OUTER HOUSE, COURT OF SESSION

[2024] CSOH 26

P985/23

OPINION OF LADY CARMICHAEL

In the petition

THE PRESIDING CORONER OF NORTHERN IRELAND

Petitioner

against

SOLDIER F

Defender

Petitioner: Ross KC, Welsh; Balfour and Manson
Defender: Findlay KC, B Ross; BCKM

26 February 2024

Introduction

[1] The background to this matter is set out in *The Presiding Coroner* v *Soldier F* [2024] CSOH 11. This opinion relates to proceedings after 2 February 2024.

9 February 2024

[2] A continued hearing took place on 9 February 2024. The respondent made no further submission in relation to the question of contempt. I was satisfied beyond reasonable doubt on the basis of admitted fact that the respondent had wilfully defied the subpoena ad testificandum, and that his conduct constituted a contempt of court. There was no dispute

that the subpoena ad testificandum had been pronounced, or that it had been personally served on the respondent. The respondent had applied unsuccessfully to have the subpoena set aside. He knew that he was required to give evidence and took a decision not to do so. That is reflected by the terms of the correspondence from his agents to the petitioner on 28 July 2023, about which there is no dispute. A continued hearing, for the presentation of mitigation, was set for 19 February 2024. Although a respondent would normally be required to appear at the bar of the court, I excused the attendance of the respondent because I wished to defer the question of whether he should require to appear until such time as I had determined the appropriate penalty. I did so with a view to avoiding any unnecessary court appearance that might increase the risk of his identity becoming known.

19 February 2024

Procedure and reporting restrictions

[3] On 19 February 2024 a hearing in mitigation took place following the finding of contempt which I had made on 9 February 2024. On the morning of the hearing senior counsel for the respondent moved that I should close the court, not just to the public, but to the press. The motion was made on the basis that senior counsel intended to refer in submissions to material which had the potential to enable a jigsaw identification of the respondent. He also might lead evidence in mitigation from a character referee. I had been aware from email during the preceding week, when I was on annual leave, that there might be a motion to close the court, but not that that the motion would seek the exceptional measure of excluding the press. The motion was made in open court with a member of the press present. I acceded to the motion. In response to an inquiry from the BBC I provided a brief opinion dealing only with that motion and decisions relating to reporting restrictions. I

repeat for ease of reference the substance of that opinion here. I have not received any further submissions in relation to that matter, but add my further reflections on the procedure that I adopted.

[4] The respondent's identity is protected by a cipher in the Northern Irish proceedings which have given rise to this petition. The Secretary of State for Defence presented a public interest immunity certificate to the petitioner which represented that that disclosure of information relating to the identities of the soldiers involved in the inquest would put them and/or their families at serious risk of harm. The petitioner upheld that part of the certificate in the proceedings before him. Against that background there were plainly substantial grounds for thinking that there would be a serious risk to the respondent if his identity were to become known.

[5] I approached the matter on the basis that there is a common law constitutional principle of open justice which can be abrogated only when there is a legitimate purpose for doing so, and where it is abrogated only to the extent necessary to serve that purpose. The purpose in this case is the protection of the life and limb of the respondent and those associated with him. Article 10 ECHR protects the right of the press to receive and impart information. That is of particular importance given the role of the press as a "watchdog" in society. Any restriction of Article 10 rights must be justified and proportionate.

[6] I raised with parties *ex proprio motu* the question of reporting restrictions, which would not necessitate the exclusion of the press. I did so for two reasons. First, if the press were to be present, or if they were not to be present, but later to be afforded access to a recording or transcript of the hearing, there might be merit in a restriction preventing reporting of details that would tend to identify the respondent or his location.

[7] Second, I had a concern, not related to the motion to close the court, but in relation to the following matter. In the event that the court were ultimately to impose a custodial penalty, the protection of the identity of the respondent would be likely to require particular care and measures to be put in place in relation both to the process by which he might enter into custody and in relation to his confinement thereafter. I raised the question of whether it might be necessary to restrict reporting for a period with a view to providing a period of grace in which such arrangements might be put in place and limiting the potential for jigsaw identification of a person who might come to be in custody at a particular point in time. Following some discussion, I came to the view that any such restriction should expire at the conclusion of the hearing on 26 February 2024. In the event that the disposal then was not a custodial disposal, no further order might be required. I would consider on 26 February 2024 whether any further reporting restriction was necessary, and what the appropriate duration of any such restriction might be. It was not my view, contrary to the submission of senior counsel, that any restriction would require to be without limit of time, given the nature of my concern.

[8] I determined to make those reporting restrictions ad interim, and provided reasons in the interlocutor in the usual way. Other than in respect that I raised the matters *ex proprio motu*, I adopted the procedure set out in Chapter 102 of the Rules of Court. I do not consider that Chapter 102 precludes the court from making a reporting restriction *ex proprio motu*. I did so because of concerns for the life and safety of the respondent.

[9] I considered whether those interim restrictions on reporting would suffice. I was left with a concern that potentially sensitive information tending to identify the respondent noted by the press might not be held securely. That would be a matter over which the court would have no control. I inquired as to whether the press were afforded access to the

inquest when soldiers were giving evidence, and I was told that they were, but in a context where the witnesses were screened from view and in some cases also had their voices distorted. I was told also that in other types of proceedings in Northern Ireland where there was a risk of the disclosure of the otherwise protected identity of service personnel in the proceedings, the court would be closed to the press. I took the exceptional step of closing the hearing to the press. The hearing was being recorded. I indicated, again in open court, that it was my intention that in the interests of open justice either the recording or a transcript, with any necessary redactions, would be made available to the press.

[10] In the event, senior counsel's oral submissions were made with very considerable care and I detected only one detail, regarding a particular military honour that might have been capable of identifying the individual. I was referred to various reports and references which, although heavily redacted, did still contain a considerable amount of detail, but that detail was not quoted in oral submissions. The respondent did call a witness in mitigation. That witness was himself a senior retired soldier whose identity is protected by a cipher. Had the press been present it is likely he would have required to have been screened from view, but I detected nothing in his testimony that would tend to identify either him or the respondent. That was my own impression. I invited submissions from parties as to whether there were any redactions which they considered might require to be made before the recording and/or a transcript were made available to the press.

[11] The BBC suggested in correspondence that I ought to have approached the respondent's motion to close the court as a motion made under Chapter 102. In response to that suggestion, I intimated that had I followed Chapter 102 procedure in respect of that, I would have required the respondent to enrol a motion using the relevant form and setting out the reasons for making the motion. I did not consider that that would have precluded

me from dealing with the matter on the day of the hearing, subject to the need to dispense with the normal period of notice to the other party. I would then have had to consider whether to make an order on an interim basis. It was likely that I would have done so, and proceeded with the hearing, because they were attended with some urgency. It was desirable that they, including any appellate proceedings that might come to follow from my decisions, were concluded before 1 May 2024. No evidence could be led in the inquest after 1 May 2024. The conclusion of proceedings in that timescale was no less desirable because the respondent had made it clear that he does not intend to purge his contempt by giving evidence in the inquest.

[12] I express no concluded view as to whether the use of Chapter 102 procedure is the appropriate means of bringing a motion to close a court to the attention of the press, as distinct from motions to restrict reporting of proceedings that are otherwise open, for example by reference to section 11 of the Contempt of Court Act 1981, or section 46 of the Children and Young Persons (Scotland) Act 1937. I have, however, considered further, albeit without the assistance of submissions, what procedure I ought to have adopted. I have come to a view different from that which I initially expressed and which is contrary to the procedure I adopted.

[13] On the hypothesis that the matter should have been the subject of a motion under Chapter 102, the motion should have been starred with intimation to media organisations, rather than resulting in an interim order. On the hypothesis that it was open to me to entertain a motion made orally on the morning of the hearing, I consider that I should have adjourned the hearing in the first instance until later in the day and asked for urgent steps to be taken to notify media organisations with a view to their instructing appearance to make representations, in particular as to what other measures might mitigate the risks about

which I was concerned. If a party wishes the court to be closed to the press clear intimation should be provided to the court at the earliest stage possible so that the media can be invited to contribute to the discussion before any order is made.

Mitigation

[14] In mitigation senior counsel drew attention to the respondent's record of military service, including a particular award bestowed on him in that connection. The respondent was a person whose record of service was of distinction, and which commanded respect. Senior counsel submitted that the military operation with which the inquest was concerned was one which had had as its object the protection of the life of an individual.

[15] The respondent produced three character references, all from senior soldiers or retired senior soldiers, vouching the onerous nature of his service, and the high esteem in which his colleagues held him. They asked the court to exercise leniency. The names of the referees were variously redacted or rendered by reference to ciphers allocated to them in other proceedings. The court was provided securely with their identities.

[16] Senior counsel submitted also that the respondent had suffered injury, in the form of post-traumatic stress disorder as a result of his deployments over the years in a number of theatres. He had become increasingly isolated over the years, and now lived a very reduced life so far as social and family contacts were concerned. That was vouched by the medical reports before the petitioner, and by a further, more recent, medical report produced for these proceedings. That most recent report indicated that Soldier F was not fit to give evidence even by responding to written questions. That meant that there could be no prospect of his purging his contempt by agreeing now to give oral evidence. All three references also mentioned the deterioration of the respondent's mental health over the years.

[17] The contempt was, senior counsel suggested, not of the most serious character. The respondent had in large part cooperated with the inquest. He had provided a statement and had been willing to address written questions. The inquest had been completed save for Soldier F's evidence. A number of other soldiers involved in the operation had given evidence. It could not be said that the inquest would be deprived of the ability to produce a verdict. Senior counsel contrasted that situation with one in which the refusal of a single witness to give evidence in a murder trial resulted in an insufficiency of evidence.

[18] Senior counsel repeatedly referred to what he characterised as the limited matters that could legitimately be the subject of findings in the inquest under the Coroners (Practice and Procedure) Rules (Northern Ireland). He queried, particularly in the light of the respondent's willingness at the time to engage with written questions, why the petitioner required the respondent to be available for oral cross-examination by counsel for the relatives of the deceased.

[19] Information was provided as to the respondent's income and outgoings in case the court were minded to impose a financial penalty. Senior counsel submitted that there was no requirement for a social work report, that obtaining one would pose potentially insuperable practical difficulties given the security concerns in this case, and that a report of that sort would add nothing to the material already tendered in mitigation.

[20] I heard evidence in mitigation from a witness who had submitted a reference using the cipher Soldier H, although he was referred to in the hearing as Soldier M. He had worked with a charity that provided assistance to retired service personnel. About four per cent of retired personnel sought assistance for medical issues from the charity, and the majority of those sought assistance for mental health problems. He described post-traumatic stress disorder as a war wound. He spoke also about what he described as moral injury, by

which he meant amongst other things, the difficulties that soldiers would have in the years after their service when they reflected on the orders they had been asked to carry out; on times when they felt they should have acted in a particular way but had not; and on whether they had received or would receive support from the public authorities in whose service they had been active, and from society more generally.

[21] I continued the hearing until 26 February 2024. I indicated that I had not reached a view in relation to penalty, but that in the event of a custodial disposal practical considerations would arise in relation to how the respondent might be brought into custody. I invited the respondent's representatives to consider those matters in case they should arise, and asked whether the court's administration might be able to assist in ascertaining what measures would be practicable. I again excused the respondent from attending in person at the continued hearing.

26 February 2024

Penalty

[22] I determined to impose a period of 6 months' imprisonment. I took into account the following matters.

[23] I accepted that the respondent suffered from post-traumatic stress disorder and other mental health problems, and that he also had physical health problems. I accepted that he had experienced traumatic incidents in the course of his service that were of a significant and distressing nature. I had no reason to doubt that at the time of the contempt of court he was distressed by the prospect of giving evidence. At that time he had presented medical reports in support of his application to be excused from giving oral evidence. The reports contained opinions variously that to give oral evidence would be likely to cause a

deterioration in his presentation, and present risks of deterioration in his mental health. The petitioner had considered that material. He and other judicial authorities in Northern Ireland decided that the respondent should be required to give evidence. I regarded the reports as relevant as part of the context in which the respondent might have formed his own subjective view that he should not be required to give evidence.

[24] The respondent has a distinguished record of military service over a number of years. I accepted also that the contempt was not one which would merit the most severe penalty that this court could impose, which was deprivation of liberty for two years.

[25] I did not accept senior counsel's analysis insofar as it characterised the findings that might be made in the inquest as formal or limited by virtue of the terms of the Coroners (Practice and Procedure) Rules (Northern Ireland), or insofar as his analysis implied that it was not either necessary or legitimate to require the respondent to be available for cross-examination by counsel for the relatives of the deceased. An inquest of the type that the petitioner is conducting must have the capacity to reach a verdict leading to a determination of whether the force used was or was not justified, if it is to comply with the obligations of the state under Article 2 ECHR: *Jordan* v *United Kingdom* (2003) 37 EHRR 2, paragraph 107.

[26] Against that background, while I accepted that the contempt did not carry the same practical consequence for the inquest as the type to which senior counsel referred, in causing, for example, a prosecution to fail entirely, I gave considerable weight to the circumstance that the respondent decided not to comply with a lawful order that he should give evidence, in the context of an inquest into deaths in a case involving state agents. That is a very serious matter.

[27] I proceeded on the basis that the respondent would not attempt to purge his contempt by giving oral evidence. Some reliance had been placed on the most recent

medical report, which indicated that his condition had deteriorated since the earlier medical reports were compiled. I placed relatively little weight on that so far as mitigation was concerned. The respondent found himself the subject of these proceedings because he decided not to give evidence at the time he was subject to a subpoena requiring him to so, and before any such deterioration had occurred.

[28] Had it not been for the respondent's state of health, previous good character and record of military service, I would have imposed a longer sentence, given the context in which the contempt occurred, namely a wilful failure by a former soldier to give evidence in an Article 2 inquest relating to deaths that had occurred at the hands of state agents, in defiance of the subpoena ad testificandum issued by the High Court of Northern Ireland.

Further procedure and reporting restrictions

[29] The usual procedure in a situation of this type is that the respondent would appear at the bar of the court and warrant would be granted for officers of law to take him from there to prison. Apart from the difficulties that might be associated with his appearance in court, I had been advised by the court administration that no member of the society of Messenger at Arms has developed vetting. I indicated that I was going to grant warrant for the removal of the individual to prison, and that I was minded to allow him a period to surrender to police officers holding a suitable level of security clearance, which failing he would be required to appear on 1 March 2024. I allowed counsel some time to consider the matter and any practical matters that might arise.

[30] When the hearing resumed, junior counsel moved me to close the court to the press. I declined to do so. Junior counsel said that the respondent wished to co-operate. He made submissions raising concerns about the reception of the respondent into custody in a

manner that would protect his identity. A member of the court's administration advised that since I had delivered my decision on penalty he had arranged a meeting to take place later in the day with representatives of the Scottish Prison Service and Police Scotland who benefitted from various forms of clearance and vetting, at which the respondent's solicitor would be welcome, so that practical matters might be discussed. I decided to grant an interlocutor determining the penalty, granting warrant for the respondent to be removed to prison, and allowing him until 10am on 1 March 2024 to surrender himself. I set a further hearing for 1 March 2024 and indicated that if the practical concerns had not been dealt with by that time, I could if necessary be addressed at that time.

[31] Junior counsel submitted that it would be necessary to restrict any reporting of the proceedings until such time as the respondent had served his sentence, given the risk that the respondent would be identified on coming into custody or during his time in prison if the timing of his imprisonment were to become known.

[32] Neither of the interim orders that I made on 19 February had been placed before me in chambers with a view to their becoming final, possibly because of the inquiry from the BBC, although that inquiry did not, as I understand it, relate to those orders. I approached the question of reporting restrictions of new, and made further interim orders so that notice of them might be provided to the media in the usual way. I made a further interim order prohibiting the reporting of details that would enable the identification of the respondent or his location, and made an interim order which would in any event expire at the conclusion of the hearing on 1 March 2024 prohibiting reporting generally. I considered that concerns about the risk of identification might have been allayed by then in the light of discussions with the relevant authorities so that no further restriction would be required, or so that it might be possible to formulate a more focused and limited restriction. I directed the court

administration to produce a transcript of the recording of the hearing that took place on 19 February 2024 and for it to be provided to parties so that they might identify any proposed redactions that might be necessary to protect the identity of the respondent before the transcript and/or recording might be made available to the press.