



In the Court Martial

R

v

Marines A – E

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**Order for anonymity of the Defendants and reporting restrictions**

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Background

1. On 22 October 2012 I made an interim order that the names of the Defendants in this case remain anonymous (together with certain reporting restrictions) until 5 November when there would be a full hearing to consider the matter. At that hearing I extended the interim order to 7 November 2012 to enable me to consider all submissions from interested parties.

2. All five Defendants have submitted that the anonymity order should continue until the end of the trial. The Prosecution remains neutral as to whether or not the order should continue and the Press Association submit that the order should be removed. I have received written submissions from Mr Glenser, representing Marine A, which included a statement from Mr Tucker-Jones, a security expert, and written observations from Captain Crozier of the Service Prosecuting Authority. I have also received written submissions objecting to the continuance of the anonymity order from:

- Ms Phillips, Director of Editorial Legal Services at the Guardian News and Media (in advance of the custody hearing on 22 October)
- Mr Dodd, Legal Editor of the Press Association;
- Mr Minchin, West of England Correspondent of the Press Association; and
- Foot Anstey LLP, representing The Herald (daily newspaper from Plymouth)

3. At the hearing on 5 November, notwithstanding two weeks' advance notice, the Press Association were unrepresented. On a joint application from the defence and the prosecution, I considered evidence relating to a security assessment in camera. This was necessary because some of the material was of a highly sensitive or classified nature. As a result the press were unable to test any of the evidence which I heard from the defence expert, but I asked him to comment on the substance of their submissions.

4. I received a document entitled "Royal Marines – Threat Assessment" from a Departmental Security Officer in the Ministry of Defence, citing an assessment from the Joint

Terrorism Analysis Centre, and heard expert testimony from Mr Tucker-Jones. He is a former Defence Intelligence Officer of 20 years' experience and an expert on regional conflicts and counter-terrorism. He is the author of *Rise of Militant Islam* which charts the violent rage of Islamist militants towards the West and is the security and terrorism correspondent of the Journal of International Security.

### The Law

5. The Armed Forces Act 2006, s158 specifies that the Court Martial must sit in open court, subject to any provision made by Court Martial rules. The Armed Forces (Court Martial) Rules 2009, r153 states that the Court may give leave for any name or other matter given in evidence in proceedings to be withheld from the public.

6. The test which I must apply in deciding whether to exercise the power in r153 comes from the House of Lords decision In re Officer L and others [2007] 1 WLR 2135 and the Court Martial Appeal Court decision In re Times Newspapers Ltd and another [2009] 1 WLR 1015. That test was expressed by Latham LJ in the Times Newspapers case (at 1021F):

“In order therefore for us to be entitled to make any order for anonymity for all or any of the soldiers we must be satisfied that either the administration of justice would be seriously affected were we not to grant anonymity or that there would be a real and immediate risk to the life of the soldiers were anonymity not granted. The only other route would be by statute.”

7. This is not a case concerning any effect on the administration of justice, but one where it is said that there would be a real and immediate risk to the life of the Defendants. In those circumstances I have asked myself the following questions:

- a. Viewed objectively, would a risk to the Defendants' lives be created or materially increased if they were not provided with anonymity;
- b. If yes, would the increased risk amount to a 'real and immediate risk' to life; and
- c. If the answer to (a) and (b) was both yes, is it reasonable to grant anonymity in all the circumstances, or could other measures be imposed which would ameliorate that risk.

8. In relation to the question of reasonableness I have been referred to the case of ex parte Kalm Todner [1999] QB 966 in which Woolf LCJ said (at 978B):

“In deciding whether to accede to an application for protection from disclosure of the proceedings it is appropriate to take into account the extent of the interference which is involved. If the interference is for a limited period that is less objectionable than a restriction on disclosure which is permanent. If that restriction only relates to the identity of a witness or a party that is less objectionable than a restriction which involves proceedings being conducted in whole or in part behind closed doors”

### Is there a risk to the Defendants' lives?

9. The Joint Terrorism Analysis Centre (JTAC) has made a threat assessment in relation to these Defendants and other members of the Armed Forces. The JTAC currently assess the threat to the Defendants to be MODERATE, that being possible but not likely, but that is

based on the fact that their names are not in the public domain. That assessment also relates to the underlying threat against all service personnel. Nevertheless, and as a result of that assessment, the Ministry of Defence have placed the Defendants on the “MOD Contingency Threat List”. That means that a number of measures are taken to increase the level of protection afforded to those personnel and their homes. These measures have not been taken for all service personnel.

10. Mr Tucker-Jones interpreted the MOD’s position as accepting that the risk against the Defendants is higher than against other service personnel because they have implemented additional security measures for them. He stated that in his professional assessment if the names of the Defendants were published there would be an increased risk to their lives, particularly from “lone wolves”, that being people who are motivated to act alone, rather than in organised cells and who are more difficult for the intelligence community to track. He also said that a threat would be posed to friends, family and the local community where the Defendants live. He said that there may well be revenge attacks on other members of the British and allied Armed Forces in Afghanistan, caused by the publication of this case, and they could increase if the Defendants’ names were published. However the risk to the individual Defendants would certainly increase if they were named. By naming them their background can be researched through the internet, their names would be posted on Jihadist websites and their names could become the focus of a cause celebre.

11. The Press Association, in their written submission, highlighted the fact that many service personnel who were going to, or returning from, active service in Afghanistan were reported in the press, often for engagement with the enemy which led to the award of gallantry medals. Mr Tucker-Jones said that these good news stories were less likely to be picked up by the Jihadists or other terrorist groups. On the other hand, these Defendants would be exposed to significant and constant media attention. Mr Minchin submitted that he does not accept that service in Afghanistan automatically presents a threat to the lives of service personnel. He also said that in the case of Baha Mousa, which was heard in the Court Martial in 2006/07, there was no anonymity order.

12. Having considered the JTAC assessment, the MOD’s decision to increase security measures for the Defendants and Mr Tucker-Jones’s assessment of the generic threat to the armed forces generally and to the Defendants in particular, I am satisfied that the publication of the Defendants’ names will increase the risk to their lives, and to those of their identifiable families and friends. This conclusion is based on an expert assessment which is not agreed or accepted by the press. I have considered the submissions from the Press Association and particularly the fact that defendants in past cases have been named without any detriment to their lives. However, the security situation has changed since then and I am told that the security services have thwarted a number of potential attacks without their successes being reported. I therefore err on the side of caution in accepting Mr Tucker-Jones’ assessment.

Is there a real and immediate risk to the Defendants’ lives?

13. The answer to this question lies in a security assessment, much of which is classified. I have therefore relied heavily on the testimony of Mr Tucker-Jones and the fact that the MOD has taken additional measures to protect the Defendants. The Press Association had the opportunity to read Mr Tucker-Jones’ assessment, although they did not hear his oral testimony. They suggest that Mr Tucker-Jones assessment is speculative and the conclusion

that can be drawn can be no higher than there may be a real and immediate risk to the lives of the Defendant.

14. Mr Glenser in his written submission, and Mr Tucker-Jones orally, both said that once the names are published they cannot be withdrawn. Mr Tucker-Jones also said that in his opinion the risk to their lives will continue whatever the outcome of the trial. Once they become the focus of attention on Jihadist websites and chat rooms their names will continue to be part of a list of potential targets. Further, he has viewed prosecution evidence which when adduced will increase the risk. Thus even if there is not an immediate risk today, that risk will increase as the trial gains more media attention.

15. Having considered the expert evidence from Mr Tucker-Jones, and the submissions from the parties, I am unable to conclude definitely that there is a real and immediate risk to the Defendants' lives today. However, I am satisfied that there may be a real and immediate risk to the Defendants' lives based on the information which is currently in the public domain, and that the risk will increase significantly when all of the prosecution evidence is disclosed as the trial unfolds. The risk comes from organised terrorist activity and "lone wolves" who are unpredictable. In this respect members of the Armed Forces are entitled to be treated differently from civilians within this country at this moment in history. While they must remain accountable for their actions, and part of that accountability is through open justice, they are also entitled to protection from terrorists who may not be concerned with due process, and who may well attempt revenge attacks. In other words, any assessment of risk must err on the side of the safety of members of the Armed Forces. I am not prepared to take a chance with these men's lives.

#### Is it reasonable to grant anonymity?

16. I considered whether other measures could be taken to protect the Defendants other than the granting of anonymity. None would be satisfactory, particularly as, according to Mr Tucker-Jones, any threat to these Defendants will continue whatever the outcome of the trial. He opined that their names will provide a focus for terrorists. In those circumstances, it is reasonable to grant anonymity. This does not undermine the principle of open justice: their trial will be in public and there is no suggestion that what is alleged to have occurred should be hidden from public scrutiny.

17. If the Defendants are acquitted at trial, then it is right that their identities are protected for the future. As members of the Armed Forces who are placed in harms way, and who undertake risks which do not confront civilians, they are entitled to this additional protection. If they, or any one of them, are convicted then the issue of anonymity will be reassessed.

#### Order

18. I am satisfied that, within the context of this case (including the unpredictability of terrorist attacks and the ongoing operations in Afghanistan) there would be a real and immediate risk to the lives of the Defendants were they to be identified by name. That risk is from Jihadist cells or extremists motivated to act alone either now or in the future and will increase significantly as the case progresses. I therefore make the order relating to anonymity and reporting restrictions attached.

In the Court Martial

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References:

- A. Armed Forces (Court Martial) Rules r153
- B. Contempt of Court Act 1981 s11

1. I direct that the five Defendants in the case of R v Marines A-E remain anonymous. They shall be referred to as Marines A, B, C, D and E, reflecting the order in which they appear on the indictment. In all correspondence and proceedings in relation to this case they will not be referred to by name, but by their letter, and their names shall not be released to the press. Arrangements are to be made to protect their identities at all further public hearings in this case.

2. I further order that there shall be no publication of:

- a. The names and addresses of any Defendant;
- b. Any image or likeness of any Defendant that would enable him to be identified;
- c. The names and addresses of the Next of Kin of any Defendant.

3. This order will remain in force until the Court Martial has delivered its finding in relation to each of the Defendants, after which this order will be reviewed.

