effective official investigation

“The obligation to protect the right to life under Article 2 of the Convention, read in conjunction with the State’s general duty under Article 1 of the Convention to ‘secure to everyone within [its] jurisdiction the rights and freedoms defined in [the] Convention’, also requires by implication that there should be some form of effective official investigation when individuals have been killed as a result of the use of force...”

11. This passage from the decision of the Strasbourg Court in *Hugh Jordan v. United Kingdom* (Decision 4 May 2001) represents an area where the Strasbourg Court has only relatively recently held that Article 2 is engaged – see *McCann and Others v. United Kingdom* (1996) 21 E.H.R.R. 97 at p.163. The efficacy of the contemporary Widgery Inquiry into Bloody Sunday has not been generally accepted, which was one of the

reasons for setting up the current Inquiry. The current Tribunal has rightly recognised at paragraph 26 of its Ruling on Venue that Article 2 places it under a procedural obligation, insofar as compatible with the substantive obligations imposed by that Article, to conduct an official Inquiry that is effective.

The duty to protect against criminal acts that threaten life

12. The recognition that this duty arises from Article 2 is another recent development of the jurisprudence of the Strasbourg Court. It was enunciated in the tragic case of *Osman v. United Kingdom* (1998) 29 E.H.R.R. 245. We shall, accordingly, describe the duty as ‘the *Osman* duty’. Because this decision has featured large in the arguments addressed to us, we propose to set out the material passage from the judgment of the Court at paragraphs 115-116:

“The Court notes that the first sentence of Article 2(1) enjoins the State not only to refrain from the intentional and unlawful taking of life, but also to take appropriate steps to safeguard the lives of those within its jurisdiction. It is common ground that the State’s obligation in this respect extends beyond its primary duty to secure the right to life by putting in place effective criminal law provisions to deter the commission of offences against the person backed up by law-enforcement machinery for the prevention, suppression and sanctioning of breaches of such provisions. It is thus accepted by those appearing before the Court that Article 2 of the Convention may also imply in certain well-defined circumstances a positive obligation on the authorities to take preventive operational measures to protect an individual whose life is at risk from the criminal acts of another individual. The scope of this obligation is a matter of dispute between the parties.

For the Court, and bearing in mind the difficulties involved in policing modern societies, the unpredictability of human conduct and the operational choices which must be made in terms of priorities and resources, such an obligation must be interpreted in a way which does not impose an impossible or disproportionate burden on the authorities. Accordingly, not every claimed risk to life can entail for the authorities a Convention requirement to take operational measures to prevent that risk from materialising. Another relevant consideration is the need to ensure that the police exercise their powers to control and prevent crime in a manner which fully respects the due process and other guarantees which legitimately place restraints on the scope of their action to investigate crime and bring offenders to justice including the guarantees contained in Article 5 and 8 of the Convention.

In the opinion of the Court where there is an allegation that the authorities have violated their positive obligation to protect the right to life in the context of their above-mentioned duty to prevent and suppress offences against the person, it must be established to its satisfaction that the authorities knew or ought to have known at the time of the existence of a real and immediate risk to the life of an identified individual or individuals from the criminal acts of a third party and that they failed to take measures within the scope of their powers which, judged reasonably, might have been expected to avoid that risk. The Court does not accept the Government's view that the failure to perceive the risk to life in the circumstances known at the time or to take preventive measures to avoid that risk must be tantamount to gross negligence or wilful disregard of the duty to protect life. Such a rigid standard must be considered to be incompatible with the requirements of Article 1 of the Convention and the obligations of Contracting States under that Article to secure the practical and effective protection of the rights and freedoms laid down therein, including Article 2. For the Court, and having regard to the nature of the right protected by Article 2, a right fundamental in the scheme of the Convention, it is sufficient for an applicant to show that the authorities did not do all that could be reasonably expected of them to avoid a real and immediate risk to life of which they have or ought to have knowledge. This is a question which can only be answered in the light of all the circumstances of any particular case."

13. We consider that the *Osman* duty is directly engaged in the present case. The majority in Londonderry, and that majority includes the families of those who were killed or injured on Bloody Sunday, wish the Inquiry well and are anxious that it should continue to be peacefully held in Londonderry. It is, however, common ground that there are, in Londonderry in particular but also elsewhere, dissident Republican elements who are not prepared to observe the cease-fire, but are anxious to disrupt the peace process. In particular, the Republican group that describes itself as the Continuity IRA is not observing the cease-fire. These elements pose a threat to the Inquiry and those who are or will be taking part in it, and in particular the soldier witnesses. The security agencies consider that this threat is, and will be, sufficiently real and imminent to call for precautionary measures to safeguard those taking part in the Inquiry. We consider that they are plainly right to do so.
14. The Tribunal's decision on venue is premised on its belief that the security measures that will be put in place to protect the soldier witnesses, if they give evidence in Londonderry, will be adequate to reduce to a satisfactory extent the real and immediate risk to which

they would otherwise be exposed. The central issues in the appeal are whether the Tribunal applied too high a threshold of risk, and whether in all the circumstances it would be procedurally unfair and/or an infringement of soldier witnesses' Article 2 rights to require them to give evidence in Londonderry.

The obligation to take all feasible precautions to minimise loss of life when carrying out an operation involving the use of force against armed opposition.

15. This is a third recent development of Strasbourg jurisprudence in relation to duties arising out of Article 2. The source is the case of *Ergi v. Turkey* (Decision 28 July 1998). The applicant's sister had been killed by cross-fire in the course of an operation by Turkish security services against terrorists. It was not clear from which source the fatal bullet had come. The Court held at paragraph 79 that Article 2 could be engaged where agents of the state failed to "take all feasible precautions in the choice of means and methods of a security operation mounted against an opposing group with a view to avoiding and, in any event, to minimising, incidental loss of civilian life".
16. The facts of *Ergi* differ from those under consideration in this appeal in that in *Ergi* the state agents were undertaking an operation involving the use of armed force which was likely to produce a criminal response involving risk to the lives of civilians. Nonetheless, this and the earlier cases to which we have referred, demonstrate that the Strasbourg jurisprudence develops incrementally on a case by case basis. *Ergi* opens the door to the argument that if a public authority is carrying out an operation which is going to invite an armed response from criminals, there is a duty to do all that is feasible to ensure that civilians are not thereby harmed.
17. In *Ergi* there was no suggestion that the operation should not have been carried out at all if it was going to endanger civilian life. In this case the Tribunal is proposing to carry out in Londonderry a peaceful activity that is not merely lawful but in the public interest in that it is designed to be part of an effective inquiry into the deaths that were caused on Bloody Sunday. The soldier witnesses' application raises the issue of whether, and in what circumstances, Article 2 can require a public authority to desist from a lawful and peaceful activity because of a terrorist threat. We are not aware of any Strasbourg jurisprudence which bears directly on this question, but we think that its answer must turn on matters of fact and degree. If, for example, a credible bomb threat is received in relation to a building where a court is sitting, we think that Article 2 would normally require the court to be cleared while the threat was investigated. At the same time, the desirability of carrying on

lawful activities in a democracy can constitute compelling justification for continuing to do so despite terrorist threats, leaving it to the security agencies to do their best to provide protection in conformity with their *Osman* duty.

The approach of the Tribunal

18. At the beginning of their Ruling, the Tribunal gives reasons that lead to its conclusion in paragraph 8 that:

“since the oral evidence of the soldiers will form a major part of the inquiry the starting point is that this evidence should be given at the Guildhall where all or virtually all the other evidence will be heard, unless indeed there are compelling reasons to take a different course.”

19. Those reasons appear principally from the following passage in paragraph 5:

“We are a tribunal comprised of members from three countries charged with seeking the truth about Bloody Sunday. On that day in a city in Northern Ireland, citizens of the United Kingdom were killed and wounded by British troops. The events of that day, though of great national and international concern, have undoubtedly had their most serious and lasting effects on the people of that city. It is there that the grief and outrage that the events occasioned are centred. It seems to us that the chances of this Inquiry restoring public confidence in general and that of the people most affected in particular (which is the object of public inquiries of this kind) would be very seriously diminished (if not destroyed) by holding the Inquiry or a major part of the Inquiry far away and across the Irish Sea, unless there were compelling reasons to do so.”

20. The Tribunal goes on to cite the paragraphs from *Osman* that we have set out above, remarking that this is the most helpful judgment. At paragraph 20 the Tribunal observes:

“*Osman* recognises a principle of proportionate obligations on the authorities and the need to recognise the lawful constraints placed on the authorities in meeting those obligations. Authorities are not in breach of those obligations unless they knew or ought to have known of the existence of a real and immediate risk to life and failed to take measures which, judged reasonably, might have been expected to avoid that risk.”

21. The Tribunal then turns to evidence of the assessment of risk, to which we shall return in due course. The crux of the reasoning of the Tribunal appears in the following three paragraphs:

“23. As will be seen from the summary, it is the view of the concerned security agencies that the risk to soldier witnesses of terrorist reprisals would be higher in Northern Ireland than in Great Britain. The soldiers submit that accordingly it would be an infringement of their rights for the Tribunal to require them to give evidence at the Guildhall rather than in Great Britain. Their case is that the Tribunal is bound to take all feasible precautions to avoid or minimise, to the greatest extent possible, any risks to the life of the individual; and that this can only be done by hearing the evidence of the soldiers in Great Britain, where the risk is lower.

24. It seems to us that the fact that the risk is greater in the one place rather than the other is not of itself determinative of the matter. On the basis of the *Osman* decision, it is incumbent on the authorities (which in the present case include both the Tribunal and the agencies responsible for the protection of witnesses) to do all that can reasonably be expected of them to avoid a real and immediate risk to life of which they have or ought to have knowledge. We are satisfied, on the basis of the security advice that we have received, that the security authorities in Northern Ireland can provide, for soldiers giving evidence at the Guildhall, a level of protection sufficient to avoid any such risk. In such circumstances we consider that the Tribunal would not be acting incompatibly with the rights of the soldiers by requiring them to give evidence at the Guildhall rather than in London, for in neither place would there be a real and immediate risk to them. Neither the MoD nor the RUC (the state authorities who have the duty to protect the soldiers while giving evidence and who must accordingly deploy the proper resources to do so) have advised us that, notwithstanding the security precautions that they could and would put in place for soldiers giving evidence at the Guildhall, the level of risk would be so high that it could be described as real and immediate or in terms to the same or similar effect.

25. We have of course borne in mind the history of terrorist attacks on military and other targets in Northern Ireland, particularly those that have recently taken place in and around the city, and the present situation with regard to terrorist organisations. We have also borne in mind that over at least the last thirty years, it appears that the protection afforded by state authorities to those required to attend courts in Northern Ireland, often in circumstances of the greatest controversy where the risk of terrorist attacks has clearly been high, has been sufficient to avert any loss of life or injury from

terrorist organisations. In our judgment the authorities will have done all that could reasonably be expected of them by providing, as they say that they can, a level of security commensurate with what has regularly (and successfully) been provided for trials in Northern Ireland where persons at risk such as soldiers, security officers, informers and others have been required to attend.

22. Having regard to the level of security that the Tribunal finds will be provided, it concludes at paragraph 26 that requiring the soldiers to give evidence in Londonderry would not infringe their Article 2 rights. Accordingly:

“...it would be unreasonable and indeed in contravention of the Article 2 procedural requirements for the Tribunal to conduct a central part of the Inquiry at somewhere other than the natural and proper place for it”.

23. The Tribunal then proceeds to consider the common law test of fairness of the procedure, and concludes that it does not differ from the requirements under the Convention. The Tribunal observes at paragraph 34:

“Certainly there is every reason to conclude that the emphasis placed in *Osman* on a principle of proportionate obligations on an authority and the need for awareness, actual or imputed, of the existence of a real and immediate risk to life can fairly be seen as equally relevant to the common law. References to ‘*compelling justification*’ are made in the context of a decision that truly interferes with human rights. Since none of the concerned agencies has suggested that such a real and immediate risk would exist notwithstanding the precautions that would be put in place, it seems to us that to require the soldiers to give their oral evidence at the Guildhall would not offend their common law rights. In other words, we consider that we are justified in requiring of the soldiers no more than what has been required on many occasions of others who have had to give evidence of killings in Northern Ireland, namely to appear and testify where the events took place, with the security authorities doing all that can reasonably be expected of them to provide a safe environment.

Clearly the soldiers would prefer to give their evidence in Great Britain, but this does not demonstrate, nor do we accept, that they have reasonable fears for their safety while going to or from the Guildhall or actually giving their evidence there, in view of the security precautions that the RUC and MoD would have in place.”

The decision of the Administrative Court

24. The Administrative Court rightly decided that it should follow the approach to reviewing the decision of the Tribunal that this Court adopted in *ex parte A* and cited at length those parts of the judgment of the Court delivered by Lord Woolf which described that approach. The Court went on to give the reasons that led it to quash the Tribunal's decision. We can summarise these as follows:
- i) The Tribunal erroneously applied the *Osman* test and asked whether the soldiers would be exposed to 'a real and immediate risk to life' whereas *ex parte A* required them to ask whether there was 'a real possibility of risk'. This misdirection fundamentally flawed the Tribunal's decision.
 - ii) It was not reasonably open to the Tribunal to find that the soldiers' fears were not reasonable.
 - iii) The Tribunal should not have started from the proposition that the soldier witnesses' evidence should be given in the Guildhall unless they showed compelling reasons for a different course. Once the risk of death was a serious or real possibility it was for the Tribunal to find some compelling justification for interfering with the soldiers' Article 2 rights by making them give evidence in the Guildhall.
 - iv) The Tribunal had failed to weigh against the confidence in the Tribunal's findings of the families and of the people in Northern Ireland the confidence in those findings of the soldier witnesses and of the people in the remainder of Great Britain.

Submissions as to the test of risk

25. For the Tribunal Mr Christopher Clarke Q.C. submitted that, whether under Article 2 or at common law, there was a single test of the threshold of risk that had to be passed before the requirement to give evidence at the Guildhall would infringe the soldiers' rights. The Tribunal had correctly identified this as the test in *Osman*. In asking whether the risk was 'real and immediate', the 'immediate' could be disregarded as not relevant. The risk had to be 'real'. One did not move straight up the scale from a risk that was 'fanciful' to a risk that was 'real'. A 'real' risk was more substantial than a risk that was merely 'not fanciful'.
26. Mr Clarke referred to a number of authorities which, so he submitted, used terminology that described a 'real' risk: *Soering v United Kingdom* (1989) 11 E.H.R.R. 439 at 468 and *Chahal v United Kingdom* (1996) 23 E.H.R.R. 413 at 456 – 'substantial grounds for

believing' that one would be in danger or subjected to ill-treatment; *Fernandez v Government of Singapore* (1971) 1 WLR 987 at p. 994 - 'a reasonable chance', 'substantial ground for thinking', 'a serious possibility' per Lord Diplock; *R v. Home Secretary, ex parte Sivakumaran* [1988] 1 AC 958 at p.994 – 'a reasonable degree of likelihood'. He submitted that there was no basis in the authorities for the test advanced by the Administrative Court of 'a real possibility of risk'. That test, which had an element of tautology, was almost bound to be satisfied however remote the risk.

27. For the soldier witnesses, Mr David Lloyd Jones Q.C. submitted, with particular reference to paragraphs 20 and 26 of its ruling, that the Tribunal had based the test of the risk that engaged Article 2 entirely on *Osman* and that the Administrative Court had correctly found that this was a misdirection. It was not the soldiers' submission, however, that any risk of attack would suffice to engage Article 2. There had to be a serious or real possibility that the soldier witnesses would be attacked.

Our conclusion on the test

28. In *Fernandez*, after adumbrating the various phrases which he considered expressed the same degree of likelihood of risk, Lord Diplock referred to the alternative of "applying, untrammelled by semantics, principles of common sense and humanity". We believe that there is much to commend that approach in the present case. The search for a phrase which encapsulates a threshold of risk which engages Article 2 is a search for a chimaera. The phrases advanced by Mr Clarke were all taken from decisions involving contexts quite different from the present. These decisions provide no authoritative basis for adopting the phrases as a threshold test for Article 2 purposes. Of one thing we are quite clear. The degree of risk described as 'real and immediate' in *Osman*, as used in that case, was a very high degree of risk calling for positive action from the authorities to protect life. It was 'the real and immediate risk to the life of an identified individual or individuals from the criminal acts of a third party' which was, or ought to have been, known to the authorities. Such a degree of risk is well above the threshold that will engage Article 2 when the risk is attendant upon some action that an authority is contemplating putting into effect itself. It was not an appropriate test to invoke in the present context.
29. In *ex parte A* at p.1877 Lord Woolf said:

"...the right approach here, once it is accepted that the fears of the soldiers are based on reasonable grounds, should be to ask: is there any compelling justification for naming the soldiers, the evidence being that this would increase the risk?"

The reference to reasonable grounds was, as we understand it, to grounds that were objectively reasonable, but Lord Woolf had earlier commented at p.1876:

“From their point of view it is what they reasonably fear which is important, not the degree of risk which the Tribunal identifies.”

30. In the present appeal, the fact that the soldier witnesses will have subjective fears if called to give evidence in Londonderry is a relevant factor when considering whether it will be fair to require them to do so. Those fears will, however, have much more significance if they are objectively justified. A critical issue is whether such fears are objectively justified, and much of the submissions that we heard were addressed to this issue.
31. We consider that the appropriate course is to consider first the nature of the subjective fears that the soldier witnesses are likely to experience if called to give evidence in the Guildhall, to consider the extent to which those fears are objectively justified and then to consider the extent to which those fears, and the grounds giving rise to them, will be alleviated if the soldiers give their evidence somewhere in Great Britain rather than in Londonderry. That alleviation then has to be balanced against the adverse consequences to the Inquiry of the move of venue, applying common sense and humanity. The result of the balancing exercise will determine the appropriate decision. This course will, we believe, accommodate both the requirements of Article 2 and the common law requirement that the procedure should be fair.

Subjective fears

32. Probably no single event in the history of the troubles in Northern Ireland within our lifetime has given rise to as much passion as Bloody Sunday. Soldiers who took part in that event, and in particular those soldiers who fired live rounds, will be aware that there are many in Northern Ireland, and especially in Londonderry, who believe that they were party to murder. They will be aware that, as the Tribunal stated in its Ruling, it is in the city of Londonderry that Bloody Sunday has had its most serious and lasting effect. They will be aware, if they come to Londonderry to give evidence, that they are potential targets for terrorists. They will be aware of recent terrorist incidents and they will be aware, from personal experience of service in Northern Ireland, of the problems involved in safeguarding terrorist targets. They will be aware of some of the steps being taken to safeguard them, but this awareness may fuel rather than allay their apprehension. As the Administrative Court observed, security arrangements on the way to and from the

Guildhall and the need for uniformed armed personnel in the Guildhall when the evidence is being given are likely to be seen as a hostile and intimidating environment by middle aged witnesses, many of whom have been civilians for many years.

33. In these circumstances we think that it must be plain that if soldier witnesses have to go to Londonderry to give evidence, many will subjectively be in fear for their lives. The Administrative Court held, in paragraph 33, that “it was not reasonably open to the Tribunal to conclude that the soldiers’ fears were not reasonable” and that “the soldier witnesses’ fears for their own safety must properly be characterised as reasonable”. There was an issue as to the purport of these findings. Mr Clarke submitted that they were findings that the soldiers’ fears were *subjectively* reasonable, and on that premise he did not seriously seek to challenge the Court’s finding. Mr Lloyd Jones, however, submitted that the Court had found that, objectively, there were good reasons for the soldiers’ fears.
34. We believe that Mr Lloyd Jones was correct. In this passage of its judgment the Court remarked “The recent history of events in the province, including the attacks on barracks at Ballykelly and Ebrington demonstrate that, despite intensive security precautions, terrorist activities put soldiers’ lives at risk”. At the end of the day, however, this issue is unimportant. We must ourselves give anxious scrutiny to the evidence and form our own views as to the extent to which it demonstrates that there are grounds for fearing for the safety of the soldier witnesses if they go to Londonderry to give evidence.

Grounds for fears

35. In considering the evidence of risk to soldier witnesses we are following in the footsteps of the Tribunal. The Tribunal considered, among other matters, assessments of the threat to soldiers, including former soldiers, giving evidence to the Inquiry provided by the security service and by what was then called the Royal Ulster Constabulary (‘RUC’). The Tribunal was also supplied by the MoD with details of terrorist attacks in Northern Ireland. The Tribunal then, on 18 June 2001, convened a meeting of all the agencies who might be responsible for the security of potential witnesses in order to be informed of the security that would be provided for witnesses at the Guildhall and at possible alternative venues. Some of this evidence was, of course, highly confidential. A summary of the meeting was prepared, excluding confidential matter, which was provided to the parties. For the purpose of the hearing before the Administrative Court a quite heavily redacted transcript of the 18 June meeting was prepared, which was also made available to the

parties. The Administrative Court took advantage, however, of the opportunity of reading, in secure circumstances, the full transcript of this meeting, and we have done the same.

36. We have referred at paragraph 23 above to the conclusions that the Tribunal based upon this evidence. Mr Lloyd Jones challenged these conclusions on essentially two grounds. First he submitted that in attempting a quantitative assessment of risk the Tribunal applied a threshold test that was too high, based on *Osman*. Secondly he submitted that the Tribunal had erred in concluding that the evidence established that this threshold would not be reached. It was his submission that the security agencies at the 18 June meeting did not make any quantitative assessment of the residual risk to the soldier witnesses that would remain once security precautions had been put in place. They simply gave an assurance that they would be able to provide the same level of precautions that they had provided to those taking part in sensitive court proceedings in the past. This was not the same thing. Mr Lloyd Jones' submission received support from observations of the Administrative Court that "the security agencies were not asked whether there was a real possibility of risk" and that "the question of whether the necessary security could be maintained for 6 months or more was never resolved".
37. Assessment of terrorist risk involves consideration of both threat and vulnerability. Threat is the likelihood that terrorists will seek to attack an individual. Vulnerability is the susceptibility of that individual to an attack. It will depend in part upon the precautionary measures that are in place to protect against attack. Threat and vulnerability are interrelated in that terrorists will be more likely to attempt an attack where the target is vulnerable.

Threat

38. On 9 April 2001 the RUC provided the Tribunal with the following threat assessment:

"This department is not in possession of any specific intelligence concerning a threat to the inquiry itself or witnesses attending it.... The emotive nature of the incident to which these proceedings relate will attract the attention of all interested parties including republican terrorist groups such as the Continuity IRA, Real IRA and the Provisional IRA.

The capability of dissident republicans to carry out attacks has increased significantly since the 1999 assessment. They have mounted attacks, which range from bombings

to shootings and attempted murder. Intelligence indicates that dissident republicans intend to escalate their level of operations.

The capability of dissident republicans to carry out attacks has increased significantly since the 1999 assessment. They have mounted attacks, which range from bombings to shootings and attempted murder. Intelligence indicates that dissident republicans intend to escalate their level of operations.

It is known that republican terrorist groups still continue to carry out targeting of security force personnel and establishments.

In recent months, members of loyalist terrorist groups have been carrying out attacks on persons/premises whom they perceive to be republican/nationalist. Whilst we do not hold specific intelligence that these groups pose a threat to the inquiry/witnesses, the unpredictable nature of rogue elements within loyalists terrorist groups and the possible threat of attack on any protesters around the Guildhall area should be borne in mind.”

39. The Security Service added this in a threat assessment supplied three days earlier, which focussed on the mainland:

“All soldiers are considered ‘legitimate’ targets by republican terrorists. In the case of soldiers and ex-soldiers involved in the events of Bloody Sunday we assess that their actions at that time would make them stand out from the generality of soldiers and make them more attractive targets, if a successful attack could be carried out.”

40. The level of threat to soldier witnesses is assessed by the RUC as ‘moderate’, which is towards the lower end of the scale.

Vulnerability

41. Republican dissidents have repeatedly demonstrated their capacity to carry out effective terrorist attacks in Northern Ireland, and in particular in Londonderry, where between February 2000 and June 2001 they were responsible for 12 major incidents. On 24 May 2001 Mr Byatt, the Head of the Bloody Sunday Inquiry Unit at the MoD wrote to the Inquiry a letter that included the following statement:

“Of overriding concern is the threat from dissident republican terrorists. In Londonderry there have been six major attacks against the security forces since last Christmas.

The mortar round that was fired at the local Brigade Headquarters at Ebrington Barracks on 23 January penetrated the perimeter security and landed inside the base close to living accommodation. The round failed to detonate; had it not done so, serious loss of life would have been inevitable. There was a grenade attack against Strand Road RUC station on 21 April, and only last week a further attack against an Army installation in the centre of Londonderry. There can be no doubt as to the determination and capability of terrorists in the Londonderry area to attack and kill members of the security forces and those closely associated with them.”

42. Counsel on behalf of some of the families have submitted that evidence provided by the MoD is not objective and should not be relied upon. We can understand the suspicion from this quarter that the MoD is concerned to support the soldier witnesses, but particulars of the attacks that have taken place are hard fact and demonstrate the accuracy of this passage.
43. The fact remains that over the last 30 years there has not been an attack, whether successful or unsuccessful, on parties or witnesses to legal proceedings, although in the case of some criminal trials these might have been expected to be prime targets. Mr Clarke submitted that this demonstrated the capability of the security agencies to reduce the risk to witnesses attending trials to a level where the risk could no longer be described as ‘real’.
44. The Tribunal at paragraphs 24 and 25 took the same view. They said that they were satisfied on the basis of the security advice received that the security authorities in Northern Ireland could provide for soldiers giving evidence at the Guildhall a level of protection sufficient to avoid a real and immediate risk to life, applying the *Osman* test. It is time to look at the advice that was given at the 18 June meeting.

The 18 June meeting

45. We propose to refer to the passages in the redacted transcript that are of particular relevance.
46. Early on in the meeting Lord Saville discussed the vulnerability of the Guildhall as a venue with one of the military participants. The latter said that even with the best sort of co-ordination and planning there would be a significant vulnerability either to the witnesses, but more probably to those seeking to safeguard the witnesses. “When you plan a military operation you plan it on the basis that you always try to choose the ground

that you are going to operate on...In this case we would be operating on the ground that the terrorist believes is his”.

47. Later, an officer of the RUC said that they would be successful in reducing the vulnerability at the Guildhall. “We have been doing it for a long number of years and we have mounted operations to deal with particular threats, large scale general threats, for a long period, and we have to say honestly that, yes, we would be capable to deal with it”. Asked whether the RUC could provide the sort of protection that they provided for people giving evidence in the courts in Northern Ireland, he said that with the current scenario and the current resources they could meet the commitment and probably continue to do so for the period of six months to a year.

48. Later the following exchange took place between Lord Saville and a senior RUC officer:

RUC Officer: I guarantee putting in that sort of effort, nobody can guarantee the outcome. We can certainly guarantee that the effort would be put in. Now in terms of reducing the risk through any risk reduction exercise, be it on the Mainland or be it in Northern Ireland, then that’s likely to be effective in reducing the risk, but it’s unlikely to eliminate the relative risk if you like. But the risk at the end of that reduction exercise is still going to be higher in Northern Ireland than it is on the Mainland.

Lord Saville: Would it be the equivalent to the risk run by witnesses giving evidence in trials over in Northern Ireland over the last thirty years?

RUC Officer: That’s a difficult and to be honest a different question. One that we didn’t discuss. I think one issue that would be of relevance is the length and duration of the evidence to be given.”

49. His colleague added that the question was not whether they could do it but whether it could be sustained given the time span that was involved.

50. These are incidents of the 18 June meeting that have not been blanked out from the redacted transcript. They indicate that the agencies concerned with security would be able to provide at the Guildhall the same level of security as has been provided at high profile criminal trials. In 30 years there has never been a terrorist attempt on a witness at a criminal trial. Are these facts enough to allay concern? In our judgment they are not.

51. There are two special features in this case which make risk assessment particularly difficult. The first is that soldiers who took part in events on Bloody Sunday may well present to some terrorists as uniquely attractive targets. The second is the unprecedented

scale of the security problem. Between 200 and 400 soldier witnesses are to be called to give evidence. They will be travelling to court sequentially day after day for a period of between 6 months and a year. It will be impossible to keep secret the routes being used to take witnesses to and from the Guildhall, or, we suspect, the accommodation in which the witnesses will be lodged. There will only be limited scope for varying the times of travel to and from the court. All these factors raise very real concerns for the security of soldier witnesses should a determined attack be planned and launched on one or more of them. The most critical question seems to us the degree of likelihood of Republican dissidents deciding to launch such an attack. That is incapable of assessment. Certainly it cannot be dismissed as remote.

52. It is right that we should state, shortly and simply, that the effect of the un-redacted portions of the transcript of the 18 June meeting that we have read is to increase the concerns expressed above. We can summarise our conclusion by saying that there would be good cause for soldier witnesses called to give evidence at the Guildhall to have fears for their safety.

Risk at the alternative venue

53. It is common ground that if the soldier witnesses give evidence in London or at some other venue on the British mainland they will still be at risk to the extent that security precautions will have to be taken. It is also common ground, however, that the risk, after security precautions have been put in place, will be lower than it would be in Londonderry. The Security Service put the matter thus in their risk assessment of 6 April 2001:

“...if the hearings at which these soldiers and ex-soldiers appear are held on the mainland, the terrorist groups will be deprived of some of the ease of operation which they enjoy on their home ground in Northern Ireland and the Republic. In consequence, the generally more difficult operating conditions on the mainland are likely to give rise to the perception that a successful terrorist attack against individual targets of this type will be harder to achieve than equivalent attacks against similar targets in Northern Ireland.”

54. This perception would reduce the likelihood of an attack being attempted, so that both threat and vulnerability would be reduced.

The downside of a change of venue

55. No-one has suggested that changing the venue of the soldier witnesses' evidence would reduce the likelihood of the Tribunal getting at the truth of what happened on Bloody Sunday, and that must be the primary object of the Inquiry. Nor would a change of venue prevent the families and others in Londonderry from seeing what transpires when the soldier witnesses give their evidence. Facilities would be put in place to enable any family members who wished and were able to do so to attend the hearing. There would be live video-linkage to Londonderry and, with modern technology, this could and should be achieved to a high technical standard. We understand that at the present some choose to watch proceedings via a video link in a family room in Londonderry and that, even in the Guildhall itself, there is a video link so remote is the witness stand.
56. The essence of the downside is the Tribunal's finding that "the chance of this Inquiry restoring public confidence in general and that of the people most affected in particular ... would be very seriously diminished (if not destroyed) by holding the Inquiry or a major part of the Inquiry far away and across the Irish Sea, **unless there were compelling reasons to do so**" [emphasis ours]. This is no light matter. The time and the expense already devoted to this Inquiry is without precedent, and we would hesitate long before taking a step that would be likely to rob it of credibility. We also sympathise with the desire of the people of Londonderry and, in particular the families, for the whole of this Inquiry to take place in their city. In their shoes we would share their emotion. But in our judgement the risk posed in Londonderry to the soldier witnesses by dissident Republican terrorists does constitute a compelling reason why their evidence should be taken in a venue other than Londonderry. In these circumstances we do not see why, should we direct a change of venue for these witnesses, this should threaten the credibility of the Tribunal or confidence in their Inquiry. The fairness and objectivity of this Tribunal must by now be quite clear to all in Londonderry. Those in the Province must also be only too sadly aware of the potential for mayhem of those dissidents who oppose the peace process.

Conclusion

57. The Administrative Court was correct to conclude that the Tribunal's Ruling on venue did not comply with the requirements of Article 2 and of fair procedure and that it should accordingly be quashed. The appeal will be dismissed. We are, however, a little puzzled by the basis upon which the Administrative Court remitted this matter to the Tribunal. Mr Lloyd Jones submitted that the terms of the Court's judgment left the Tribunal no

scope for any decision other than one that the soldier witnesses' evidence should not be taken in Londonderry. We agree with this submission. Accordingly we intend to remit this matter to the Tribunal with a direction that the soldier witnesses' evidence should not be taken in Londonderry. This will leave it to the Tribunal to decide where and how this evidence should be taken and how best to make use of video facilities.

Order: Appeal dismissed. No order as to costs.

A2.49: High Court of Justice in Northern Ireland, Queen's Bench Division (Crown Side) (Belfast, 19th February 2002): screening of RUC officers (item 22 above)

[2002] NIQB 16
Ref: KER3615

In the High Court of Justice in Northern Ireland
Queen's Bench Division (Crown Side)
In the matter of an application by Mary Doherty for Judicial Review

Judgment
(Approved by the Court for handing down)
Delivered: 19th February 2002

KERR J

Introduction

This is an application by Mary Doherty for judicial review of the decision of the Bloody Sunday Inquiry Tribunal to allow certain police officers to give evidence to the Tribunal from behind screens. Mrs Doherty is the sister of Gerard Donaghy who was shot dead in Londonderry on 30 January 1972 on what has come to be known as Bloody Sunday.

Background

The circumstances in which the Inquiry was set up and the manner in which it has been conducted to date have been described in the judgment of the Court of Appeal in England in *R v Lord Saville of Newdigate ex p. A* [2000] 1 WLR 1855. In view of the urgency of this matter I do not propose to rehearse what there appears.

The Bloody Sunday Inquiry is about to hear evidence from a number of police officers about their role in the events of 30 January 1972. Twenty of these officers have applied successfully to the Tribunal for an order that they be permitted to give their evidence from behind screens. On 7 February 2002 the Tribunal directed that while giving evidence the officers should be visible to the legal representatives of the various parties including those who appear on behalf of the families of the deceased and of the wounded. They will otherwise be screened from view. The applications to be screened were made on the basis of the officers' avowed fear that if they are identified, the risk to their lives from terrorist attack will be increased. It was said on their behalf that the fear of the officers is grounded inter alia on the contents of intelligence assessments provided by the Police Service of Northern Ireland dated 31 January 2002 and 5 February 2002. The latter of these states: -

"It is judged that the level of threat faced by police witnesses to the Tribunal will be greater than that faced by military personnel. This is due to the fact that a number of these witnesses live locally with their families and are likely to come into contact with terrorist suspects in the course of their ordinary lives, a situation that is not generally applicable to the military witnesses."

Applications had been made in 1999 and again in 2000 on behalf of a small number of police officers that they be permitted to give evidence from behind screens. Some who had then applied to be screened withdrew their applications before they were adjudicated on but those applications that proceeded were successful. No challenge was made to the decisions of the Tribunal in 1999 and 2000 to allow officers to be screened while giving evidence.

This is the third application for judicial review of decisions taken by the Tribunal. The first related to the Tribunal's determination that soldiers who were to give evidence to the Inquiry should be required to disclose their names. The Divisional Court and the Court of Appeal in England concluded that no decision was possible other than that anonymity be granted to the soldiers. The second application for judicial review involved a challenge to the Tribunal's decision that the soldiers should travel to Londonderry to give evidence. Again the decision of the Tribunal was quashed by the Divisional Court and the Court of Appeal.

The families of the victims of the shootings on Bloody Sunday opposed the applications made by the soldiers. They consider that the anonymising of the soldiers and the receipt of their evidence in Great Britain rather than in Londonderry, where the events of 30 January 1972 took place, substantially compromise the openness that they had come to expect in the conduct of the Inquiry. They have reacted to the latest decision of the Tribunal with predictable and understandable dismay. They regard the screening of police officers from their view as a significant restriction on their participation in the Inquiry. Their sense of grievance is increased because of the intense interest that they have in the outcome of its deliberations and they are mystified that the police

officers wish to be screened from the next of kin of the victims since it is universally acknowledged that the families have conducted themselves with dignity and restraint throughout the hearings that have so far taken place.

The applicant described the importance that she attaches to police officers giving evidence without being screened in the following paragraphs of her affidavit: -

5. The evidence of the RUC witnesses is of great consequence to my family as my brother, Gerard Donaghy, was found to have nail bombs in four of his pockets. Gerard is the only one of the deceased who will have any allegations made in respect of his conduct on Bloody Sunday. There is compelling evidence that shows that these devices were in fact planted by unknown members of the security forces. Many of the RUC witnesses who have been granted screening by Lord Saville, and are due to give evidence shortly, have direct evidence to give in relation to the circumstances in which his body was discovered to contain nail bombs at a Regimental Aid Post near the Craigavon Bridge. As a result of the Tribunal ruling in relation to screening, I feel that I am being excluded from the most important evidence that relates to me. I find this particularly difficult as the military witnesses to this Inquiry have already been allowed to give their evidence anonymously somewhere in Britain that has yet to be decided. Most of the relatives, given their family and financial situations will not be able to attend the hearings in Britain in the same way as they do in Derry.

6. The large wooden box in which the RUC officers will give their evidence prevents me from seeing their faces or their demeanour when they are asked questions by the lawyers. Similarly it is very difficult to hear the witnesses when they give their evidence from inside the wooden box. The family members who were present when Mr Hunter recently gave evidence were also unable to see the Tribunal Panel or their reactions to the evidence of this witness, such was the size of the wooden box that has been erected. This is particularly frustrating for us as Prime Minister Blair promised us an open, transparent and public Inquiry.

7. Lord Saville has also said on numerous occasions that the Tribunal will ensure that all parties will have a "level playing field" throughout the Inquiry. It seems particularly unfair that dual standards appear to be in operation when one considers the circumstances in which the security force witnesses will give evidence compared with the 500 civilian witnesses who have given evidence to date and continue to do so.

8. When a screened witness is about to give evidence, the families and the wounded are told to vacate the Guildhall Chamber along with the public who sit upstairs. We are excluded from the Chamber where we have been sitting for almost two years of oral hearings until the security staff (who include armed police) say that we can return as the screened witness has been seated.

This is a humiliating experience. It appears to us as if we are some type of threat to the witness who is only giving evidence in an Inquiry that we have fought so hard for. We have publicly and consistently said that no one should feel under threat by coming to Derry to give their evidence to the Inquiry. It is irrelevant what their evidence is. This applies as equally to current or former police officers as it applies to current or former members of the British Army. It is unthinkable and we would condemn unreservedly any attack or threat on any witness to the Inquiry.

9. The Court should know that we have shown no hostility to anyone who has been involved in this Inquiry. By way of example, shortly before Christmas 2001, Mr Gerard Elias QC (who represents a number of the Soldiers) and his team asked could they visit the "Families Centre" as there is a permanent exhibition showing many photographs etc of Bloody Sunday. Mr Elias QC was invited to come along and we facilitated his team. They stayed for approximately 45 minutes and talked to many of the persons who were present. Similarly, Mr Edmund Lawson QC (who acted for the majority of the Military Witnesses) paid tribute to the families and the reception that we have given him and his colleagues (See Transcript Day 133 page 119 and 120) since they have come to Derry to represent the soldiers."

The Issues

The test to be applied

There was general agreement on this question. The test to be applied by the Tribunal is that which was adumbrated in paragraph 31 of the judgment of the Court of Appeal delivered on 19 December 2001 in the venue application. There the court said: -

"31. We consider that the appropriate course is to consider first the nature of the subjective fears that the soldier witnesses are likely to experience if called to give evidence in the Guildhall, to consider the extent to which those fears are objectively justified and then to consider the extent to which those fears, and the grounds giving rise to them, will be alleviated if the soldiers give their evidence somewhere in Great Britain rather than in Londonderry. That alleviation then has to be balanced against the adverse consequences to the Inquiry of the move of venue, applying common sense and humanity. The result of the balancing exercise will determine the appropriate decision. This course will, we believe, accommodate both the requirements of Article 2 and the common law requirement that the procedure should be fair."

Four elements of the test can be identified from this passage: 1. the subjective fears of the witnesses; 2. the extent to which those fears can be objectively justified; 3. the extent to which the fears will be alleviated if the measures sought are taken; 4. the balancing of the alleviation of the fears against the adverse consequences of the measures.

The requirement of openness

The Bloody Sunday Inquiry was set up under the Tribunal of Inquiries Act 1921. Section 2 provides: -

“A tribunal to which this Act is so applied as aforesaid-

(a) shall not refuse to allow the public or any portion of the public to be present at any of the proceedings of the tribunal unless in the opinion of the Tribunal it is in the public interest expedient to do so for reasons connected with the subject matter of the inquiry or the nature of the evidence to be given.”

Mr Treacy submitted that this provision should be interpreted against the background of the recommendations of the Royal Commission on Tribunals of Inquiry.[1] The relevant recommendations are as follows: -

“115. As we have already indicated it is, in our view, of the greatest importance that hearings before a Tribunal of Inquiry should be held in public. It is only when the public is present that the public will have complete confidence that everything possible has been done for the purposes of arriving at the truth.

116. When there is a crisis of public confidence about the alleged misconduct of persons in high places, the public naturally distrusts any investigation carried out behind closed doors. Investigations so conducted will always tend to promote the suspicion, however unjustified, that they are not being conducted sufficiently vigorously and thoroughly or that something is being hushed up. Publicity enables the public to see for itself how the investigation is being carried out and accordingly dispels suspicion. Unless these inquiries are held in public they are unlikely to achieve their main purpose, namely, that of restoring the confidence of the public in the integrity of our public life. And without this confidence no democracy can long survive.[2]

Lord Saville in his opening statement dealt with this issue as follows: -

“The statute under which we are acting allows us to exclude the public or any portion of the public from any part of the proceedings, if we consider that it would be in the public interest for us to do so, but we shall need very strong grounds indeed to take that course, and in the event that we did, we would publish our reasons for doing so.”[3]

Mr Treacy argued that the screening of witnesses represented a substantial and unacceptable compromise on the openness of the proceedings. He pointed out that the erosion of the open nature of the Tribunal’s work was recognised by Lord Saville himself in giving the ruling on the police officers’ application for screening when he said: -

“To our mind screening remains a significant inroad on the public nature of the proceedings”[4]

These considerations, Mr Treacy suggested, made it inevitable that witnesses should give evidence in the conventional manner, visible to all, unless compelling reasons dictated otherwise. No such reasons were present in this instance, he claimed.

Should the Tribunal conduct an investigation into the avowed fears of the witnesses?

For the applicant Mr Treacy QC submitted that the Tribunal ought not to have accepted the ipse dixit of the police officers that they were concerned for their safety if they had to give evidence without screens. There was ample reason, he suggested, to view that claim with scepticism. He argued that if the Tribunal felt constrained to accept, without investigation or challenge, the assertions of the police officers on this matter there was nothing to prevent other witnesses making similar, unverified claims with disastrous consequences for the openness of the Inquiry process and the loss of public confidence.

Both Mr Clarke QC for the Tribunal and Mr Hanna QC for the police officers submitted that the information provided by the Police Service was such that no inquiry into the genuineness or the reasonableness of the fear that the police officers claimed to feel was required.

Should the Tribunal have distinguished between the various groups of witnesses?

Some of the witnesses have retired from the police force. Some applied for screening in 1999 but later withdrew their application. One gave evidence before the Widgery Tribunal[5] without screens and in his own name. Some police witnesses have a high public profile; they have appeared on television although not in relation to the Bloody Sunday Inquiry. Mr Treacy argued that each of these groups required separate consideration by the Inquiry. Instead the Tribunal treated all of them as a single group.

Should the Tribunal have required that the witnesses be visible to the families?

Mr Treacy referred to the fact that no one had suggested that the relatives of the deceased and the wounded represented any threat to the security of the witnesses. The threat identified in the risk assessment reports was said to come from dissident Republican groups. The Tribunal should therefore have considered the families separately, he said. This had been the approach taken to photographs of two soldiers which Sir Allan Green (who appeared on behalf of a soldier designated H) sought to have introduced in evidence. It had been proposed that the photographs should only have limited circulation among the legal representatives. In the event the Tribunal accepted a compromise suggested by Lord Gifford QC (who appears on behalf of the Wray family) that the photographs should be made available not only to the legal representatives of the various parties but also their clients. Mr Treacy suggested that this course reflected the Tribunal's proper recognition that the families' rights under Article 2 of the European Convention on Human Rights required to be protected by their full participation in the Inquiry process. A similar approach ought to have been taken by the Tribunal in relation to the matter of screening, Mr Treacy argued. It should have ensured that the police witnesses were visible to the families while giving evidence, he claimed.

Mr Treacy further argued that, in any event, the screening of the police officers from the view of the families involved an interference with their rights under Article 2 and, on the authority of *Hatton v UK* [2001] ECHR 36022, the Tribunal was obliged to "to minimise, as far as possible, the interference with these rights, by trying to find alternative solutions and by generally seeking to achieve their aims in the least onerous way as regards human rights"[6].

Should the Tribunal permit non-legally qualified members of the families' legal team to see the witnesses?

This issue was raised at a late stage in the proceedings. It was submitted that the effect of the Tribunal's ruling was to exclude those members of the families' legal team who do not possess professional qualifications from the group who will be able to see the police witnesses as they testify. According to Mr Madden, the applicant's solicitor, the team members who are not professionally qualified are either law graduates or pupil solicitors. Their exclusion will, it is claimed, hamper the proper presentation of the case for the families. It is also claimed that the applicant's solicitors were not consulted about the exclusion of the non-legally qualified staff nor given an opportunity to make representations on the matter. Finally it is suggested that their exclusion is incongruous given that members of the Tribunal staff such as technology experts will be able to see the witnesses as they give evidence.

The need for the Inquiry to be open

There was general agreement that a vital aspect of the Tribunal's task was the winning and maintenance of public confidence in the Inquiry process. It is in my view beyond question that this feature is put at risk if witnesses give evidence from behind screens. I have no doubt as to the genuineness of the concerns expressed by the applicant about the effect that the screening of witnesses will have on how the work of the Tribunal will be perceived by members of the families of those killed and wounded.

The Tribunal dealt with the circumstances in which it would contemplate permitting witnesses to be anonymised or screened in a ruling of 24 July 1998 as follows: -

"It should be remembered that there are various different forms of anonymity. Depending on the circumstances, it might be appropriate to allow a witness to give evidence without stating his or her name and address in public, or perhaps to give evidence from behind a screen in order to conceal his or her physical appearance. It might also be necessary to preserve the anonymity of individuals by substituting letters or numbers for names in witness statements and other documents. Mr Treacy [counsel for a group of families and wounded] referred us to a number of authorities in this field, including *Scott v Scott* ([1913] AC 417, [1911-13] All ER Rep 1), *A-G v Leveller Magazine Ltd* [1979] 1 All ER 745, [1979] AC 440) and *R v Murphy & Maguire* ([1990] NI 306). He also annexed to his written submissions a copy of an article by Gilbert Marcus, "Secret Witnesses" (1990) PL 207. Mr Treacy argued that the granting of any form of anonymity was a very grave step that should only be taken if justified on compelling grounds.

In adversarial procedure, great importance is rightly attached to the principle of open justice. In particular, the courts require very strong grounds indeed before departing from the rule that a person charged with a criminal offence is entitled to know the identity of prosecution witnesses and to see them give their evidence. One of the reasons for this is to enable the opposing party to investigate and assess the credibility of those witnesses. The position in relation to an Inquiry such as this one is, in our view, rather different. Nobody is being prosecuted before this Tribunal, nor is it our function to do justice between parties competing in an adversarial contest. Our task is to do justice by ascertaining, through an inquisitorial process, the truth about what happened on Bloody Sunday. The proper fulfilment of that task does not necessarily require that the identity of everyone who gives evidence to the Inquiry should be disclosed in public. The Tribunal will know the identity of all witnesses and, unlike a court, will itself take responsibility for investigating their credibility if there is reason to think that such an investigation is necessary. Indeed we think that there are likely to be circumstances in which granting anonymity will positively help us in our search for the truth. Witnesses are unlikely to come forward and assist the Tribunal if they

believe that by doing so they will put at risk their own safety or that of their families. Moreover it would be a mistake to suppose that the grant of anonymity would always operate to protect soldiers who are alleged to have been guilty of serious offences on Bloody Sunday. There may well be witnesses who wish to give evidence that is favourable to the interpretation of events for which the families and the wounded contend, but who will not co-operate with the Tribunal without assurances as to their anonymity. We are aware, for example, of certain television programmes in which people describing themselves as ex-soldiers present on Bloody Sunday have criticised the conduct of the Army on that day, but have done so anonymously, presumably for fear of reprisals by their former comrades. Accordingly, we will be willing to grant an appropriate degree of anonymity in cases where in our view it is necessary in order to achieve our fundamental objective of finding the truth about Bloody Sunday. We will also be prepared to grant anonymity in cases where we are satisfied that those who seek it have genuine and reasonable fears as to the potential consequences of disclosure of their personal details, provided that the fundamental objective to which we have referred is not prejudiced. As to the degree of anonymity that is appropriate, Our current view is that restricting the disclosure of names and addresses ought to be sufficient in most, if not all, cases. We would regard the use of a screen as a wholly exceptional measure. The obligation nevertheless remains firmly on those who seek anonymity of any kind to justify their claim.”

This passage was quoted with approval by the Court of Appeal in the anonymity judicial review application. At paragraph 68 of that court's judgment it was stated that even if witnesses gave evidence anonymously “the Tribunal would certainly be still conducting an inquiry in public”. It appears to me that the same reasoning must be applied to the giving of evidence by screened witnesses. Self evidently, the Inquiry is not being conducted as openly as would be the case if witnesses gave evidence in the normal way, but the Inquiry is still being conducted in public; the witnesses' answers can be heard and they can be subject to face-to-face challenge by lawyers on behalf of the next of kin of the deceased and of the wounded.

I agree with the Tribunal that any departure from a conventional form of proceeding requires to be justified by the party seeking such dispensation but the context in which an asserted justification should be judged must include the following considerations (i) that the Inquiry is not an adversarial proceeding and (ii) that the openness of the proceeding, although compromised, is not destroyed. Moreover, while the preservation of public confidence is an important factor, this must be balanced against the rights of those who seek to reduce any risk that might be occasioned by their giving evidence in open court. The level of justification required must reflect these considerations and must, in my opinion, be commensurately less than would be needed if, for instance, an application were made that the Inquiry should receive evidence in camera.

It is clear that the 1921 Act contemplated that inquiries conducted under its provisions would normally be in public and the Salmon report laid great store by the need for hearings to be conducted in public. But, as the Court of Appeal in the anonymity case observed, “section 2 [of the Act] itself recognises that there can be circumstances where the public are excluded because it is ‘in the public interest expedient so to do’. The statute itself is, therefore, acknowledging that an inquiry can perform its primary duty even though the public are excluded in part from its investigation” [7].

In any event, there is a danger, I think, in conflating the concept of the public nature of the inquiry with the asserted need for the witnesses to be identified and visible. The latter is relevant to the degree of confidence that people may have in the outcome of the Inquiry but the public nature of the proceeding is not eliminated by allowing witnesses to give evidence from behind screens. Put shortly, the Inquiry still takes place in public although the proceedings are not as open as before. It was the holding of inquiries in public rather than in private that the Salmon report considered to be of paramount importance. The testimony of these witnesses will still take place in public even if they give evidence from behind screens.

Is an investigation of the claims of the witnesses necessary?

The applicant makes a two-pronged attack on the Tribunal’s failure to hold an investigation into the claims of the police witnesses that they would fear for their safety if required to give evidence without being screened. Firstly, it is suggested that there is ample reason to doubt the truth of those claims which demanded an investigation of their accuracy. Secondly, it is submitted that the Tribunal failed to address the need for such an investigation. In this context Mr Treacy referred to his submission that an investigation was required and to the failure of the Tribunal to deal with that submission in its ruling.

Mr Simpson is one of the officers whose request that he be screened was granted by the Tribunal. He had applied for screening in 1999 but before that application could be dealt with, he withdrew it. In the written submission made on his behalf in support of his recent application, it was stated that “he did consider making an application for screening in 1999 but, at that time, decided not to do so”. Mr Treacy submitted that this statement was demonstrably untrue. An application had in fact been made and was withdrawn. This alone, Mr Treacy said, was sufficient to alert the Tribunal to the need for an investigation of his claim that he feared for his safety if required to give evidence without screens.

Constable Montgomery had given evidence before the Widgery Tribunal in 1972. It was suggested by Mr Clarke that he had done so in the expectation that he would not be named but had been instructed by Lord Widgery to reveal his identity. This claim was not borne out by the transcript of the proceedings before the Widgery Tribunal, Mr Treacy said. This was therefore another instance of a false claim being made which required to be investigated.

Next, Mr Treacy claimed that the excuse proffered for the lateness of the applications by all the other applicants for screening, viz that they had been unaware that it was possible to make such an application, was simply incredible. Nine applications had been made in 1999 and 2000. From the relatively small cadre of police officers who would be required to give evidence, it was impossible to accept that nine were aware that an application for screening could be made and the others were not, he suggested. The applications in 1999 and 2000 were made by the Chief Constable on behalf of the officers concerned. It was inconceivable that the other officers who now made application were unaware of the earlier applications. Their assertion to the contrary cast doubt on the veracity of their current claim to be afraid to give evidence without screens. In this context counsel referred to the position of Detective Superintendent Brian McVicker. Mr McVicker has been in charge of the investigation of the bombing outrage in Omagh in August 1988. He has, according to Mr Treacy, a high public profile and has frequently appeared on television, albeit not in connection with the events on Bloody Sunday. It was not believable, Mr Treacy claimed, that Mr McVicker believed that he would be at any greater risk from republican dissident groups if he appeared unscreened before the Tribunal.

Finally, Mr Treacy argued that the Tribunal's unquestioning acceptance of the anonymous intelligence assessments from the Police Service for Northern Ireland offended the need for practical independence required for the Article 2 investigation that the Tribunal is required to carry out. An officer of the same force as those referred to in the reports made these assessments. They were general in nature and were not directed to individual officers nor did they deal with the specific applications for screening that those officers were making. They should not have been accepted by the Tribunal as justifying the screening of the officers without further investigation.

Both reports were made to the Legal Adviser of PSNI. The first is dated 31 January 2002 and is as follows: -

"Despite the fact that PIRA are currently on ceasefire their terrorist capability has not diminished in any way. Intelligence gathering remains a priority with police officers continuing to be of particular interest. The significance of the events of Bloody Sunday and the outcome of the Saville Inquiry are extremely important to the republican psyche and the details of those police officers giving evidence to the Inquiry would be much sought after.

Should the personal details of any such police officer become known to a terrorist group then he/she may face an increased risk of terrorist attack. This risk is equally applicable to those officers who have already retired.

Dissident republican terrorists who are not on ceasefire naturally pose a substantial threat to all police officers. Despite recent setbacks as a result of continued successes by security forces they nevertheless remain highly capable of carrying out attacks. Since 1999 dissident republicans have carried out attacks as a result of bombing, mortar and shooting attacks on police and police establishments. We are aware from current intelligence that dissident republican groups continue to specifically target police officers both on and off duty. We are aware of contact between republican dissidents and PIRA.

Whilst there is no intelligence to indicate any direct threat exists against those officers called to give evidence to the Inquiry the possibility that some action may be taken against them cannot be dismissed.”

The first application on this occasion for screening was by Mr Simpson. It was resisted by the families. In a skeleton argument submitted by Mr Treacy and Ms Doherty on behalf of the clients of Madden & Finucane it was argued that there was no intelligence to indicate that there was any direct threat against Mr Simpson. It was suggested that this prompted the second assessment of risk report. It was in the following terms: -

“Further to our intelligence assessment dated 31.01.02 the additional details are forwarded for consideration:

- As previously indicated a general threat exists to any police witness whose personal details, including appearance, might be disclosed. The level of possible threat faced by these police witnesses is likely to vary, dependent upon the following factors: the nature of the evidence given by individual officers or ex-officers; the nature of their duties on the day in question; the media interest in their evidence and also whether the individual officer has been the subject of paramilitary attention in the past
- It is judged that the level of threat faced by police witnesses to the Tribunal will be greater than that faced by military personnel. This is due to the fact that a number of these witnesses live locally with their families and are likely to come into contact with terrorist suspects in the course of their ordinary lives, a situation that is not generally applicable to the military witnesses”

Mr Treacy suggested that this report deliberately overstated the level of risk in order to meet points made in the skeleton argument submitted for his clients. This was yet another reason to doubt the accuracy and veracity of the assessed risk and this should have prompted the Tribunal to conduct an investigation into the police officers' claims.

All of the police witnesses who have applied for screening have been shown the risk assessment reports. They have also been made aware that a man from Londonderry had recently been convicted of possession of information likely to be useful to terrorists at the Special Criminal Court in Dublin. The information related to the movements of a PSNI superintendent and members of his family.

The claim that the police officers who have applied to give evidence behind screens were unaware until recently that they could make such an application is surprising. One would have thought that the earlier applications in 1999 and 2000 must have received fairly wide publicity. Certainly Mr Simpson was well aware that such an application could be made. I also think that it is likely that the police officers who sought to be screened must have anticipated that they would be required to give evidence to the Inquiry. The Tribunal's solicitors had interviewed them and it should have been clear that the information that they had to give would be directly relevant to the Tribunal's deliberations.

It does not follow, however, that, because one may have reservations about the suggestion that the police officers did not know that they could apply to be screened until recently, there must be an investigation into their claim to entertain a reasonable and genuine fear for their personal safety if required to give evidence. The risk assessments provide ample material on which such a fear might be founded. Indeed, any police officer who was informed that the PIRA was continuing to gather intelligence about policemen's movements and that there was contact between PIRA and dissident republican groups is bound to be concerned. When it is stated that the information on those officers who are to give evidence to the Inquiry would be "much sought after" it is difficult to imagine that any such officer would not be extremely concerned for his own safety.

It is to be remembered that the test set out by the Court of Appeal involves an examination of the subjective fears of the witnesses and a decision on whether those fears are objectively justified. The conclusion that anyone, informed that he was at greater risk than the soldiers who are to give evidence, would inevitably be afraid for his safety is beyond plausible challenge, in my view. By the same token, the objective justification for those fears is readily supplied by the risk assessments. It could hardly be said that the fears are fanciful or manufactured when they are based on the contents of the two reports. Reservations about the authenticity of the views expressed in the reports do not necessarily sound on the objective justification for the fears of the police officers. This is the information with which the police officers have been provided. Unless they have reason

to dismiss the reports, their contents provide clear justification for the fears. No investigation is required to allow that conclusion to be reached. Whatever doubts may attend the background to the applications for screening, the plain fact is that at the time those applications were made there was ample material on which to conclude that the fears of the officers were genuine and objectively warranted.

I can deal briefly with the second limb of the argument under this heading. Mr Treacy contended that the Tribunal had failed to consider whether an investigation into the genuineness of the fears expressed by the police officers was required, notwithstanding his submission to that effect. True it is that the Tribunal makes no reference to this in its ruling but I would be slow to conclude on that account that it had failed to consider the argument. It must be remembered that the ruling was made on the day that submissions on the screening application were completed and one cannot realistically expect that every argument addressed to the Tribunal will be dealt with in what was a concise summary of the issues and the Tribunal's conclusions on them. Quite apart from this, however, I am satisfied that the only conclusion that the Tribunal could have reached was that an investigation into the authenticity of the claims made was neither necessary nor appropriate. The argument must fail for that reason also.

Article 2 of the European Convention of Human Rights

Article 2 provides: -

“1. Everyone's right to life shall be protected by law. No one shall be deprived of his life intentionally save in the execution of a sentence of a court following his conviction of a crime for which this penalty is provided by law.

2. Deprivation of life shall not be regarded as inflicted in contravention of this article when it results from the use of force which is no more than absolutely necessary:

- (a) in defence of any person from unlawful violence;
- (b) in order to effect a lawful arrest or to prevent the escape of a person lawfully detained;
- (c) in action lawfully taken for the purpose of quelling a riot or insurrection”

In *Jordan v UK* [2001] ECHR 24746 ECtHR held that “a thorough and effective investigation capable of leading to the identification and punishment of those responsible for the deprivation of life, including effective access for the complainant to the investigation procedure” was required in order to meet the procedural safeguards implied by Article 2.[8] It is on this requirement that the applicant

relies in advancing the case that she is entitled to insist on the need for the police officers to give evidence without being screened.

Article 2, however, also imposes on public authorities a duty to protect individuals against criminal acts that threaten life. In *Osman v UK* [1998] 29 EHRR 245 ECtHR said of this duty: -

“The Court notes that the first sentence of Article 2(1) enjoins the State not only to refrain from the intentional and unlawful taking of life, but also to take appropriate steps to safeguard the lives of those within its jurisdiction. It is common ground that the State’s obligation in this respect extends beyond its primary duty to secure the right to life by putting in place effective criminal law provisions to deter the commission of offences against the person backed up by law-enforcement machinery for the prevention, suppression and sanctioning of breaches of such provisions. It is thus accepted by those appearing before the Court that Article 2 of the Convention may also imply in certain well-defined circumstances a positive obligation on the authorities to take preventive operational measures to protect an individual whose life is at risk from the criminal acts of another individual. The scope of this obligation is a matter of dispute between the parties.

For the Court, and bearing in mind the difficulties involved in policing modern societies, the unpredictability of human conduct and the operational choices which must be made in terms of priorities and resources, such an obligation must be interpreted in a way which does not impose an impossible or disproportionate burden on the authorities. Accordingly, not every claimed risk to life can entail for the authorities a Convention requirement to take operational measures to prevent that risk from materialising. Another relevant consideration is the need to ensure that the police exercise their powers to control and prevent crime in a manner which fully respects the due process and other guarantees which legitimately place restraints on the scope of their action to investigate crime and bring offenders to justice including the guarantees contained in Article 5 and 8 of the Convention.

In the opinion of the Court where there is an allegation that the authorities have violated their positive obligation to protect the right to life in the context of their above-mentioned duty to prevent and suppress offences against the person, it must be established to its satisfaction that the authorities knew or ought to have known at the time of the existence of a real and immediate risk to the life of an identified individual or individuals from the criminal acts of a third party and that they failed to take measures within the scope of their powers which, judged reasonably, might have been expected to avoid that risk. The Court does not accept the Government’s view that the failure to perceive the risk to life in the circumstances known at the time or to take preventive measures to avoid that risk must be tantamount to gross negligence or wilful

disregard of the duty to protect life. Such a rigid standard must be considered to be incompatible with the requirements of Article 1 of the Convention and the obligations of Contracting States under that Article to secure the practical and effective protection of the rights and freedoms laid down therein, including Article 2. For the Court, and having regard to the nature of the right protected by Article 2, a right fundamental in the scheme of the Convention, it is sufficient for an applicant to show that the authorities did not do all that could be reasonably expected of them to avoid a real and immediate risk to life of which they have or ought to have knowledge. This is a question which can only be answered in the light of all the circumstances of any particular case.”[9]

The Court of Appeal in the venue case considered that the *Osman* duty was engaged in the case of the soldiers who were required by the Tribunal’s order to give evidence in Londonderry. But it concluded that the Tribunal was wrong to have assessed the risk that was required to engage Article 2 as the “real and immediate” risk mentioned in *Osman*. The Court of Appeal said: -

“Such a degree of risk is well above the threshold that will engage Article 2 when the risk is attendant upon some action that an authority is contemplating putting into effect itself. It was not an appropriate test to invoke in the present context.”[10]

Although the court described the search for a phrase that encapsulates a threshold of risk which engages Article 2 as “a search for a chimaera”, it nevertheless was confident that the threshold was passed in that case. It was this conclusion that prompted the formulation of the test in paragraph 31 of the judgment and, as I have said, it was agreed that this was the test to be applied in the present case.

If the police officers’ Article 2 rights are engaged, the Tribunal is obliged to take sufficient precautions to protect their lives – see *Ergi v Turkey* (decision 28 July 1998) paragraph 81. The Court of Appeal in the venue application considered that a balancing exercise had to be carried out between the measures needed to “alleviate” the subjective fears of the witnesses and the grounds giving rise to them on the one hand and “the adverse consequences” that the measures would cause on the other. Lord Saville had some difficulty with this concept, as do I. If the measures needed to alleviate the fears and the reasons for them are to be regarded as the steps necessary to protect the witnesses’ substantive Article 2 rights (in other words their right to have their life protected), I cannot accept that these can be mitigated by adverse consequences that might accrue to others’ procedural Article 2 rights. It surely cannot be right to refrain from taking precautions deemed necessary to protect someone’s life in order to cater even for the need to ensure the thorough and effective investigation of another’s death.

In any event, the conclusion of the Tribunal that the police officers had reasonable and genuine fears for their safety appears to me to be tantamount to saying that their Article 2 rights were engaged and required such protection as the Tribunal could provide. Since I have concluded that the Tribunal was entitled to decide that the police officers' fears were genuine and objectively justified, it follows that the screening of the witnesses must be allowed if it will help to reduce the risk to them.

The need to distinguish between the various police officers

In advancing the claim that the Tribunal, in assessing the level of risk to the applicants for screening, should have distinguished between the various categories of witness, Mr Treacy relied principally on the decision in *Van Mechelen and others v The Netherlands* [1997] ECHR 21363. In that case the applicants were charged with serious criminal offences, including attempted murder and robbery. The evidence against them consisted of statements made before the trial by anonymous police officers. None of those officers appeared at the trial. The applicants were convicted and appealed. On appeal, the witnesses were questioned under a special procedure, but remained anonymous. A number of named witnesses were also heard in open court. The police witnesses claimed that they wished to remain anonymous to protect their families. It was not alleged that any named or anonymous witnesses were threatened by or on behalf of the applicants. The applicants' convictions were upheld, and their appeal to the Supreme Court was dismissed. The applicants complained that they had not received a fair trial as the domestic courts used statements of unidentified persons, in respect of whom the exercise of the defence rights was unacceptably restricted, in violation of arts 6(1) and 6(3) of the European Convention on Human Rights. At paragraph 56 of its judgment the Court said: -

"56. In the Court's opinion, the balancing of the interests of the defence against arguments in favour of maintaining the anonymity of witnesses raises special problems if the witnesses in question are members of the police force of the State. Although their interests – and indeed those of their families – also deserve protection under the Convention, it must be recognised that their position is to some extent different from that of a disinterested witness or a victim. They owe a general duty of obedience to the State's executive authorities and usually have links with the prosecution; for these reasons alone their use as anonymous witnesses should be resorted to only in exceptional circumstances. In addition, it is in the nature of things that their duties, particularly in the case of arresting officers, may involve giving evidence in open court."

Mr Treacy argued that this passage suggested that generally serving police officers should be required to give evidence in open court without restriction. The Tribunal ought to have distinguished between those witnesses who were still serving officers and those who had retired in its approach to the question of screening, therefore.

I cannot accept this argument. In the *Van Mechelen* case a risk to the safety of the witnesses had not been established. The police officers were in a separate room with the investigating judge, from which the accused and even their counsel were excluded. All communication was via a sound link. The defence was unaware of the identity of the police witnesses and were also prevented from observing their demeanour under direct questioning. The only justification for this procedure that was offered was the “operational needs of the police”. Unsurprisingly, ECtHR did not find this to be sufficient justification.

By contrast, in the present case the police officers will be visible to the legal representatives of the families and can be questioned directly. Their identities are known. Apart from these considerations, the risk assessment reports provide material on which to conclude that the fears of the officers are genuine and objectively justified. Moreover, the risk is said to be the same whether the officers were still in post or had retired. In these circumstances, there was no basis on which the Tribunal could have distinguished between them.

Should the next of kin of the deceased and the wounded be permitted to see the witnesses while they give evidence?

The claim that the families should be allowed to observe the witnesses while they gave evidence was presented on two bases. Firstly, it was suggested that it had been universally accepted that they posed no threat to the police officers and that there was no reason therefore that they should be excluded. Secondly, it was argued that to prevent them from seeing the witnesses while they gave evidence involved an interference with their Article 2 rights and that the Tribunal was under an obligation to minimise that interference. To that end, the Tribunal (it was said) should have investigated how the families’ rights under Article 2 could have been accommodated rather than dismissing the possibility of their being allowed to see the witnesses testify as “not practical”.

Mr Hanna QC on behalf of the police officers has made it clear (both in his submissions to the Tribunal and before this court) that he casts no aspersions whatever on the members of the families of the deceased and the wounded. Neither he nor his clients are in a position, however, to say with certainty that the perceived risk will not be increased if the families and the wounded are permitted to see the police officers while they give evidence. It is on that basis that he opposes the extension of the group who are to have this facility to include the next of kin and the wounded. It is

not practical, Mr Hanna suggests, to embark on an elaborate vetting procedure of this group which numbers some 120 persons and to put in place adequate procedures to ensure that there was no inadvertent release of information that might increase the risk to his clients.

I accept the submissions of Mr Hanna on this point. In doing so, let me also make clear that I have no reason whatever to doubt the sincerity of the applicant's strongly worded condemnation of any attempt to attack or threaten any witness to the Inquiry. It is clear that all involved in the Inquiry have been treated with great courtesy by the representatives of the families with whom they have come in contact. But the matter for me is put beyond dispute by consideration of the logistical burden that would be involved in attempting to ensure that those who were permitted to observe the witnesses were bona fide members of the extended group and, more importantly, that they did not inadvertently reveal details about the appearance of the witnesses which might increase the risk to them.

In this context, I do not consider that the Tribunal's decision in relation to the redacted photographs of soldiers G and H can be taken as providing a guideline to its approach on the matter of screening. It may well be, as Mr Treacy has claimed, that the Tribunal's acceptance of the compromise suggested by Lord Gifford reflected its view that special consideration should be afforded the families in that matter but the risk to witnesses must be evaluated by reference to the particular circumstances in which it has been identified and taking account of the personal situation of the witnesses to whom it applies. Indeed Lord Saville was at pains to point out that the Tribunal's ruling on the matter of the photographs was not to be taken as a precedent for any future application. He said: -

"I should stress that this is indeed [a] compromise solution to allow us to get on and should not in any sense, shape, manner or form be treated as laying down any ruling on principles relating to Soldier H or indeed any other soldier." [11]

It was not disputed that the denial of the opportunity to see the witnesses while they gave evidence represented an interference with the applicant's procedural rights under Article 2 of the Convention and I intend to deal with the matter on that basis. I should not be taken as having reached any final conclusion on that proposition however, and would prefer to reserve my opinion on its correctness.

Mr Treacy argued that since the applicant's Article 2 rights were engaged, the Tribunal was required to minimise as far as possible the interference with those rights and should conduct an inquiry as to the means by which that minimum level of interference might be achieved. He relied for this proposition on the decision of ECtHR in *Hatton v UK*. In that case the applicants lived in the vicinity of Heathrow airport and alleged that their sleep had been regularly disturbed by aircraft noise, which had increased since 1993. In 1993 the government introduced a night quota scheme to reduce airport noise at the main London airports. The scheme had been challenged by way of judicial review, and the Court of Appeal had upheld the Government's decision. The applicants complained to the European Court of Human Rights, inter alia that the level of aircraft noise at night amounted to an unjustifiable interference in their private lives in violation of art 8 of the Convention. It was held that a fair balance had to be struck between the competing interests of the individual and the community as a whole. In striking that balance, States had to have regard to the whole range of material considerations, and in particular, had to seek to minimise, as far as possible, interference with Article 8 rights. At paragraph 97 of its judgment the court said: -

"[The court] considers that States are required to minimise, as far as possible, the interference with these rights, by trying to find alternative solutions and by generally seeking to achieve their aims in the least onerous way as regards human rights. In order to do that, a proper and complete investigation and study with the aim of finding the best possible solution which will, in reality, strike the right balance should precede the relevant project."

The *Hatton* case was concerned with the extent of the margin of appreciation available to States in deciding whether measures that interfered with rights under Article 8 were "necessary in a democratic society in the interests of ... the economic well-being of the country ... or for the protection of the rights and freedoms of others." Unlike Article 2, Article 8 is a qualified right which permits an area of discretionary judgment to be exercised by States where such matters as the national economy and the rights of other citizens may be jeopardised by the full implementation of an individual's Convention right. By contrast, interference with an Article 2 right is not permitted by recourse to such considerations. Here the Tribunal concluded that the witnesses' substantive Article 2 rights were engaged. In those circumstances it was obliged to put in place such measures as were necessary to ensure that those rights were properly safeguarded. Since it concluded that screening was necessary to achieve that objective, there could, in my opinion, be no question of a weighing of those rights against the asserted procedural rights of the applicant.

Does the Tribunal's ruling exclude non-legally qualified members of the families' legal team?

I can deal briefly with this matter. Mr Clarke QC has submitted that this matter has not been addressed by the Tribunal in its ruling of 7 February. I agree. The Tribunal in its ruling acceded to the application made on behalf of the witnesses by Mr Hanna and appears to have adopted his formulation of the terms of the proposed order. Lord Saville said: -

“We have today listened to an application made by Mr Hanna QC on behalf of 20 serving and former police officers, that these officers should be screened when they give their evidence to the Inquiry from all except the qualified lawyers acting on behalf of the interested parties and, of course, the Tribunal, its counsel and staff.”[12]

Apart from the oblique reference to “qualified lawyers” the Tribunal did not refer to the question of the presence of members of the families' legal team, no doubt for the prosaic reason that no argument on this issue was made. I do not construe the ruling as necessarily having the effect of excluding these individuals. It is for the Tribunal to decide whether they should be permitted to be present, if and when any application is made on the topic. In those circumstances, it would be quite inappropriate for me to say more on the subject.

Conclusions

I have decided that none of the grounds of challenge to the Tribunal's ruling has been made out. The application for judicial review must therefore be dismissed. I should like to say, however, that this decision does not reflect adversely on the propriety of the challenge, which was advanced – and responded to - in a most responsible manner.

[1] Cmnd 3121 at page 38

[2] Cmnd 3121 at page 38

[3] Opening Statement of Lord Saville 3rd April 1998

[4] Transcript Day 187 page 75 line 22-24

[5] The Tribunal of Inquiry into the events of Bloody Sunday held in 1972

[6] para 97 of the Court's judgment

[7] para 68 of the judgment

[8] para 160 of the judgment

[9] paras 115 - 116

[10] para 28

[11] Page 249 of the transcript

[12] Page 72 of the transcript

A2.50: Court of Appeal in Northern Ireland (Belfast, 8th May 2002): screening of RUC officers (item 22 above)

[2002] NICA 25(1); [2002] NICA 25(2); [2002] NICA 25(3)
Ref: NICC3690

In Her Majesty's Court of Appeal in Northern Ireland on appeal from the High Court of Justice (Crown Side) in the matter of an application by the next of kin of Gerard Donaghy (deceased) for Judicial Review and in the matter of a decision of the Bloody Sunday Inquiry dated 7th February 2002

Judgment
(Approved by the Court for handing down)
Delivered: 8th May 2002

(subject to editorial corrections)

[2002] NICA 25(1)
Ref: NICC3690

NICHOLSON LJ

Introduction

This is an appeal from the decision of Kerr J dismissing an application by Mary Doherty for judicial review of the ruling of the Bloody Sunday Inquiry Tribunal to allow twenty police officers to give evidence to the Tribunal from behind screens in the Guildhall, Londonderry (Derry).

The Decision of Kerr J

In the course of his judgment Kerr J stated that on 7 February 2002 the Tribunal directed that while giving evidence the police officers should be visible to the legal representatives of the various parties

including those who appear on behalf of the family of the deceased and of the wounded. They would otherwise be screened from view. The applications to be screened were made on the basis of the officers' avowed fear that if they were identified, the risk to their lives would be increased.

Intelligence assessments provided by the Police Service of Northern Ireland dated 31 January 2002 and 5 February 2002 were relied on by them before the Tribunal. He referred to the reactions of the families of those who were killed or injured. They felt that screening compromised the openness which they had expected in the conduct of the Inquiry.

He described the importance which Mary Doherty attached to police officers giving evidence without being screened. Her brother, Gerard Donaghy, who was shot and killed by a soldier was subsequently found to have nail bombs in four of his pockets. There was evidence that they had been planted in his pockets after he had been shot. A number of the police officers who had applied for screening were going to give evidence as to the circumstances in which his body was discovered to contain nail bombs at a Regimental Aid Post near the Craigavon Bridge. She felt that she was being excluded from some of the most important evidence relating to her as next of kin of her brother, not least as the soldiers involved in the shooting of her brother had been granted anonymity and the right to give evidence to the Tribunal in London, although it was not alleged, as I understand it, that the killing could be justified or excused by the allegation that he had nail bombs in his pockets.

Kerr J went on to set out the issues and the test to be applied. I cite from his judgment the following passage:

"There was general agreement on this question. The test to be applied by the Tribunal is that which was adumbrated in paragraph 31 of the judgment of the Court of Appeal delivered on 19 December 2001 in the venue application. There the court said:-

'31. We consider that the appropriate course is to consider first the nature of the subjective fears that the soldier witnesses are likely to experience if called to give evidence in the Guildhall, to consider the extent to which those fears are objectively justified and then to consider the extent to which those fears, and the grounds giving rise to them, will be alleviated if the soldiers give their evidence somewhere in Great Britain rather than in Londonderry. That alleviation then has to be balanced against the adverse consequences to the Inquiry of the move of venue, applying common sense and humanity. The result of the balancing exercise will determine the appropriate decision. This course will, we believe, accommodate both the requirements of Article 2 and the common law requirement that the procedure should be fair.'

Four elements of the test can be identified from this passage: 1. the subjective fears of the witnesses; 2. the extent to which those fears can be objectively justified; 3. the extent to which the fears will be alleviated if the measures sought are taken; 4. the balancing of the alleviation of the fears against the adverse consequences of the measures.”

He set out section 2 of the Tribunal of Inquiries Act 1921, a relevant portion of the recommendations of the Royal Commission on Tribunals of Inquiry (Cmnd 3121) and a passage from the opening statement of Lord Saville on 3 April 1998.

The Need for the Inquiry to be Open

In response to submissions by the parties Kerr J stated that there was general agreement that a vital aspect of the Tribunal's task was the winning and maintenance of public confidence in the Inquiry process, that it was beyond question that this feature was put at risk if witnesses gave evidence from behind screens and cited a passage from the statement of the Tribunal about anonymity and screening of witnesses made in Derry on 24 July 1998. He concluded that the screening of witnesses did not mean that the Inquiry was not being conducted in public. It did mean that the Inquiry was not being conducted as openly as it could be, but the witnesses' answers could be heard and they could be subject to face-to-face challenge by lawyers on behalf of the next-of-kin of the deceased and of the wounded.

He agreed with the Tribunal that any departure from a conventional form of proceeding requires to be justified by the person seeking justification but that the following considerations applied. The Inquiry is not an adversarial proceeding and the openness of the proceedings, although compromised is not destroyed. Moreover there is a balance to be struck between those seeking to reduce the risk occasioned by their giving evidence in open court and the preservation of public confidence.

In further response to submissions he accepted that section 2 of the Act recognised that there can be circumstances where the public are excluded because it is in the public interest expedient so to do.

It was the holding of inquiries in public that the Salmon report considered to be of paramount importance and the testimony would still be in public although behind screens.

All of the police officers who had applied for screening had been shown risk assessment reports and were made aware that a man from Derry had recently been convicted of possession of information likely to be useful to terrorists. This information related to the movements of a PSNI superintendent and members of his family.

He found the claim that the police officers who applied to give evidence behind screens were unaware until recently that they could make such an application surprising and thought it likely that they must have anticipated that they would be required to give evidence to the Inquiry. It did not follow, however that there must be an investigation into their claim to entertain a reasonable and genuine fear for their personal safety if required to give evidence. The risk assessments provided ample material on which such a fear might be founded.

The test set out by the English Court of Appeal involved an examination of the subjective fears of the witnesses and a decision on whether those fears were objectively justified. He concluded that the police officers would inevitably be afraid for their safety and that the objective justification for those fears was readily supplied by the risk assessments. No investigation was required to allow that conclusion to be reached. He was satisfied that the only conclusion which the Tribunal could have reached was that an investigation into the authenticity of the claims made was neither necessary nor appropriate.

He dealt with submissions about Article 2 of the Convention, including *Jordan v UK* [2001] ECHR 24746, *Osman v UK* [1998] 29 EHRR 245 ECtHR, the decision of the English Court of Appeal in the soldiers' application to give evidence elsewhere than in Derry (or, implicitly, anywhere other than in Northern Ireland) and their formulation of the test, already referred to, at paragraph 31 of the judgment of Phillips MR, agreed to be applied in the application before him.

He expressed the view that the screening of the police officers must be allowed if it would help to reduce the risk to them. In response to submissions he held that as the identities of the police officers were known, the risk assessments were such that there was no basis on which the Tribunal could have distinguished between the various police officers.

Other submissions led him to hold that there could be no question of a weighing of the substantive rights of the police officers against the procedural rights of the appellant and that, therefore, there could be no distinction amongst the twenty police officers. He also held that families of the next of kin and of the wounded could not be distinguished from the rest of the public in practice, so far as screening was concerned.

The Tribunal had excluded the non-legally qualified members of Messrs Madden & Finucane, solicitors for the families of the next-of-kin and the wounded, from seeing police witnesses who were screened in 1999 and 2000. This ruling was not challenged at the time. There were professional grounds for doing so. No representations were made on their behalf when the application was made to exclude non-qualified lawyers on the present occasion. Kerr J held that the Tribunal was entitled

to make the same ruling about non-legally qualified persons in respect of the police witnesses on this occasion as it had made for the police witnesses in 1999 and 2000 without objection.

Grounds of Appeal from the Decision of Kerr J

1. The learned Judge had been wrong in holding:-
 - (1) That it had been agreed that the test to be applied was that outlined in paragraph 31 of the judgment of the Court of Appeal.
 - (2) That “the public nature of the proceeding is not eliminated by allowing witnesses to give evidence from behind screens.”
 - (3) That “the testimony of these witnesses will still take place in public even if they give evidence from behind screens.”
2. He failed to consider the effect that the screening of witnesses would have on the Tribunal’s search for the truth .
3. The learned Judge had erred in holding:-
 - (1) That the reservations about the background to the police witnesses’ applications for screening did not justify further investigation into the bona fides of their applications.
 - (2) That “the only conclusion that that the Tribunal could have reached was that an investigation into the authenticity of the claims made was neither necessary nor appropriate.”
4. The learned Judge failed to deal with the appellant’s submission that the Tribunal’s independence was compromised by acceptance of the threat assessments.
5. The learned Judge erred in refusing to hold that the Tribunal had failed to consider whether an investigation into the genuineness of the fears was appropriate.
6. The learned Judge erred:-
 - (1) In holding that the Tribunal was correct in refusing to distinguish between the different categories of applicants.
 - (2) In holding that there would be a logistical burden involved in attempting to ensure that members of the families if permitted to observe the witnesses were “bona fide members of the extended group.”

7. There was no evidence before the learned Judge on which he could reach the conclusion that there would be such a logistical burden.
8. The learned trial Judge erred in holding that where Article 2 rights are engaged there is no balancing exercise to be carried out.
9. The learned Judge's conclusion that there is no balancing exercise to be carried out was never argued by any of the parties before the court and was contrary to their submissions.
10. The learned Judge erred in holding that interference with an Article 2 right can never be justified by recourse to considerations such as the rights of others.
11. The learned Judge erred in refusing to hold that the Tribunal had a duty to ensure the least possible interference with the appellant's Article 2 procedural rights.
12. The learned Judge erred in holding that in its ruling the Tribunal had not considered the question of the presence of members of the families' legal teams.
13. The Judge erred in holding that the ruling did not have the effect of excluding non-legally qualified members of the families' legal teams.
14. The learned Judge failed to consider the appellant's argument that the Tribunal had failed to give any or adequate reasons for its decisions.

The First Ground of Appeal (Ground 1(1))

The first ground of appeal is that the learned [trial] judge erred in holding that it had been agreed that the test to be applied was that outlined in paragraph 31 of the judgment of the Court of Appeal of England and Wales on the issue of Venue.

I do not accept that he was wrong in so holding. As conceded by counsel for the appellant the skeleton argument on her behalf was based on the assumption that the test in paragraph 31 was the correct test. But we did not consider it appropriate to hold the appellant to the confines of the argument addressed to Kerr J but to permit counsel to submit that the decision of the Court of Appeal of England Wales in Lord Saville of Newdigate & Others v Widgery Soldiers & Others (Unreported: 19 December 2001: [2001] EWCA Civ 2048) was wrong and should not be followed. If that argument were to succeed and the test in paragraph 31 were held to be the wrong test, it would follow that the appeal must succeed.

It was pointed out in the course of argument that the Court of Appeal in Ireland usually followed the decisions of the English Court of Appeal where it had pronounced upon a topic. In McCartan v Belfast Harbour Commissioners [1910] 2 IR 470 AT 494-495 Holmes LJ said:-

“It is true that, although we are not technically bound by decisions in the coordinate English Court, we have been in the habit in adjudicating on questions as to which the law of the two countries is identical, to follow them. We hold that uniformity of decision is so desirable that it is better, even when we think the matter doubtful, to accept the authority of the English Court, and leave error, if there be error, to be corrected by the Tribunal whose judgment is final on both sides of the Channel. “

In Northern Ireland Railway Transport Board v Century Insurance Co Ltd [1941] NI 77 AT 107 Murphy LJ agreed that this principle should be followed and stated that the Court of Appeal in Northern Ireland should follow the decision of the English Court of Appeal in Jefferson v Derbyshire Farmers Ltd [1921] 2 KB 281 which appeared to him to be indistinguishable from the case before the Court of Appeal in Northern Ireland.

In McGuigan v Pollock & Another [1957] NI 74 at 106 Black LJ said:

“When a doubtful point has been decided in a particular way by the English Court of Appeal our courts feel a natural hesitation about refusing to follow the English decision” and cited the two authorities to which I have previously referred.

It is true that in Re McKiernan’s Application [1985] NI 385 Lord Lowry said at 389:

“Although decisions and dicta of the Court of Appeal in England do not bind the courts in this jurisdiction, they traditionally, and very rightly, are accorded the greatest respect, particularly where the same, or identically worded, statutes fall to be construed. Therefore, that I may account scrupulously for the decision I have reached in this judgment, it becomes one to deal faithfully with the relevant English authorities.”

In that case the Court of Appeal in Northern Ireland declined to follow R v Board of Visitors of Hull Prison ex parte St Germain (No 1) [1979] QB 425 and R v Deputy Governor of Camphill Prison ex parte King [1984] 1 QB 735. The decision of the Court of Appeal in Northern Ireland was later upheld by the House of Lords in R v Deputy Governor of Parkhurst, ex parte Leech [1988] 1 AC 533. In Beaufort Developments (NI) Ltd v Gilbert Ash (NI) Ltd & Another [1997] NI 142 at 155 Carswell LCJ said:

“If the matter was *res integra*, we should be attracted to an interpretation of the contract which would allow the court to review the architects’ certificates, with the consequence that we should allow the appeal and refuse to stay the action. ... We are conscious however of the practice which the Court of Appeal in this jurisdiction had adopted in the past of following the decisions of the English Court of Appeal where it has pronounced upon a topic, even where we think that another conclusion might be preferable.”

He referred to the authorities to which I have referred (other than McKiernan). On appeal to the House of Lords the opinion which the Court of Appeal would have reached if the matter had been *res integra* was adopted.

It was further pointed out in the course of argument that as the Divisional Court and Court of Appeal in England and Wales had accepted jurisdiction in respect of rulings made by the Tribunal in Derry, the Tribunal was bound by the decisions of two Courts of Appeal. Mr Clarke for the Tribunal invited us not to cause the Tribunal to suffer from Schizophrenia and I certainly recognise that if we held that a different test than that applied by the Court of Appeal in England was the correct test, the Tribunal might have to go to the House of Lords for a final decision, which might unnecessarily delay their proceedings, or we might remit their ruling back to the Tribunal which, in turn might lead the party adversely affected by a change in ruling to select the Divisional Court in England and Wales for a further judicial review. It would be bound to follow the English Court of Appeal, the courts would look foolish and an appeal to the House of Lord would be inevitable.

I should perhaps express my own view that in a criminal case on appeal, our Court of Appeal should adopt the practice outlined by Lord Lowry, and on the civil side follow it even if we believed the English Court of Appeal to be “plainly wrong”. I remind myself that the House of Lords has often found what seemed plain to the Court of Appeal to be plainly the opposite. Thus the course proposed by Carswell LCJ in civil cases seems the most appropriate.

The Test Set out at Paragraph 31 of the Judgment of the Court of Appeal

I am prepared to apply the same test as they applied and accordingly, I see no point in criticising any part of the judgment or, for example, in seeking to reconcile paragraphs 13 and 28 of the judgment.

I accept that the risk to the police officers is ‘real’ without seeking to re-define the word and is ‘immediate’ in the sense that, if they give evidence in open court without screening, the risk is that from that point in time a plan may be put into effect to target one or more of them and when the Tribunal has completed its task an attempt may be made on the target.

I consider that the Court of Appeal did not fail to understand that the decision in *Ergi* was based on facts significantly different from the facts in this case and did not seek to import into this case the requirement that the Tribunal should take all feasible precautions to minimise the risk to the police officers but that it should do all that could reasonably be expected of it. They assessed the risk to the soldiers as higher than the Tribunal did. The risk engaged Article 2 and the balancing act required to be carried out needed to be adjusted because the Tribunal had assessed the risk at too low a level.

The test set out at paragraph 31 is appropriate when one is considering the duty of fairness to witnesses at a public inquiry and when the question is whether there is a real and immediate risk to their lives. None of the arguments of Mr Treacy persuaded me that the approach of the Court of Appeal was flawed in principle.

Grounds 1(2) and (3), 2, 3, 4, 5, 6, and 7

The subjective fears of the police witnesses, the extent to which those fears can be objectively justified and the extent to which the fears will be alleviated if the measures sought are taken.

The Tribunal received written submissions on behalf of the police officers and of the families of those who were killed and wounded. On Thursday 7 February 2002 oral submissions, were made on their behalf and by others. These ran to 70 pages of transcript. Five Queen's Counsel, including three on behalf of the families, made these submissions. The Tribunal's Ruling is to be found at p272 and following of the transcript for that day.

Lord Saville stated:

"The basis for the application [for screening] is that, in the light of the principles set out in paragraph 31 of the recent Court of Appeal decision (unreported: 19 December 2001: [2001] EWCR Civ 2048: Case No C/2001/2538) dealing with venue, these individual applicants have reasonable and genuine fears for their personal safety were they to appear in public at the Guildhall to give their evidence, that these fears would be alleviated if screening were allowed and that when balanced against the adverse consequences to the Inquiry of listening to the evidence other than in full public view, commonsense and humanity dictated that screening should be allowed ...

Those opposing the application submitted that the delay demonstrated, or at least went a very long way towards demonstrating, that in truth the applicants could not hold genuine or reasonable fears for their safety in the absence of screening ...

It seems, though we have not heard from the Police Service on this, that there may have been some breakdown in communication between the service itself and its former and serving officers. Be that as it may, we are not persuaded that the delay in making the applications demonstrates, or goes towards demonstrating, that the fears now expressed are neither genuine nor reasonable ...

The applicants, unlike the soldiers, do not have the protection of anonymity. Again, unlike all or virtually all the soldiers, they live in Northern Ireland where some are still serving police officers: hundreds of their colleagues have died from terrorist activity over the last 30 years. Thankfully, the terrorist threat at present appears to be reduced from that which existed before, but that it still exists cannot be denied, as is apparent from the information put before the Inquiry today and the future, of course, is unknown.

The fear that the police officers have stems not so much from the evidence they can give about Bloody Sunday, or indeed from their activities on that day, but from the opportunity, particularly since their names are known and since they live and some work here, that would be afforded to dissident groups to identify them more closely were they not to be screened.

We, in short, accept that the applicants have reasonable and genuine fears for their safety, and we further accept that these fears could be alleviated to a significant degree by screening ...”

Before Kerr J Mr Treacy QC renewed the submissions which he had made before the Tribunal that the fears were not genuine or reasonable, that the history of the applications and the material discrepancies in them cast doubt on their bona fides and that they could not be objectively justified and made further submissions on these issues which Kerr J rejected. Before us Mr Treacy renewed the submissions he had made before the Tribunal and Kerr J and made additional submissions. Furthermore we have had affidavits and material placed before us on behalf of the appellant. Most, if not all of these were before Kerr J. Nothing that could be said on behalf of the families was left unsaid.

On 31 January 2002 a superintendent of the PSNI provided the legal adviser to the police with a Bloody Sunday Inquiry Intelligence Assessment. It was in the following terms:

“Despite the fact that PIRA are currently on cease-fire their terrorist capability has not diminished in any way. Intelligence gathering remains a priority with police officers continuing to be of particular interest. The significance of the events of Bloody Sunday and the outcome of the Saville Inquiry are extremely important to the republican psyche and the details of those police officers giving evidence to the Inquiry would be much sought after.

Should the personal details of any such police officer become known to a terrorist group then he/she may face an increased risk of terrorist attack. This risk is equally applicable to those officers who have already retired.

Dissident republican terrorists who are not on cease-fire naturally pose a substantial threat to all police officers. Despite recent setbacks as a result of continued successes by security forces they nevertheless remain highly capable of carrying out attacks. Since 1999 dissident republican have carried out bombing, mortar and shooting attacks on police and police establishments. We are aware from current intelligence that dissident republican groups continue to specifically target police officers both on and off duty. We are aware of contact between republican dissidents and PIRA.

Whilst there is no intelligence to indicate any direct threat exists against those officers called to give evidence to the Inquiry the possibility that some action may be taken against them cannot be dismissed.”

On 5 February 2002 a further assessment was made available. It was in the following terms:-

“Further to our intelligence assessment dated 31.01.02 the additional details are forwarded for consideration:

- As previously indicated a general threat exists to any police witness whose personal details, including appearance, might be disclosed. The level of possible threat faced by these police witnesses is likely to vary, dependent upon the following factors: the nature of the evidence given by individual officers or ex-officers; the nature of their duties on the day in question; the media interest in their evidence and also whether the individual officer has been the subject of paramilitary attention in the past
- It is judged that the level of threat faced by police witnesses to the Tribunal will be greater than that faced by military personnel. This is due to the fact that a number of these witnesses live locally with their families and are likely to come into contact with terrorist suspects in the course of their ordinary lives, a situation that is not generally applicable to the military witnesses.”

To suggest that the Tribunal’s independence has been compromised by receiving these assessments seems to me to be absurd. From what other reliable source other than the PSNI could such assessments be obtained? They do not have to be slavishly accepted if the Tribunal considers that they are exaggerated.

A sergeant, it was said correctly, had made and withdrawn an application for screening in 1999 and on the Friday before the police officers were to commence giving evidence indicated that he intended to renew his application. A separate application for screening was made on his behalf in writing and replied to by counsel on behalf of the families. He had changed his mind about applying for screening because his view of the increased risk to his life had changed. He had perceived the effect of the proceedings of the Inquiry on the attitudes of some people in Derry in relation to the security forces. Accordingly, the re-awakening of memories of the events of Bloody Sunday increased the risk to his life and the lives of members of his family. This risk was compounded by the fact, unknown to him in 1999, that a video image of the proceedings was broadcast to premises within the city of Derry known as the Rialto Cinemas to be viewed by any member of the public. He was concerned about the conviction in July 2001 by the Special Criminal Court in the Irish Republic of a Derry man for possessing information likely to be of assistance to members of an illegal organisation in the commission of a serious offence. The information related to a superintendent of the RUC in Derry (see the judgment of Kerr J at page 20).

On Friday 31 January 2002, the sergeant read for the first time an Intelligence Assessment of that date and must have discussed with his legal advisers the effect of the decision of the English Court of Appeal of 19 December 2001.

Express reference was made on behalf of the sergeant to the judgment of the Court of Appeal in England and a passage was cited from the judgment of Lord Phillips MR in which he stated:

“It is, however, common ground that there are, in Londonderry in particular but also elsewhere, dissident Republican elements who are not prepared to observe the ceasefire, but are anxious to disrupt the police process ... These elements pose a threat to the Inquiry and those who are or will be taking part in it, and in particular the soldier witnesses. The security agencies consider that this threat is, and will be, sufficiently real and imminent to call for precautionary measures to safeguard those taking part in the Inquiry. We consider that they are plainly right to so.”

This confirms Mr Clarke’s submission, that the police officers were conscious of the implications of that decision of the Court of Appeal in England.

On behalf of the sergeant it was pointed out that unlike the soldier witnesses living in Great Britain, he resided in Northern Ireland and the risk to him was greater than the risk to them. He would be giving his evidence in public and his name would be known. His name was given at the Tribunal and mentioned in Kerr J’s judgment. Reference was made on his behalf to the assessments of the threat to the RUC witnesses. I have already set out these assessments in my judgment.

It is not surprising that the sergeant was unaware that the Rialto Cinema was used as an additional venue. That it has closed down for the time being, as Mr Clarke for the Tribunal told us, does not mean that it would not re-open if the police officers gave evidence unscreened. Video recordings or visual images of police officers might be obtained for further study, as was submitted on their behalf.

I further note that the legal representatives of the appellant made no submission to Kerr J or to this court that the information which the sergeant had about the conviction before the Special Criminal Court was incorrect.

It was submitted that his fears were not based on reasonable grounds, because the assessment of threat was general in nature and was supplied by the police force to which the applicant for protective measures belonged. I have dealt with the generality of the assessment. It was open to the Tribunal to take the view, as it did, that the generality of the threat affected all the individual witnesses. The Tribunal was entitled to accept that it was genuine because it was expressed in a moderate way.

A Constable who gave evidence at the Widgery Inquiry in 1972 without anonymity or screening has claimed screening. It is accepted that 30 years later he has claimed that he asked for and was refused anonymity by that Tribunal. A transcript of his evidence has been provided. The Tribunal was entitled to accept that he did not deliberately tell an untruth about his stated wish for anonymity at that time and to refuse to differentiate his application from that of the Sergeant on the ground that his recollection of what happened at the Widgery Tribunal 30 years ago is at fault.

On Monday 3 February 2002 the police officers (other than the Sergeant) who were to start giving evidence that week met with their legal advisers in Derry and asked for screening.

The Tribunal considered that there may well have been a breakdown in communications between the RUC and individual police officers, serving or retired, and, if so, it would follow that they did not know of the memorandum sent by the Tribunal to RUC Headquarters in July 1998 indicating that applications for anonymity or screening should be made promptly. They gave statements to Eversheds, Solicitors acting for the Tribunal. We were informed by Mr Clarke that another large group of police officers who also made statements to Eversheds have not been required to give evidence before the Tribunal. The police officers will have learnt, therefore, not long before they came to Derry that they were definitely required by the Tribunal to give evidence. Those who have taken part in the Inquiry will have been aware of applications for screening in 1999 and 2000 which were granted. But the Tribunal was entitled to accept that these police officers were not necessarily aware that screening applications were made then and was entitled to take the view that the police officers were influenced by the intelligence assessments which they were shown when they came

to give evidence in Derry, even if they might have been expected to apply for screening at an earlier stage. Therefore the Tribunal was entitled to accept their bona fides.

It was argued that they should not have been treated as a `job lot'. In particular there were two officers whose names are well-known to the public and have been in the public eye. But, as Mr Clarke pointed out, they have not been associated with Bloody Sunday and those who may present a real risk to them when they give evidence are not likely to have watched them on TV or taken a special interest in them or their appearance. If they give evidence unscreened, special interest in their appearance will be aroused. If screened, no doubt they will take care to avoid publicity in the future, so far as they can.

The majority of the police officers have retired from the RUC. One lesson which they take with them into retirement is that they should not divulge to those who do not know that they were in the RUC what their past occupation was, except in special circumstances. (A retired police officer was killed in front of his wife by the IRA in early 1998). If they were not screened, the retired police officers might be recognised by such persons who had not known what they did in the past.

It was argued that each individual claim for screening should have been the subject of a separate ruling. It was not indicated how this task should be carried out. Obviously the witnesses would have had to be screened. Some gave special reasons for screening which the Tribunal did not disclose. Part of the individual hearings might have had to be held in camera. If they stated that they were unaware of the Tribunal's memorandum in 1998, of the applications for screening in 1999 and 2000, of the Tribunal's intention to call them as witnesses until recently and of the Intelligence Assessment until Monday 3 February 2002 how could those statements be impugned? I reject that criticism of the Tribunal.

The Tribunal had material justifying its view that the police officers have subjective fears which are reasonably held by all of them.

If any of the police officers resided in Great Britain, I would have held that the ruling in his favour was irrational. Nothing in this judgment is intended to give any support for any application by any soldier for screening, if he resides in Great Britain. But if there are special circumstances in any given case it is a matter for the Tribunal, not the court.

Grounds 8 to 14 of the Appeal from Kerr J

The Tribunal carried out a balancing exercise, in applying the test set out at paragraph 31 of the judgment of the Court of Appeal. I do not accept that Kerr J, whatever reservations he may have had about the judgment, applied some different test than was required by the Court of Appeal.

The killings of police officers in Derry and elsewhere which had reached 350 in 1998, the woundings and other incidents of near misses and the intelligence assessments all bear out the objective justification of their fears. Two police officers who gave evidence to the Widgery Inquiry were subsequently killed by the IRA but the interval of time between the giving of evidence and the killings may well indicate that there was no connection.

The subjective fears of the police officers and the objective justification for them are not much greater than those of other RUC officers, serving or retired. But I am prepared to accept on the basis of the intelligence reports that the Tribunal was justified in holding that they are entitled to protection as witnesses and as they do not have anonymity, that screening is the only realistic option, subject to the balancing exercise which must be carried out.

In his ruling Lord Saville said:

“There remains ... the question of balancing these considerations against the adverse consequences to the Inquiry of allowing screening to take place. We do not accept that screening is something of little real importance. This is a public inquiry and the public should be able to see how those who gave evidence before the Inquiry conduct themselves. It is true that the legal representatives of the families will be able to see witnesses, as of course will the Tribunal itself, but to our mind screening remains a significant inroad on the public nature of the proceedings having said this, though, we are not persuaded that the public confidence in this Inquiry will be undermined to such a degree that the applicants’ genuine and reasonable fears must be overborne.

Once again, we bear in mind that the applicants are publicly named individuals, but we accordingly conclude that the application should be granted. It was suggested during the argument that a possible middle ground would be to allow the families of those who died or were wounded to see the witnesses excluding the rest of the public, but to our minds this is not really a practical suggestion.

Finally, we should record that we have looked at the confidential material relating to the particular circumstances of the individual applicants, but our decision is based upon the materials and submissions made available to all.”

In my view this ruling was one which the Tribunal was entitled to make.

Mr Treacy argued again before us that if the public was excluded from viewing the police witnesses, the families should be permitted to do so.

It was contended that the relevant police witnesses entertain no subjective fears in respect of the families of the next-of-kin and the wounded. The families, as one would expect of them, have behaved in a restrained and dignified way. Many of those who have given evidence have stated that they wish no harm to those who came to give evidence.

It would be necessary to carry out a 'vetting' exercise on the 127 members of the families. How this could be done was not indicated. Presumably some investigation would have to be carried out in camera. The Tribunal has stated that it is not really a practical suggestion. Such a view was within the scope of its discretion. In my view it would be outside our jurisdiction to remit that ruling for further consideration.

The Tribunal has made a ruling that only qualified lawyers are to be present when screened police officers are giving evidence. Unqualified lawyers would have to be vetted. Doubtless, they can assist in preparation for cross-examination of the police officers but I cannot accept that Mr Harvey QC or any other member of the Bar who cross-examines a police officer requires the assistance of a lawyer who has no practical experience of advocacy. If there is need for liaison, junior counsel or a qualified lawyer can liaise with them.

Conclusions

Judicial Review is a supervisory jurisdiction, not an appeal. The Tribunal made efforts to avoid anonymity of witnesses and to have the soldiers give evidence in Derry. They have tried to hold the Inquiry as openly as possible. The families must realise that the blame for the limitations on openness rests not with the Tribunal or the courts but elsewhere.

As was submitted on behalf of the Tribunal the police witnesses will be named; their evidence will be heard, transcribed and reported; they will be seen by the Tribunal (who are the decision makers in what is an inquiry, not a trial) and by the lawyers (who will be able to make submissions as to the significance, if any, to be attached to the "demeanour" of the witness and the proceedings will still take place in public.

If there are matters which can be settled consensually by all parties, so be it. But in our supervisory role we are not entitled to and are not going to dictate to the Tribunal.

I must thank counsel for the appellant, for the Inquiry and for the police officers for their submissions and the manner in which they were presented.

[2002] NICA 25(2) Ref: GIR3691

JUDGMENT OF GIRVAN J

Introduction

The background to this appeal emerges clearly from the judgment of Kerr J. In this appeal the appellant seeks to quash the decision of the Bloody Sunday Tribunal which allowed certain police officers to give evidence to the Tribunal from behind screens (“the screening decision”).

This being a judicial review application it is appropriate to state at the outset that the function of the court is a supervisory and not an appellate function. As in all judicial review applications the court must focus its attention on the questions whether the impugned decision is flawed by reason of illegality, irrationality or procedural irregularity (see Council of Civil Service Union v Minister of the Civil Service [1984] 3 All ER 935 at 950 per Lord Diplock). The court may hold a decision unlawful because it was reached in an unfair or unjust manner. In judging whether a decision made has exceeded the margin of appreciation of the relevant decision maker the human rights context is important. The more substantial the interference with human rights the more the court will require by way of justification before it is satisfied that the decision is reasonable in the sense that it is within the range of responses open to a reasonable decision maker (see R v Ministry of Defence ex parte Smith [1996] QB 517 at 554 and R v Lord Saville of Newdigate [2000] 1 WLR 1855 at 1866). The human rights context in which a decision falls to be reviewed gives rise to another factor as stated by Lord Woolf in the latter decision at 1867 E - G:

“When a fundamental right such as the right to life is engaged, the options available to the reasonable decision maker are curtailed. They are curtailed because it is unreasonable to reach a decision which contravenes or could contravene human rights unless there are sufficiently significant countervailing considerations. In other words it is not open to the decision maker to risk interfering with fundamental rights in the absence of compelling justification. Even the broadest discretion is constrained by the need for there to be countervailing circumstances justifying interference with human rights. The courts will anxiously scrutinise the strength of the countervailing circumstances and a degree of the interference with the human right involved and then apply the test accepted by Sir Thomas Bingham MR in R v Ministry of Defence ex parte Smith [1996] QB 517.”

In his attack upon the screening decision Mr Treacy QC sought to argue that the Tribunal was in error in its understanding of the law to be applied in deciding the application whether the relevant

officers should be screened. He argued that in purporting to follow and apply the test stated by the English Court of Appeal in Lord Saville of Newdigate & Ors v Widgery Soldiers & Ors [2002] EWCA Civ 2048 (“the venue decision”) the Tribunal fell into error. He sought to argue that that decision itself was wrong and should not have been followed or applied by the Tribunal. The venue decision he argued was not binding upon this court. In the alternative he contended that even if the Court of Appeal’s statement of law in the venue decision was correct the Tribunal failed to apply the test therein stated correctly. Had it done so it would have been bound to refuse the screening application or would, at least, have made a more limited screening order. Mr Treacy also attacks the decision on the grounds that no reasonable Tribunal presented with the material put before it on behalf of the relevant police officers could have reached the conclusion they had ultimately reached that the officers should be screened in the way directed by the decision. He further contended that the Tribunal approached the application in the wrong way failing to properly investigate the applications which raise serious questions as to the good faith of the applications and failing to properly investigate the question whether a more restricted form of screening could be set in place allowing at least the families of the deceased and wounded to see the police witnesses giving evidence.

The illegality issue

In reaching its decision the Tribunal clearly proceeded upon the basis that the law to be applied was that stated by the Court of Appeal in the venue decision. Lord Saville in giving the Tribunal’s decision stated:

“We, in short, accept that the applicants do have reasonable and genuine fears for their safety, and we further accept that these fears could be alleviated to a significant degree by screening. There remains, therefore, the question of balancing these considerations against the adverse consequences to the inquiry of allowing screening to take place.”

The way Lord Saville on behalf of the Tribunal expressed the ruling makes clear that the Tribunal had in mind the test stated by Lord Phillips MR in the venue decision.

Clearly if the venue decision is wrong as a matter of law then the Tribunal decision would have been based on an incorrect legal premise and would be erroneous in a point of law.

Two questions arise. Firstly, is it open to this court to hold that the Tribunal should not have followed and applied the law as stated by the English Court of Appeal in the venue decision? Secondly, have the applicants in fact raised any sustainable argument that that decision was in fact wrong?

It must be stated at the outset that for the court to come to a different conclusion from that reached by the English Court of Appeal in the venue decision would produce bizarre and wholly undesirable results which would make the working of the Tribunal almost impossible. If the police officers' application were revisited by the Tribunal and rejected as a result of a ruling by this court the police officers would presumably have the right to bring the matter back before the English courts for review and the English courts would be bound to apply and follow the venue decision until overruled by the House of Lords. If this court enunciated a test differing from that stated in the venue decision the result would be that the Tribunal would have two inconsistent legal directions from courts of competent jurisdiction and could not apply both. As it was, when it dealt with the screening application a court of competent jurisdiction had given a definitive ruling which the Tribunal was bound to apply.

It has been the practice in this jurisdiction for the Court of Appeal to follow and apply English Court of Appeal decisions on a common point of law (see Beaufort Development v Gilbert Ash [1997] NI 142, Northern Ireland Railway Transport Board v Century Insurance Company Ltd [1941] NI 77 and McGuigan v Pollock [1955] NI 74). This practice followed from the approach adopted by the Irish Court of Appeal (see Holmes LJ in McCartan v Belfast Harbour Commissioners [1910] 2 IR 470 at 494-495). It is not clear whether a similar approach is adopted by the English Court of Appeal in relation to decisions of this court. It is true that in Re McKiernan [1985] NI 385 Lord Lowry put the position somewhat differently. He pointed out that while the English Court of Appeal decisions traditionally and rightly are accorded the greatest respect this court is not bound to follow them and in that case the Court of Appeal differed from the conclusions reached by the English Court of Appeal in the Camphill Prison case [1985] 2 WLR 336. It is interesting to note that the Northern Ireland Court of Appeal's approach was ultimately accepted as correct by the House of Lords in a later case.

In this case the desirability and wisdom of following the English Court of Appeal decision is all the stronger because the decision in each jurisdiction governs the one tribunal and as noted a difference of approach and the two jurisdictions would produce unworkable results.

In deference to Mr Treacy's forceful arguments and bearing in mind that the issue of the correctness of the test in the venue decision may arise again it is necessary to look at the substance of Mr Treacy's contention that the decision in the venue decision was wrong. At the outset I can state that Mr Treacy has failed to persuade me that the venue decision is wrong in law in the way in which the English Court of Appeal enunciated the proper approach to be adopted in applications such as the present one.

In the venue decision a number of now incontestable points were established. While the Tribunal was master of its own procedure and has considerable discretion as to what procedure it wishes to adopt it must still be fair. Whether a decision reached in the exercise of its discretion is fair or not is ultimately one to be determined by the court. Article 2 of the Convention places the Tribunal under a procedural obligation in so far as compatible with the substantive obligations imposed by article 2 to conduct an official inquiry that is open and effective. When there is a “risk” to the lives of witnesses before the Tribunal the circumstances may call for the exercise of the Tribunal’s judgment as to how fairly to cater for that risk in the arrangement it makes for the conduct of the inquiry. What is contentious in this appeal is what is the nature and extent of the risk that calls for the exercise of that judgment and how the nature of that risk affects the way in which the judgment should be exercised.

Mr Treacy argued that before article 2 is engaged there must be a “real and immediate risk” to the witnesses concerned. He sought to argue that that phrase “real and immediate risk” pointed to a relatively high degree of risk. He argued that the decision in Osman v UK [1998] 29 EHRR 245 made clear that that was the level of risk in question. Lord Phillips MR in the venue case was prepared to accept that the real and immediate risk envisaged in Osman by the European Court of Human Rights (“the ECHR”) was a very high degree of risk calling for positive action from the authorities to protect life. Such a degree of risk was well above the threshold that would engage article 2 when the risk was attendant on some action that an authority was contemplating putting into effect itself. Such a test requiring a high degree of risk was not the appropriate test to invoke in that latter context.

In Osman it was accepted by the ECHR that the Convention may imply in certain well defined circumstances a positive obligation on the authority’s part to take preventive operational measures to protect an individual whose life is at risk from the criminal acts of other individuals. What was in issue in that case was the scope of the obligation. Not every claimed risk to life can entail for the State authorities a Convention requirement to take operational measures to prevent that risk from materialising. If the test of “real and immediate threat” envisaged in Osman indeed does point to a very high degree of risk (a point on which I would prefer to reserve my opinion) I respectfully agree with the approach adopted by the Court of Appeal in England that a different and lower threshold of risk will engage article 2 when the risk is attendant upon some action which a public authority is itself contemplating putting into effect.

Having stated that the threshold of risk that would engage article 2 when the risk attendant on actions to be taken by an authority is well below a very high degree of risk, the Court of Appeal at paragraphs 30 and 31 set the position out thus:-

“30. In the present appeal, the fact that the soldier witnesses will have subjective fears if called to give evidence in Londonderry is a relevant factor when considering whether it will be fair to require them to do so. Those fears will, however, have much more significance if they are objectively justified. A critical issue is whether such fears are objectively justified, and much of the submissions that we heard were addressed to this issue.

31. We consider that the appropriate course is to consider first the nature of the subjective fears that the soldier witnesses are likely to experience if called to give evidence in the Guildhall, to consider the extent to which those fears are objectively justified and then to consider the extent to which those fears, and the grounds giving rise to them, will be alleviated if the soldiers give their evidence somewhere in Great Britain rather than in Londonderry. That alleviation then has to be balanced against the adverse consequences to the inquiry of the move of venue, applying common sense and humanity. The result of the balancing exercise will determine the appropriate decision. This course will, we believe, accommodate both the requirements of article 2 and the common law requirement that the procedure should be fair.”

The issue of the genuineness of the subjective fears of the witnesses and the issue of the objective grounds for such fears were much debated in this appeal. The fact that a witness has a genuine subjective fear and how to deal with that fear are relevant considerations for the Tribunal in ensuring procedural fairness. The requirement of procedural fairness involves a duty to be fair to witnesses including, for example, protecting them (see Lord Woolfe MR in R v Lord Saville of Newdigate [2000] 1 WLR 1855 at 1868). In expressing itself as it did in paragraphs 30 and 31 the Court of Appeal sought to bring together the relevant principles to be applied in ensuring procedural fairness in a context where article 2 is engaged. Nothing in Mr Treacy’s able submissions has persuaded me that there is any error in the approach adopted by the Court of Appeal in paragraphs 30 and 31.

The Tribunal (arguendo) and Kerr J expressed some difficulty with the approach set out in paragraph 31. Kerr J stated:-

“The Court of Appeal in the venue application considered that a balancing exercise had to be carried out between the measures needed to alleviate the subjective fears of the witnesses and the grounds giving rise to them on the one hand and the adverse consequences that the measures would cause on the other. Lord Saville had some difficulty with this concept as do I. If the measure is needed to alleviate the fears and the reasons for them are to be regarded as the steps necessary to protect the witnesses’ substantive article 2 rights (in other words their right to have their life protected), I cannot accept that these can be mitigated by adverse consequences that might accrue to other procedural article 2 rights. It surely cannot be right to

refrain from taking precautions deemed necessary to protect someone's life in order to cater even for the need to ensure the thorough and effective investigation of another's death."

As I read paragraph 31 of the judgment however it appears to me that no such difficulty arises. What the Court of Appeal ruling calls for is a judgment by the Tribunal that properly weighs in the balance the rights of the witnesses and their rights to a fair procedure on the one hand and the rights of other interested parties before the Tribunal and the interests of a fair inquiry. If the steps sought by the witnesses go beyond what is necessary for the proper protection and vindication of their article 2 rights and the right to fairness in the light of the risk and in the light of the countervailing rights of other interested parties then the Tribunal should not accede to the witnesses' application in the form in which it is made and it would have to protect the rights in a more balanced way. Thus, for example, if the police witnesses in the present case had sought not screening but a direction that their evidence be given in camera or that they should be excused from giving evidence at all then the Tribunal, when weighing the risk to their lives and their right to fairness on the one hand and the rights of the families and the interests of a fair inquiry, could conclude that the witnesses' concerns would be adequately and properly catered for by a screening order.

In the result the Tribunal was correct to apply the approach set out in the venue decision. The Tribunal did not misunderstand the correct legal approach to be adopted in relation to determining the screening applications.

The validity of the impugned decision

It is necessary then to consider whether the Tribunal correctly applied the law in deciding the screening applications and whether the decision is flawed on some other basis. Much of the force of Mr Treacy's submissions was directed to the question whether the police officers' application was made in good faith and whether they genuinely entertained subjective fears as to their safety and whether the Tribunal adopted a fair procedure to probe the genuineness of their expressed fears. The arguments forcefully put by Mr Treacy in this court had been put before the Tribunal before it reached its decision and the Tribunal was aware of the thrust and nature of the applicants' case.

The Tribunal had before it the intelligent assessments the second of which dated 5 February 2002 stated:-

"As previously indicated a general threat exists to any police witness whose personal details, including appearance, might be disclosed. The level of possible threat faced by these police witnesses is likely to vary dependent upon the following factors: the nature of the evidence given

by individual officers or ex-officers, the nature of their duties on the day in question, the media interest in their evidence and also whether the individual officer has been the subject of paramilitary attention in the past.

It is judged that the level of threat faced by police witnesses to the Tribunal will be greater than that faced by military personnel. This is due to the fact that a number of these witnesses live locally with their families and are likely to come into contact with terrorist suspects in the course of their ordinary lives, a situation that is not generally applicable to the military witnesses.”

As expressed this assessment relates to all the police witnesses who thus face a risk to their lives which cannot be shrugged off as an unrealistic one. Furthermore the risk is expressed to be greater than that faced by military personnel the risk to whom in the opinion of the English Court of Appeal in the venue decision justified the more draconian remedy of a change of venue.

In stating the conclusions of the Tribunal on the application Lord Saville stated that the Tribunal was not persuaded that the delay in making the applications demonstrated or went to demonstrate that the fears now expressed were not reasonable. The delay in making the applications did not show that the fears of the applicants are without foundation but went on to state:-

“The applicants unlike the soldiers do not have the protection of anonymity. Again, unlike all or virtually all the soldiers, they live in Northern Ireland where some are still serving police officers; hundreds of their colleagues have died from terrorist activity over the last 30 years. Thankfully, the terrorist at present appears to be reduced from that which existed before, but that it still exists cannot be denied, as is apparent from the information put before the inquiry today and the future of course is unknown.

The fear that the police officers have stems not so much from the evidence they can give about Bloody Sunday or indeed from their activities on that day, but from the opportunity, particularly since their names are known and since they live and some work here, that would be afforded to distant groups to identify them more closely where they not to be screened.

We in short accept that the applicants do have reasonable and genuine fears for their safety, and we further accept that these fears could be alleviated to a significant degree by screening ...”

The conclusion that the fears were genuine could not be categorised as irrational or perverse particularly bearing in mind that it would be “unreasonable to reach a decision which could contravene human rights” (per Lord Woolf in R v Saville of Newdigate [2000] 1 WLR at 1867. The conclusion that there was no objective reason for fear on the part of the officers would itself have

been perverse in the light of the intelligence evidence. The very fact that there was an objective basis for fear itself supports the Tribunal's conclusion that there was a genuine subjective fear.

Having material before it to justify its conclusion that there was subjective fear on the part of the officers with objective grounds for that fear the Tribunal then had to balance the rights of the police officers and the interests of the families and the interests of ensuring a fair and open inquiry. The Tribunal properly bore in mind that screening was not something of little real importance. It properly recognised the screening was a significant in road into the public nature of the proceedings. Accordingly, the Tribunal did not lightly accede to the application. It concluded however that it was not persuaded that the public confidence and inquiry would be undermined to such degree that the applicants' genuine and reasonable fears should be overborne, a decision well within its margin of appreciation.

It must be borne in mind that the police officers are named, will be giving evidence in person before the Tribunal, will be cross-examined by representatives of the next of kin, will be seen by the qualified lawyers acting for the next of kin and will be heard by the public (including the next of kin). Their evidence will be transcribed and available to everyone. While the families will not see the witnesses face to face and to that extent the transparency of the inquiry is affected, screening will not prejudice a full investigation before the inquiry.

It is true that the next of kin have a procedural article 2 right that a full and proper investigation into the deaths of the deceased will be carried out (*Jordan v UK* [2001] ECHR 247). The authorities make clear however that such a right does not necessarily carry with it a right to participate in the inquiry in a particular way or necessitate a particular form of inquiry or investigation. The state's investigation of the conduct of its representatives must be effective and independent but the steps which are required to achieve this will depend on the facts of the case and may vary enormously (per Carswell LCJ in *Re Adams Application* [2001] NI 1.) If there is a conflict between the procedural rights of the next of kin and the substantive rights of individuals not to be exposed to a life threatening risk or to have the risk minimised the substantive right must prevail. There is nothing in the reasoning of the Tribunal to indicate that it misunderstood the correct approach or having understood it correctly failed to apply the correct approach properly.

Should the screening have been in a modified form?

By way of alternative arguments Mr Treacy contended that the Tribunal was wrong to treat all the police officers in that application as a class and should have distinguished the case of at least two officers who were it was contended well known individuals and who could not benefit from screening. He argued that the Tribunal should have permitted the next of kin to see the police

witnesses and that members of the families' legal team who are not qualified should not have been covered by the screening order.

So far as distinguishing between the applicants is concerned it must be recalled that the intelligence advice set out above applied to all officers giving evidence to the Tribunal. The fact that some officers do not wish to avail of the opportunity to be screened cannot in itself detract from the interests of others who have a legitimate grounds for fear for their safety. The Tribunal had been directed to the names of two officers who it was alleged on behalf of some of the next of kin (though not the next of kin represented by Mr Treacy) were well known faces. The Tribunal did not exclude them from those covered by the screening order. It cannot be said that the Tribunal was acting perversely in not excluding them bearing in mind the intelligence material available to the Tribunal.

In relation to permitting the next of kin to see the witnesses this was an idea raised by another counsel acting on behalf of some of the other next of kin not represented by Mr Treacy. The Tribunal rejected the proposal as not a practical suggestion.

Mr Clarke QC pointed that the physical layout of the Guildhall was such that it was not practically possible to treat the next of kin as a separate class. He contended that the risk of details of appearances leaking out even inadvertently was such that it was not possible to say that there was no increased risk in allowing 127 persons seeing the witnesses. Inadvertent disclosure could not be prevented. An extensive vetting procedure would be called for and this in itself would present grave difficulties. He contended that the decision of the Tribunal on this point was a common sense and practical one.

If the circumstances call for screening (and the Tribunal has legitimately held that it did) then the Tribunal had to consider whether it would be practical to permit the families to see the screened witnesses. This was par excellence a matter for the Tribunal which is familiar with the logistical and practical matters affecting the fair conduct of the hearings. I have not been persuaded that the Tribunal fell into error in concluding that it was not practical to restrict the screening.

On the issue of non legally qualified members of the families' legal team Mr Clarke QC submitted that this had not been addressed by the Tribunal in its ruling. The Tribunal ruled that the officers should be screened when they gave their evidence from all except the qualified lawyers acting on behalf of the interested parties and the Tribunal, its counsel and staff. The Tribunal did not refer to the question of the presence of members of the families' legal team and there was no argument on this issue before it. Kerr J held that the Tribunal would have to decide whether they should be permitted to be present if an when any application was made on that topic. I agree.

If on behalf of the next of kin or any of them an application were made to modify the screening order grounded on alternative and potentially workable proposals affecting members of the families and unqualified lawyers such application would doubtless be considered by the Commission as would any application made to. Our decision upholding the currently impugned decision of the Tribunal does not fetter the powers of the Tribunal in relation to any such further application which would have to be decided on the merits and on an application of the correct legal principles.

[2002] NICA 25(3)

Ref: HIGF3703

JUDGMENT OF HIGGINS J

I have had the advantage of reading in draft the judgments of Nicholson LJ and Girvan J. Since I am in agreement with their analysis of the substantive legal issues and with the conclusions that they have reached on this appeal I need only add a few words of my own.

When Parliament decides on a motion of the Prime Minister that the executive actions of its servants and agents be subjected to an inquiry, it is only proper that such an inquiry be conducted in public and in an open manner. Section 2 of the Tribunal of Inquiries Act 1921 permits of an exception. This provides that where in the opinion of the Tribunal it is in the public interest expedient to do so it may refuse to allow the public or a section of the public to be present. Otherwise a departure from the convention in which inquiries are conducted in public and are open fully to all, can only be justified in very exceptional circumstances. There can be no doubt as to the genuineness of the concern expressed by the applicant and those wounded and by the families of those killed and wounded in Londonderry on 30 January 1972 about the effect that the screening of police witnesses will have on the conduct of the Inquiry. They feel intensely that this will compromise the openness of the Inquiry and will inhibit the quest for truth on which the Inquiry is embarked. This concern must be acknowledged and closely considered in any evaluation of the propriety of the Tribunal's decision to allow the police officers to be screened, not least because of the universally accepted proposition that a vital dimension to the Tribunal's work is the winning and maintenance of public confidence in its procedures. While a Tribunal so established is the master of its own procedure it is nonetheless open to judicial review. However the powers of a court either at first instance or on appeal are limited to reviewing the legality, rationality or procedure employed by a Tribunal in its decision-making process. In this appeal the decision which the applicant seeks to quash is a decision that the police witnesses due to give evidence before the Tribunal should be screened from view by all save the members of the Tribunal and the qualified lawyers representing those concerned in the issue before the Tribunal namely the killing and wounding of civilians in Londonderry on 30 January 1972.

The applicant is the sister of one of the civilians killed on that date and it is alleged that explosive devices were found in his pockets some time after he was killed.

The application by the police witnesses to be screened from public when giving evidence was made a short time before the police witnesses were due to give evidence. The bona fides of police witnesses in making that application occupied much of the hearing before this court. The other substantive issue related to the legal test to be applied when a person raises an issue that his right to life is threatened by executive action of a public authority. This latter issue was the subject of a decision in the Court of Appeal in England and Wales on an application by soldiers due to give evidence to the Inquiry, that their evidence be heard by the Inquiry otherwise than in Londonderry, where the Tribunal has sat since the Inquiry began – see Lord Saville of Newdigate and Others v Widgery Soldiers and Others 2001 EWCA 2048. According to the Court of Appeal in England and Wales the test to be applied is that set out at paragraphs 30 and 31 of the judgment. It states -

“30. In the present appeal, the fact that the soldier witnesses will have subjective fears if called to give evidence in Londonderry is a relevant factor when considering whether it will be fair to require them to do so. Those fears will, however, have much more significance if they are objectively justified. A critical issue is whether such fears are objectively justified, and much of the submissions that we heard were addressed to this issue.

31. We consider that the appropriate course is to consider first the nature of the subjective fears that the soldier witnesses are likely to experience if called to give evidence in the Guildhall, to consider the extent to which those fears are objectively justified and then to consider the extent to which those fears, and the grounds giving rise to them, will be alleviated if the soldiers give their evidence somewhere in Great Britain rather than in Londonderry. That alleviation then has to be balanced against the adverse consequences to the inquiry of the move of venue, applying common sense and humanity. The result of the balancing exercise will determine the appropriate decision. This course will, we believe, accommodate both the requirements of article 2 and the common law requirement that the procedure should be fair.”

I am satisfied that is the correct test and was the test applied by the Tribunal in arriving at its decision. Thus for me the question as to when this Court should depart from a decision of the Court of Appeal in England and Wales does not arise. There was ample evidence before the Tribunal in the form of the police witnesses statements as to their fears and the two intelligence assessments for the Tribunal to conclude that the fears expressed by the police witnesses were real and genuine and that there was objective evidence to support them.

The views of the families, however genuine and strongly felt, must be weighed against the threat to the safety of the police officers if they are required to give evidence without screens and the perception of the police officers in relation to the assessed threat. One may perhaps approach the issue of the police officers' perception of the threat to them by posing the question: what was the reaction of a police officer likely to be when confronted with information that PIRA was continuing to gather information about the movements of officers; that elements of PIRA were in contact with dissident republicans who are not on ceasefire; that police officers who gave evidence to the Inquiry were considered to be at greater risk than soldiers who have been permitted to give their evidence anonymously in Great Britain and that their personal details including their appearance would be "much sought after"? Viewed thus it is impossible to escape the conclusion that any police officer due to give evidence would be extremely concerned for his safety.

To the question whether the fears can be said to be objectively justified an equally ready answer may be given. The risk assessment reports provide such justification. No inquiry is required to establish that those reports fully justify the expressed fears of the police officers. The appellant's argument on this point appeared to suggest that the Tribunal was bound to inquire into the basis on which the reports were made but, in my opinion, this misconstrues the test laid down by the Court of Appeal in the venue case. It enjoined the Tribunal to consider whether *the fears* were genuine, not whether the material that prompted the fears was authentic and verifiable.

Once it is accepted that the fears expressed by the police officers are genuine and objectively justified, the third limb of the test is easily disposed of in the present case. If the police officers' Article 2 rights are engaged, the Tribunal is obliged to take sufficient precautions to protect their lives. The police officers' Article 2 rights are engaged here. The screening of the witnesses will make it more difficult for them to be identified. Once that position is accepted the procedural rights of the public or a section of it, to see the police witnesses give their evidence before the Tribunal, must give way to the substantive rights of the police witnesses under Article 2 of the ECHR. It appears to me that the Tribunal had no option but to permit them to be screened.

If the Tribunal, in order to protect the police officers' Article 2 rights, is obliged to take "sufficient precautions" to protect their lives, it is not easy to see how it can carry out any meaningful "balancing of the alleviation of the fears against the adverse consequences of the measures". Be that as it may, I agree that the interests of the families, however, important and authentic, cannot displace the Convention rights of the police officers.

No argument put before the Court persuades me that the Tribunal should have made an exception in its ruling for the wounded and the families of the killed and wounded. Thus in applying the test set out in paragraph 31 the Tribunal did not act illegally nor was its decision to screen the officers

from the public or a section of it irrational or procedurally incorrect. This will be little comfort for the applicant, the wounded and the other families who have waited a long time and patiently for the truth about the events of 30 January 1972 to emerge and whose conduct throughout the Inquiry has been beyond reproach, but on the contrary the subject of much praise by everyone concerned with the Inquiry. While the police witnesses will be screened from public view they will be heard by all and seen by the members of the Tribunal and the lawyers representing the applicant and the other interested parties. Such a procedure compromises the open and public nature of Tribunal hearings it does not destroy it. None of the arguments which have been presented to this Court have persuaded me that the ruling of the Tribunal was unlawful, erroneous or procedurally incorrect. I agree with the conclusion of Kerr J in the court below that the ruling on the screening of the police witnesses was one which, in the special circumstances before it, the Tribunal was entitled to reach. I therefore dismiss the appeal for the reasons stated. The Tribunal ruled that the police witnesses should be screened from all but the qualified lawyers representing those concerned. That ruling was consistent with an earlier ruling to which no objection was taken. I agree with the view expressed by Kerr J that whether the ruling should include or exclude non-qualified lawyers engaged on behalf of some of those concerned is an issue for the Tribunal and not for this Court. I too would dismiss the appeal.

Bibliography

During the course of the Inquiry and apart from the historical reports prepared for us by Professor Paul Arthur and Professor Paul Bew,¹ we also consulted a number of books and other materials about the history of Northern Ireland and about Bloody Sunday, in order to provide ourselves with as wide as possible a view of the different perspectives held about these matters. However, the findings we have made relating to the events of Bloody Sunday itself are not based on opinions or views expressed in this material but on the evidence that we read, heard and saw during the course of the Inquiry. The authors of some of the books gave evidence to the Inquiry about specific matters.

¹ [E6.0001-0047](#); [E7.0001-0043](#); [E17.1.1](#); [E17.2.1](#); [E17.3.1](#); [E17.4.1](#); [E17.5.1](#); [E17.6.1](#); [E17.7.1](#); [E17.8.1](#); [E17.9.1](#); [E17.10.1](#); [E17.11.1](#)

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