Case Reference:2012CM00442

Regina

-v-

Marines A, B and C

and

The Media

Applicant

and

The Ministry of Defence

Interested Party

Ruling on anonymity following verdict

Introduction

1. On 6 November 2012 I issued an order protecting the identities of five marines who had been charged with murder. I directed that they were to be known as Marines A – E and that there should not be any publication of their names and addresses, any image or likeness which would enable them to be identified and the names and addresses of their Next of Kin. I stated that the order would remain in force until the Court Martial had delivered its finding (verdict) after which the order would be reviewed. In the narrative accompanying the order I stated that if any of the defendants are acquitted at trial, then it would be right that their identities should be protected for the future. I said that 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. The Prosecution offered no evidence against Marines D and E and they were acquitted sometime before the commencement of this trial and they have taken no further part in these proceedings, although they were referred to in evidence by their designated cypher.

2. I have now been asked by Miss Kissin who represent the media to review this order before the finding, so that the media know the parameters of what they may report as soon as the finding is announced. They submit that the anonymity order should be lifted so that the names of the defendants may be reported. Those submissions have been supported by the Prosecution, who also submit that the order be lifted in relation to Marines D and E. Those representing the defendant resist the application and submit that the order should be extended. Those representing D and E were not present but have submitted a short statement to the

Court resisting the application and submitting that no variation should be made until they have had the opportunity to address the Court.

The Law

3. The law was briefly stated in the narrative which accompanied the original order for anonymity on 6 November 2012. Miss Kissin submitted that the focus of my consideration should be whether there is a real and immediate risk to the lives of the defendants and their families. The House of Lords provided guidance on how to apply this test in In re Officer L and others [2007] UKHL 36. Lord Carswell said (para 20) "The wording of the test (real and immediate) has been the subject of some critical discussion but its meaning has been aptly summaries in Northern Ireland by Weatherup J in In re W's Application [2004] NIQB 67 at 17, where he said that "a real and immediate risk is one that is present and continuing." It is in my opinion clear that the criterion is and should be one that is not readily satisfied: in other words, the threshold is high…….. In my opinion the standard is constant and not variable with the type of act in contemplation and is not easily reached. Moreover, the requirement that the fear has to be real means that it must be objectively well-founded…….. in assessing the existence of a real and immediate risk for the purposes of Article 2, the issue does not depend on the subjective concerns of the applicant but on the reality of the existence of the risk".

Submissions on behalf of the Defendants

4. Mr Glenser spoke on behalf of Marine A, but Counsel representing Marines B and C adopted his submissions. He relied on the expert opinion of Mr Anthony Tucker-Jones who in a hastily prepared statement, and when giving oral testimony, concluded that in his "expert opinion, objectively analysing material available, I am of the firm view that there is a real and immediate risk to the individuals and their families if identities and addresses were to become known. The outcome could be catastrophic." He said that in his opinion, nothing had changed since my order of November 2012. In the event of a conviction he had little confidence the HMP would be able to protect them unless they were segregated. He said that publication of their names would make them "poster boys" for Islamist radicals and Jihadists, their names will "go viral" very quickly. This incident will be seen as a transgression foremost against a Muslim and, therefore, a transgression against the wider Muslim community. Mr Tucker-Jones also warned that if the defendants were convicted and protected in prison, there would be a risk of attacks on their families who would be soft targets.

5. Mr Glenser said that the risks previously identified have, if anything increased since video clip 5 had been played in Court and there is a need for continued protection. If their names were published, on conviction the defendants would have to be kept within a VPU and if acquitted they would be at risk from lone wolf, Jihadists who will not respect the Courts determination of innocence.

Submissions on behalf of the Media and Prosecution

6. Miss Kissin submitted that there simply is no real and immediate risk to life which has been objectively verified. It is a high threshold which must not depend on the subjective concerns of the individuals themselves. She said, citing the Court of Appeal in In re Trinity Mirror plc [2008] EWCA Crim 50 at 32, that it is: "impossible to over emphasise the importance to be attached to the ability of the media to report criminal trials. In simple terms this represents the embodiment of the principle of open justice in a free country. An important aspect of the public interest in the administration of criminal justice is that the identity of those convicted and sentenced for criminal offences should not be concealed. Uncomfortable though it may frequently be for the defendant that is a normal consequence of his crime."

7. She said that if convicted of murder the defendant(s) will be in prison for a long time and no risk to life can arise from their names being in the public domain. There is no evidence that they will be at particular risk from the prison population. She said there is no specific evidence of any heightened risk to any of the families. None of them have given evidence in the proceedings and they are in no different position that the families of others convicted of murder. Finally there can be no increase in risk to Armed Forces personnel generally – any increased risk would be from the fact of trial not the publication of the names of the defendants.

8. Mr Perry said that the Prosecution support the media's application irrespective of the verdict in each case on the basis that the high threshold required had not been satisfied. He also submitted that the anonymity order in respect of Marines D and E should be discharged. He made that submission on basis that D and E are in no different position from other members of patrol who were identified. Evidence was also heard from other individuals who were serving in the area and no concern has been raised in relation to any real and immediate risk.

9. He said that there was no power to make an order in respect of families or next of kin because no information had been withheld during course of proceedings.

10. He submitted that taking Mr Tucker-Jones assertions at their highest they do not satisfy the high threshold required by Article 2 of the convention because he expresses himself in the conditional and it follows his assessment of risk is contingent and not one that is real and immediate. Mr Perry submitted there is simply no real and immediate risk and the Court should resist the temptation of making an order erring on the side of caution.

11. Finally, the State is under a continuing obligation to provide safety for its citizens. To the extent suggested that the State would breach their Article 2 obligations that is no basis for the Court to proceed on a contingent possibility that the State and its agents would fail to fulfil those obligations. :

Decision

12. The first submission from Mr Glenser was that nothing had changed in relation to the risk since November 2012 and if anything the risk has increased. With respect, I disagree. A number of incidents have occurred in the past year which have changed the context:

a. There has been a fatal attack on Fusilier Rigby by a "lone wolf" which suggests that the general risk to all members of the Armed Forces. This was a random attack and adds no weight to an argument that specific personnel may be targeted.
b. Staff Sergeant Bales was convicted by a Court Martial in the USA for the murder of 16 Afghan villagers in March 2012. His details and image have been published. As an aside I am surprised that an expert in the field had not studied the case and been able to give factual advice based on those circumstances.
c. Importantly, the names of other members of the patrol who were present when the Afghan insurgent was shot by Marine A have been mentioned during the trial. No objection has been taken and I have not been informed that there is any risk aside from the general risk faced by all service personnel as far as they are concerned.
d. Finally the MOD are no longer troubled by this issue. The Prosecution is instructed by the Director of Service Prosecutions, and they have made positive submissions that the names should be released.

13. The evidence of real and immediate risk comes from Mr Tucker-Jones. I am afraid his opinion both in his written submissions and orally was unconvincing. When tested by Mr Perry he was unable to give objectively well founded reasons for his conclusions and he conceded that this was a subjective opinion, albeit based on 20 years experience in the field. That is not to diminish his expertise, but in this case he has been unable to point to anything which enables me to say that the high threshold has been reached.

14. As far as the protection of a convicted defendant in prison is concerned, Mr Tucker-Jones evidence was speculative based on published statistics. He has no expertise in the regimes established in prisons, nor whether there is any real risk of attacks from other prisoners. His suggestion that they might be at risk from people who had previously supported them but had been let down as the evidence has emerged at trial is fanciful.

15. As I have said previously, the principle of open justice is immutable and must only be restricted where either the administration of justice would be seriously affected without the grant of an order for anonymity or there would be a real and immediate risk to the personnel were anonymity not granted. This is not a case relating to the administration of justice and I am not satisfied that those who seek a continuance of the anonymity order have demonstrated that the fear that the marines' lives will be at risk is objectively well-founded.

Defendants who may be convicted

16. If any of the defendants are convicted of murder they will be identified by name, rank and unit.

Defendants who may be acquitted

17. I have reviewed my opinion that the names of acquitted defendants should be not be published. For me to continue the order for anonymity I must be satisfied that there is a real and continuing risk that their Article 2 rights may be breached by the publication of their names. At the time of my original order in November 2012 I was satisfied that this high threshold had been passed, but matters have changed since then. The names of other members of the patrol who are also not guilty of murder – as any defendants who are acquitted would be – have been stated in the trial without objection. The MOD have not made any submissions and the Prosecution, on instruction, now support the release of their names.

18. I therefore direct that at the end of the trial the order for anonymity in relation to any acquitted defendant is also rescinded. That includes Marines D and E, although I am conscious that they have not been present or represented to make any submissions. Nevertheless in my view there is nothing they could add which would alter my view.

19. No home addresses and next of kin have not been mentioned in this trial and there is no obligation on the Prosecution to disclose them. It is enough that a service person be identified in the manner I have already specified by name, rank and unit.

Appeal

20. Counsel for the defendants have indicated that they wish to appeal to the Court Martial Appeal Court against this ruling under the Armed Forces (Court Martial) Rules 2009 r 154. Although that rule allows an appeal against an order restricting the access of the public or publication of a report of the trial, he argues *mutatis mutandis* it must apply to an order to rescind a previous order for anonymity.

21. Mr Perry submitted (and I agree) that there is no express power in the Rules which permit an appeal against an order which does not derogate from the principle of open justice. However, he concedes that this is an important point which should be determined by the Court Martial Appeal Court and, if any of the defendants are convicted, that determination should be before sentence.

22. Given the sensitivities of the case and the fact that once the names are in the public domain there is no going back, I believe it appropriate that the interested parties have the opportunity to appeal against my order. Such an appeal will be to

determine whether there is any right of appeal and if there is to argue the merits. Therefore I make the following order:

a. The anonymity order dated 6 November 2012 shall remain in force pending further determination by the CMAC;
b. Any appeal against my order that the names of Marines A – E may be published must be lodged with the CMAC by Friday 15 November. If no such appeal is lodged by that date the names of Marines A to E may be published.

HHJ Jeff Blackett
Judge Advocate General 8 November 2013