Neutral Citation No.: [2008] NIMAG 01

Ref:	**Mag01**

Judgment: approved by the Court for handing down

Delivered:	**03/10/08**

(subject to editorial corrections)

Director of Public Prosecutions Complainant

Damien William McKenna Defendants
Sean Gerard Patrick McConville
Gary Toman

Ruling

1. The three accused are jointly charged with three explosives offences, namely conspiracy to cause an explosion on a date unknown between 28 March 2007 and 6 April 2007, and possession of an explosive substance, namely an improvised mortar bomb, with intent, and in suspicious circumstances, between the same dates.

2. The prosecution has requested the court to conduct a preliminary inquiry under Articles 31-34 of the Magistrates' Courts (NI) Order 1981, and has furnished papers to the court and served them on the accused in accordance with those provisions. In response, the accused have exercised their right under Article 34(2) of the Order to require fourteen prosecution witnesses to attend the committal proceedings and give evidence on oath.

3. The prosecution then lodged a number of applications with the court in regard to some of those witnesses. This ruling relates to those applications, which were opposed by the accused, and were heard on 29 September 2008.

4. The applications are as follows:-

(i) an application under section 3 of the Criminal Evidence (Witness Anonymity) Act 2008 for witness anonymity orders. This application requests that witnesses referred to in the committal papers as Soldiers B,C,D,E,F,G,H and I, be permitted to be referred to by those letters when giving evidence. It includes requests that, in order to preserve the anonymity of the witnesses, their names are withheld from the accused and their legal representatives, they are not asked questions which might lead to their identification and they are screened, when giving evidence, from everyone except the Judge, the prosecution and the legally qualified representatives of the accused;

(ii) an application under Article 80A of the Police and Criminal Evidence (NI) Order 1989 for the court to give leave for six witnesses who are soldiers, namely Soldiers B,C,E,F,H and Stuart Cockburn to be permitted to give oral evidence at the committal through a live link from Afghanistan, where they are presently serving;

(iii) an application under Articles 18 and 20 of the Criminal Justice (Evidence) (NI) Order 2004 for the statements of four witnesses who are soldiers, namely Soldiers

F,G,H and I to be admitted as hearsay evidence and read at the committal proceedings.

5. At the hearing on 29 September, the prosecution called oral evidence from three witnesses, namely Detective Superintendent David McConville, Mr.Chris Keay, an Assistant Director in the Ministry of Defence, and Mr.William Byatt, another senior civil servant in the Ministry of Defence, in support of their applications. The prosecution also placed before the court two Public Interest Immunity Certificates from The Right Honourable Bob Ainsworth M.P., dated 16 July 2008 and 26 September 2008. I should make it clear that, while the second of those certificates refers to a schedule with a protective marking of "SECRET UK EYES ONLY" which was only being provided to the resident magistrate, no such schedule was, in the event, supplied.

6. As a background to the applications, I will briefly summarise the evidence on which the prosecution seek to rely to prove the charges against the accused.

7. On 29 March 2007, a number of soldiers were deployed on surveillance duties in the area of the Cornakinnegar Road, Lurgan. At about 8.45 p.m., Soldier B observed a male, whom he identified as Damien McKenna, walking countrywards with two other males. Surveillance footage, filmed by a camera controlled by Soldier F, shows three males, alleged by the prosecution to be the three seen by Soldier B, walking down a lane into a field. The group remained in the field for about one hour, and were seen at three different points.

8. At 10 p.m., Soldier E saw a group of men walking up the lane from the field, and then turn towards Lurgan. He followed them and was able to count four in the group. Soldier D also saw the group of four men, and saw all four get into a Nissan Primera car, which drove off towards Lurgan town centre. The car was stopped by police a short distance away. In the car were the three accused and a fourth man. All were arrested and searched. McKenna and McConville had dirty hands and wet and dirty trousers.

9. McKenna, who was the front seat passenger, was found to have on him items which included a circuit tester, wire cutters and strippers, and gloves. McConville, who was the driver, was found to have gloves. A sock was found under the front passenger seat.

10. The four accused were interviewed, but made no admissions. A search of the field proved negative, although, as the field bordered the railway track, the search concentrated on that area. The accused were then released.

11. Five days later, on 5 April, the field was searched again. During this search, an improvised mortar and launch tube were found at a point where it is alleged the group of men had been standing for about ten minutes. The accused were re-arrested, although it was not possible to find the fourth man who had been in the car.

12. Forensic examination found fibres indistinguishable from fibres from the gloves found in the possession of McConville, on the mortar shell, launch frame and a tape lift from the gate to the field. Fibres indistinguishable from the sock found under the

front seat of the car were found on the mortar launch frame. DNA from this sock matched Toman.

13. The prosecution allege that the offences were part of dissident Republican activity against members of the security forces, and part of an active campaign in large areas of Northern Ireland.

14. I now turn to consider the prosecution applications. In the course of argument, it became apparent that the defence's real concerns and objections related to the application for anonymity and screening. The other two applications were less controversial, as a result of which I gave oral rulings on them on 29 September, while indicating that I would give reasons in writing later. I will deal briefly with those matters first.

Live Link

15. The relevant Article of the 1989 Order reads as follows:-

80A. - (1) In this Article "live link" means a live television link or other arrangement whereby a witness, while absent from the courtroom or other place where the proceedings are being held, is able to see and hear a person there and to be seen and heard by-

(a) the judge and the jury (if there is one);
(b) legal representatives acting in the proceedings; and
(c) any interpreter or other person appointed to assist the witness.

(2) Where two or more legal representatives are acting for a party to the proceedings, paragraph (l)(b) is to be regarded as satisfied in relation to those representatives if the witness is able at all material times to see and be seen by at least one of them.
(3) Where the court gives leave, a witness (other than the accused) who is outside the United Kingdom may give evidence through a live link in proceedings to which this Article applies.
(4) This Article applies-

(a) to preliminary investigations or preliminary inquiries into indictable offences;
(b) to trials on indictment;
(c) to appeals to the Court of Appeal; and
(d) to hearings of references under section 10 of the Criminal Appeal Act 1995.

(5) A statement made on oath by a person outside the United Kingdom and given in evidence through a link by virtue of this Article shall be treated for the purposes of Article 3 of the Perjury (Northern Ireland) Order 1979 as having been made in the proceedings in which it is given in evidence.
(6) Where in proceedings before a magistrates' court-

(a) evidence is given by means of a live link by virtue of this Article, but
(b) suitable facilities for receiving such evidence are not available at any court-house in which that court can (apart from this paragraph) lawfully sit,

the court may sit for the purposes of the whole or any part of those proceedings at a place designated by the Lord Chancellor, after consultation with the Lord Chief Justice, as a place having facilities to receive evidence given through a live link.
(7) Without prejudice to any power to make such rules, magistrates' courts rules, Crown Court rules and rules of court may make such provision as appears to the authority making them to be necessary or expedient for the purposes of this Article.

(8) References in this Article to a person being able to see or hear, or be seen or heard by, another person are to be taken as not applying to the extent that either of them is unable to see or hear by reason of any impairment of sight or hearing.
(9) In this Article, "judge" includes, in relation to a magistrates' court, resident magistrate..

16. Article 80A does not set out any factors to be taken into account in deciding whether or not to grant leave under paragraph (3). It seems reasonable to take into account the cost and practicability of requiring the attendance of the witnesses in person. I am satisfied that the cost would be considerable and further, that there would be significant disruption to ongoing military activities in Afghanistan.

17. The accused objected to the application on the grounds that the witnesses refer to maps and diagrams in their statements, and there may be practical difficulties in cross-examining them. I would pause to note that the form of taking depositions at committal, where both the questions in cross-examination and the replies have to be typed out, already makes cross-examination difficult. Courts are now well used to witnesses giving evidence by way of live link, both at committal and at trial, and I do not consider that there are any practical difficulties which cannot be overcome. As it happens, in the course of oral argument, the legal representatives for the accused did not press their objections.

18. I therefore accede to the application that Soldiers B, C, E, F, and Stuart Cockburn be permitted to give evidence by way of live link from Afghanistan. As Craigavon is not presently a designated court for hearing evidence from abroad by way of live link, arrangements will have to be made to hold the committal elsewhere. The Clerk will notify the parties accordingly.

Hearsay

19. The relevant provisions of the 2003 Act read as follows:-

18. - (1) In criminal proceedings a statement not made in oral evidence in the proceedings is admissible as evidence of any matter stated if, but only if-

(a) any provision of this Part or any other statutory provision makes it admissible,
(b) any rule of law preserved by Article 22 makes it admissible,
(c) all parties to the proceedings agree to it being admissible, or
(d) the court is satisfied that it is in the interests of justice for it to be admissible.

(2) In deciding whether a statement not made in oral evidence should be admitted under paragraph (1)(d), the court must have regard to the following factors (and to any others it considers relevant)-

(a) how much probative value the statement has (assuming it to be true) in relation to a matter in issue in the proceedings, or how valuable it is for the understanding of other evidence in the case;
(b) what other evidence has been, or can be, given on the matter or evidence mentioned in sub-paragraph (a);
(c) how important the matter or evidence mentioned in sub-paragraph (a) is in the context of the case as a whole;
(d) the circumstances in which the statement was made;
(e) how reliable the maker of the statement appears to be;

(f) how reliable the evidence of the making of the statement appears to be;
(g) whether oral evidence of the matter stated can be given and, if not, why it cannot;
(h) the amount of difficulty involved in challenging the statement;
(i) the extent to which that difficulty would be likely to prejudice the party facing it.

(3) Nothing in this Part affects the exclusion of evidence of a statement on grounds other than the fact that it is a statement not made in oral evidence in the proceedings.

20. - (1) In criminal proceedings a statement not made in oral evidence in the proceedings is admissible as evidence of any matter stated if-

(a) oral evidence given in the proceedings by the person who made the statement would be admissible as evidence of that matter,
(b) the person who made the statement ("the relevant person") is identified to the court's satisfaction, and
(c) any of the five conditions mentioned in paragraph (2) is satisfied.

(2) The conditions are-

…

(c) that the relevant person is outside the United Kingdom and it is not reasonably practicable to secure his attendance;

20. I am satisfied that Soldiers F and H are outside the United Kingdom and, while it would be possible to secure their attendance at court in Northern Ireland, it is not reasonably practicable to do so. However, a live link is available in this case, and is going to be used by other soldiers anyway. Soldiers F and H could clearly "attend" to give evidence in that manner and it is reasonably practicable for them to do so. In those circumstances, I hold that they do not fall within section 20(2)(c).

21. I therefore turn to consider the evidence of all four soldiers under section 18. I bear in mind that these are committal proceedings and not a trial. The issue for the court is whether there is sufficient evidence to return the accused for trial, not whether they are guilty of the offences. The evidence of three of the four soldiers, namely Soldiers G, H and I relates only to the handling and storage of an exhibit. Counsel for the accused did not proffer any good reason for requiring the attendance of these witnesses, and, in effect, conceded that their attendance is not necessary. Considerable expense is likely to be involved in requiring them to give oral evidence. Applying the factors set out in section 18(2), I am satisfied that it is in the interests of justice for their statements to be admitted as hearsay at the committal.

22. The prosecution conceded that Soldier F is different. He was in charge of a camera which filmed images which are of importance to the prosecution case. The prosecution case is that the film shows persons, who can be shown by other evidence to be the defendants, in the vicinity of the place where the explosive device was found. In my view, if it is practicable for Soldier A to give oral evidence, which, in the light of my ruling on the live link, it is, then he should give oral evidence. I therefore refuse the application to admit his evidence as hearsay.

Anonymity

23. I reserved judgment on this application and now set out my ruling.

24. The relevant provisions of the 2008 Act read as follows:-

2 Witness anonymity orders
(1) In this Act a "witness anonymity order" is an order made by a court that requires such specified measures to be taken in relation to a witness in criminal proceedings as the court considers appropriate to ensure that the identity of the witness is not disclosed in or in connection with the proceedings.
(2) The kinds of measures that may be required to be taken in relation to a witness include measures for securing one or more of the following–
(a) that the witness's name and other identifying details may be–
(i) withheld;
(ii) removed from materials disclosed to any party to the proceedings;
(b) that the witness may use a pseudonym;
(c) that the witness is not asked questions of any specified description that might lead to the identification of the witness;
(d) that the witness is screened to any specified extent;
(e) that the witness's voice is subjected to modulation to any specified extent.
(3) Subsection (2) does not affect the generality of subsection (1).
(4) Nothing in this section authorises the court to require–
(a) the witness to be screened to such an extent that the witness cannot be seen by–
(i) the judge or other members of the court (if any);
(ii) the jury (if there is one); or
(iii) any interpreter or other person appointed by the court to assist the witness;
(b) the witness's voice to be modulated to such an extent that the witness's natural voice cannot be heard by any persons within paragraph (a)(i) to (iii).
(5) In this section "specified" means specified in the witness anonymity order concerned.

3 Applications
(1) An application for a witness anonymity order to be made in relation to a witness in criminal proceedings may be made to the court by the prosecutor or the defendant.
(2) Where an application is made by the prosecutor, the prosecutor–
(a) must (unless the court directs otherwise) inform the court of the identity of the witness, but
(b) is not required to disclose in connection with the application–
(i) the identity of the witness, or
(ii) any information that might enable the witness to be identified,
to any other party to the proceedings or his or her legal representatives.
(3) Where an application is made by the defendant, the defendant–
(a) must inform the court and the prosecutor of the identity of the witness but
(b) (if there is more than one defendant) is not required to disclose in connection with the application–
(i) the identity of the witness, or
(ii) any information that might enable the witness to be identified,
to any other defendant or his or her legal representatives.
(4) Accordingly, where the prosecutor or the defendant proposes to make an application under this section in respect of a witness, any relevant material which is

disclosed by or on behalf of that party before the determination of the application may be disclosed in such a way as to prevent–
(a) the identity of the witness, or
(b) any information that might enable the witness to be identified,
from being disclosed except as required by subsection (2)(a) or (3)(a).
(5) “Relevant material” means any document or other material which falls to be disclosed, or is sought to be relied on, by or on behalf of the party concerned in connection with the proceedings or proceedings preliminary to them.
(6) The court must give every party to the proceedings the opportunity to be heard on an application under this section.
(7) But subsection (6) does not prevent the court from hearing one or more parties in the absence of a defendant and his or her legal representatives, if it appears to the court to be appropriate to do so in the circumstances of the case.
(8) Nothing in this section is to be taken as restricting any power to make rules of court.

4 Conditions for making order
(1) This section applies where an application is made for a witness anonymity order to be made in relation to a witness in criminal proceedings.
(2) The court may make such an order only if it is satisfied that Conditions A to C below are met.
(3) Condition A is that the measures to be specified in the order are necessary–
(a) in order to protect the safety of the witness or another person or to prevent any serious damage to property, or
(b) in order to prevent real harm to the public interest (whether affecting the carrying on of any activities in the public interest or the safety of a person involved in carrying on such activities, or otherwise).
(4) Condition B is that, having regard to all the circumstances, the taking of those measures would be consistent with the defendant receiving a fair trial.
(5) Condition C is that it is necessary to make the order in the interests of justice by reason of the fact that it appears to the court that–
(a) it is important that the witness should testify, and
(b) the witness would not testify if the order were not made.
(6) In determining whether the measures to be specified in the order are necessary for the purpose mentioned in subsection (3)(a), the court must have regard (in particular) to any reasonable fear on the part of the witness–
(a) that the witness or another person would suffer death or injury, or
(b) that there would be serious damage to property,
if the witness were to be identified.

5 Relevant considerations
(1) When deciding whether Conditions A to C in section 4 are met in the case of an application for a witness anonymity order, the court must have regard to–
(a) the considerations mentioned in subsection (2) below, and
(b) such other matters as the court considers relevant.
(2) The considerations are–
(a) the general right of a defendant in criminal proceedings to know the identity of a witness in the proceedings;
(b) the extent to which the credibility of the witness concerned would be a relevant factor when the weight of his or her evidence comes to be assessed;

(c) whether evidence given by the witness might be the sole or decisive evidence implicating the defendant;
(d) whether the witness's evidence could be properly tested (whether on grounds of credibility or otherwise) without his or her identity being disclosed;
(e) whether there is any reason to believe that the witness–
(i) has a tendency to be dishonest, or
(ii) has any motive to be dishonest in the circumstances of the case,
having regard (in particular) to any previous convictions of the witness and to any relationship between the witness and the defendant or any associates of the defendant;
(f) whether it would be reasonably practicable to protect the witness's identity by any means other than by making a witness anonymity order specifying the measures that are under consideration by the court.

25. This is new legislation, passed by Parliament as a response to the decision of the House of Lords in the case of R v Davis. In that case, the House of Lords held that the common law did not allow for evidence to be given anonymously in criminal cases. Legislation was the only means whereby that could be permitted. Further, on the particular facts of that case, the House of Lords found that the steps taken to preserve the anonymity of some witnesses had rendered the trial unfair. However, it is implicit in the reasoning of their Lordships that the fact that some evidence has been given anonymously will not automatically render a trial unfair.

26. In this case, the defence sought to argue that the 2008 Act is incompatible with Article 6 of the European Convention on Human Rights, and asked me to make a declaration to that effect. Even if I agreed with the defence argument, which I do not, I have no power to make such a declaration. I am bound to apply the 1998 Act, interpreting it, insofar as I can, consistently with the Convention.

27. The defence have also asked me to take no account of the two Public Interest Immunity Certificates, as the minister did not attend to give evidence on oath and be cross-examined. I do not accept the defence submission. PII Certificates are a recognised method whereby the Government can make known to a court concerns about the disclosure of information. They do not bind the court. The court can take account of the fact that the minister is not available for cross-examination. In any event, in this case the relevant matters set out in the two Certificates have also been covered by written statements and oral evidence from Detective Superintendent McConville and Mr. Keay and oral evidence from Mr.Byatt, all of whom were cross-examined. I regard this as the primary evidence in support of the application, and I make it clear that I would have reached the same conclusions on the basis of that evidence alone, without reference to the PII Certificates.

28. I now turn to the conditions set out in the Act. In accordance with section 3(3)(a), the prosecution have informed the court of the identity of the witnesses. In accordance with section 3(6), the accused have been given an opportunity to be heard.

29. Section 4(2) states that the court may make a witness anonymity order only if it is satisfied that Conditions A to C are met. I pause to observe that the court can only make an order if the conditions are met, but retains a discretion whether or not to make an order even if satisfied that the conditions are met. The defence argued that, in accordance with normal practice in criminal cases, satisfied means satisfied beyond

reasonable doubt. I do not accept that. When one analyses the matters about which the court must be satisfied, it is clear to me that they are matters of judgment rather than matters of fact. I agree with the submission of the prosecution that it is neither appropriate nor helpful to analyse the test in terms of a standard of proof applicable solely to matters of fact.

30. Having said that, the prosecution have presented some factual evidence to the court in support of their application, and I consider it appropriate that, in reaching a final decision, I rely only on facts that have been proved to the criminal standard.

31. In considering the conditions, and whether they are met, I found considerable assistance in the judgment of Hart J. in R v Grew and others. While that case pre-dated the House of Lords judgment in R v Davis and the 2008 Act, the similarities between the applications, and the similarities between the principles applied by Hart J. and the conditions set out in the statute, are obvious.

32. Section 5 states that, when deciding whether conditions A to C are met, the court must have regard to the considerations set out in section 5(2) and such other matters as the court considers relevant. On reading the considerations in section 5(2), it is immediately apparent that they are really relevant to Condition B, and to the overall decision whether to make an order, bearing in mind that section 4(2) gives the court a discretion whether to make an order. While I bear them in mind in considering whether Conditions A and C are met, I only propose to deal with them in detail in considering Condition B and my final decision. I propose to deal with the Conditions in that order.

33. I bear in mind that the soldiers give different evidence. Soldier B gives a description of the activities of various people and purports to identify McKenna as one of those people. Soldiers B-E give descriptions of the activities of various people without purporting to identify anyone. Soldier F was responsible for the camera which was filming from above, and Soldiers G-I only give continuity evidence in respect of the film. Once again, these differences are less significant to the decision whether Conditions A and C are met, but they are relevant to Condition B, and I will only refer to them in any detail in considering Condition B.

34. Finally, before turning to the Conditions separately, I note that the court has to consider whether each of the measures requested is necessary. When referring to the making of an order, I am referring to an order for all the measures requested except where I state otherwise.

Condition A

35. I am satisfied, from the evidence of Detective Superintendent McConville, Mr.Keay and Mr.Byatt, supported by the PII Certificates, that the soldiers concerned are highly trained, and capable of carrying out difficult and dangerous surveillance activities. Mr.Byatt said, and I accept, that the number of special forces is only a small fraction of the total number of soldiers in the army, and the number with the particular skills of the soldiers in this case is only a small fraction of the number of soldiers in special forces. Their skills are rare and highly valued. Mr.Byatt estimated the cost of training one of these soldiers as being in excess of £200,000. The defence suggested

to all three witnesses that this application was really only about saving money. In response, Mr.Byatt pointed out that many soldiers who volunteer for these duties do not pass the rigorous testing process, so it is not simply a matter of allocating more money in order to replace them, leaving aside the time that such training takes.

36. Many, if not all, of the eight soldiers concerned are now out of Northern Ireland. It is clear, however, that they are performing similar duties elsewhere, and could be required to return to Northern Ireland in the future. I am satisfied that, if their identities were to become known, it could seriously compromise their ability to perform their duties. If they were to continue performing such duties, the risks to their lives would be greatly increased. The likely consequence is that they would have to be moved to other duties, or, at the very least, limited as regards the places in which they could operate. It is clear to me that it is very much in the public interest that the security forces should have available to them, when necessary, highly trained surveillance soldiers as part of their operations against terrorism and other serious crime. I am satisfied that disclosure of their identities would cause real harm to the public interest. I am therefore satisfied, under section 4(3)(b), that a witness anonymity order is necessary in order to prevent real harm to the public interest.

37. In reaching that conclusion, I have given particular consideration to whether it is necessary to screen the witnesses from the accused. I am clear that the Act contains such a power, since section 2(2)(d) contains a power for the court to order the witness to be screened to any specified extent, and section 2(4)(a) does not preclude it. In my view, the measures necessary include screening from the accused. If the accused are able to see the soldiers, then their ability to perform their duties in Northern Ireland in the future will be compromised. It is not realistic, as the defence suggested, to imagine that the soldiers will only be prevented from participating in operations against these accused or their immediate associates. Northern Ireland is too small for such a view to be taken.

38. Having reached that conclusion, it is unnecessary for me to rule on whether the test in section 4(3)(a) is met. In that regard, I take a similar approach to that adopted by Hart J. in R v Grew and others. I agree with his view that the two grounds overlap to some extent. In this case, the defence sought to pour scorn on the idea that the soldiers could be too afraid to give evidence without the benefit of anonymity, when thousands of police officers and civilians gave evidence in their own names in open court through the height of the troubles. Of course, as pointed out by the prosecution, the test is not fear, but rather safety. I am satisfied that the greatest risk to the soldiers' safety would arise if they were to continue in the same duties. That is the main reason why their ability to perform those duties would be compromised.

Condition C

39. I have summarised the facts above. The charges are serious and it is important that the criminal process should operate to determine whether the accused are guilty, in which case they should be punished accordingly, or not guilty, in which case they should be released. The evidence of the soldiers, taken together, is an important part of the case, although it is obvious that some are more important than others. Even allowing for that fact, I am satisfied that it is important that all the soldiers should testify.

40. Mr.Keay gave evidence that he spoke to all the soldiers by telephone. Each indicated that, if protective measures were not available, they would be unwilling to testify, for reasons which included fear for their own safety. In addition, officers in their chain of command confirmed that they would not require the soldiers to testify unless suitable steps are taken to preserve their anonymity.

41. Without the soldiers, the evidence is likely to be considered insufficient to proceed and the charges are likely to be withdrawn. While there may be cases of such public importance that the authorities will be prepared to require soldiers performing the same duties as those in this case to give evidence even if their identity is revealed, I do not believe that this is such a case. Whether the case proceeds or not, I am satisfied that the soldiers will not testify if a witness anonymity order is not made.

42. Overall, I am satisfied that it is necessary to make the order in the interests of justice by reason of the fact that it appears to the court that it is important that the witnesses should testify and they will not testify if the order is not made.

Condition B

43. The first point to make is that Condition B refers to “fair trial” when the proceedings before the court are committal proceedings. On one narrow view, any order made in this court will have no effect on the fairness of the trial, because, in the event of a return for trial, the prosecution will have to make a fresh application to the trial judge.

44 However, that would be an absurd view. The better approach is to regard fair trial as a process, of which committal proceedings are one part. One can then regard Condition B as requiring the court to be satisfied that any order would be consistent with this part of the process being fair to the defendant. That enables the court to take account of the distinct purpose of committal proceedings, namely to decide whether the accused have a case to answer, not whether they are guilty or not guilty.

45. As stated above, section 5(2) sets out a number of considerations to be taken into account when deciding whether Conditions A to C, and, in my view, particularly B, are met.

46. I accept that there is a general right for a defendant in criminal proceedings to know the identity of a witness in the proceedings. Clearly, it is not to be regarded as an unqualified right.

47. The evidence of the soldiers is not the only evidence. It is backed up by the film itself (allowing for the fact that it is proved by one of the soldiers), the evidence of the police officers about the circumstances of the arrest and the items found in the searches of the accused and the car, and by the forensic evidence. There may be an issue whether the evidence of the soldiers could be described as “decisive” in those circumstances. There are cases in which the prosecution need to prove a series of matters, and a failure to prove any of them will result in the failure of the case, so they could all be described as decisive. I approach this application on the basis that the evidence of the soldiers as a whole appears to me to be decisive in the respect that the

case could probably not proceed without it. That does not mean that the evidence of any one of them could be regarded as decisive in itself.

48. It is clear that the Act does not preclude anonymous evidence from being the sole or decisive evidence implicating the accused. Nor is it clear that Convention jurisprudence precludes it. In Davis, at [87], Lord Mance stated :-

> "The court's reliance, in a case concerning anonymous evidence, on principles governing the use of out of court statements by identified witnesses, coupled with the citation from Kok v Netherlands, again suggests that, even in relation to anonymous evidence, there may be no absolute requirement that such evidence should not be sole or decisive factor in conviction."

At [89] he observed that:

> "It is considerably less certain, for the reasons I have mentioned in paragraph [84]-[86] above, that there is an absolute requirement that anonymous testimony should not be sole or decisive evidence, or whether the extent to which such testimony is decisive may be no more than a very important factor to balance on the scales. I doubt with the Strasbourg Court has said the last word about this.

49. The reference by Lord Mance to "the extent to which [the] testimony is decisive" supports the view that the question whether evidence can be described as decisive is not always clear cut, and can be a matter of degree. That, in turn, in my view, is a reason why it should be a factor in reaching a decision as to anonymity, as opposed to precluding it. In accordance with the provisions of the Act, I take into account my conclusion that the evidence of the soldiers is essential to the prosecution case. I regard that as a very important factor against allowing anonymity.

50. In this case, there will clearly be a particular issue over the credibility of Soldier B as regards his identification of McKenna. While there is film of men in the area, and while other soldiers see groups of men at various times, there appears to be no other identification of any of the accused until they are stopped in the car. The identification of McKenna is therefore important to the case of all three accused, because the other two were arrested with him.

51. There are also likely to be issues about the credibility of Soldiers B-E in regard to their evidence generally, including their descriptions of what people or groups of people they saw and when and where they saw them. It is harder for the court to predict the extent to which the credibility of soldiers F-H will be an issue. On the face of the papers, no obvious issues arise and none were drawn to my attention by the defence, other than a general attack on the credibility of all the soldiers arising from the fact that they were undercover soldiers operating in an environment with a long history of hostility to the army.

52. Considerations (d) and (e) go directly to the question whether the accused will have a fair trial if a witness anonymity order is made. While this is one of the first cases under the 2008 Act, I consider that the court is entitled to have some regard to cases decided before the Act was passed. It is clear that, prior to the House of Lords judgment in Davis, there had been a series of cases in the United Kingdom in which witnesses had been permitted to give evidence anonymously. In Northern Ireland, a number of these cases involved undercover soldiers and police officers. R v Grew, referred to above, was one such case. In each of the cases where anonymity for undercover soldiers or police officers was permitted, it is clear that the trial judge had concluded that trial would be fair. I am not aware of any such case in Northern Ireland where it was subsequently held on appeal that the trial was unfair as the result of such anonymity.

53. Of course, in Davis, where both the trial judge and the Court of Appeal in England and Wales had decided that the trial was fair, the House of Lords disagreed and disagreed, it has to be said, in trenchant terms. However, the facts and circumstances of Davis are completely different to this case and to almost any case involving undercover soldiers or police officers, and those differences are clear when one looks at considerations (d) and (e). The House of Lords held that there was no way in which the evidence of the anonymous witnesses in Davis could be properly tested by the defence; and one of the main reasons was the possibility of a motive on the part of one or more of the witnesses to be dishonest arising from the relationship between the witness and the defendant. Without knowing the identity of the witness, the defence could not even make a start on exploring that possibility.

54. In the case of the undercover soldiers in this case, there is no evidence of any previous relationship with any of the accused. It is true that Soldier B purports to have been able to identify McKenna as the result of a number of previous sightings of him. The defence sought to argue that these could have involved some relationship between them, for example, a bad relationship where one had assaulted the other. This is pure speculation. Further, the defence will be able to question Soldier B about those previous sightings. In the event that new information emerges relevant to any of the conditions, section 6 of the Act enables the court to discharge or vary any witness anonymity order it has made.

55. In Davis, the identity of the witnesses would have had immediate significance and meaning for the defendant. In this case, it is difficult to see that the names of the soldiers would mean anything to the accused. I also consider that it is very unlikely that disclosure of the names of the soldiers would enable the defence to make any meaningful enquiries about their background. As regards whether any of the soldiers have any relevant previous convictions, or any particular motive to be dishonest, the accused will be reliant on the prosecution fulfilling their duty of disclosure, and that will be the case whether their names are disclosed or not. Mr. Kerr Q.C., on behalf of the prosecution, has given an undertaking that the duty of disclosure will be complied with.

56. In this regard the issue of screening requires to be considered separately. The defence make the point that, while the names of the soldiers may not mean anything to the accused, the physical appearance of the soldiers might. The accused might recognise one of the soldiers as a person they had seen previously, or had an argument

or fight with, or some interaction with which might provide a motive for the soldier to be untruthful. For that reason, the defence submit that, if there is to be a witness anonymity order, the screening aspect of the order should not go as far as the prosecution request. In particular, the witnesses should not be screened from the defendants. In this regard, the defence are assisted by the requirement for the court to consider each measure separately. Section 5(2)(f) also requires the court to consider whether it would be reasonably practicable to protect the witnesses' identities by any means other than by making a witness anonymity order specifying the measures that are under consideration by the court.. In my view, this implicitly enacts one of the principles identified at common law, namely that the court should adopt the least intrusive method available.

57. I was also informed by defence counsel that, should a witness anonymity order be made to include the witnesses being screened from the accused, the legal representatives for the accused will adopt the position taken by defence counsel in the Davis case, and decline the opportunity to see the witnesses themselves. Lord Bingham described what occurred at the trial of Davis as follows:-

> "The judge's order did not deny the appellant's counsel, then as now Mr Malcolm Swift, the opportunity to see the witnesses as they gave evidence, but Mr Swift regarded it as incompatible with the relationship between counsel and client to receive information which he could not communicate to the appellant in order to obtain instructions, and he accordingly submitted to the restriction imposed on the appellant. It has not been suggested that he should have acted otherwise."

58. As a result of Mr. Swift's action, he was unable to observe the demeanour of the witnesses, and the same result will occur in this case. The defence submit that this is among the matters that will make the proceedings unfair.

59. I have given particular consideration to these defence submissions, as I consider that the decisions whether to screen the witnesses from the accused, and whether to do so might render the proceedings unfair, are the most difficult aspects of the applications before me.

60. I bear in mind that I am conducting committal proceedings and not the trial. I have concluded that the evidence of the witnesses can be properly tested at committal without their identity being disclosed, that is without either real names being disclosed to anyone but the court, and without their physical appearance being disclosed to anyone but the court and the legal representatives for the accused. I consider it to be most unlikely that disclosing the names of the witnesses to the accused, or allowing the witnesses to be seen by the accused, will make any difference whatever to the lines of questioning that the defence will be able to pursue, or impact on the decision whether to return the accused for trial.

61. As regards any tendency or motive to be dishonest, I have no information before me to suggest that any particular motive or tendency exists, over and above that which can already be suggested by the defence as arising from the fact that the witnesses are undercover soldiers operating in a hostile environment. I rely on the prosecution to

fulfil their duty of disclosure in respect of previous convictions, or any other information or material in their possession which might suggest a motive to be dishonest. There is no information before me to suggest any previous relationship between any of the soldiers and the accused. I do not regard Soldier B's statement about previous sightings of McKenna as indicative of any such relationship. In any event, as I have stated, I will keep that matter under review during the proceedings.

62. I do not consider that it would be reasonably practicable to protect the witnesses' identities by any means other than a witness anonymity order containing the measures applied for by the prosecution.

63. I have already found, in reaching the conclusion that Condition A was met, that real harm to the public interest will be occasioned if the measures requested, including screening the soldiers from the accused, are not put in place.

64. Overall, taking account of all the considerations set out in section 5(2), and notwithstanding the fact that the importance of the soldiers' evidence is a powerful factor against allowing anonymity, I am satisfied that the taking of the measures applied for by the prosecution would be consistent with the committal proceedings being fair to the accused.

65. It is a matter for the defence whether they adopt the approach of the defence in the Davis case, and it is not for me to advise them in that regard. However, it has been a factor in my decision that I do not consider that the measures applied for in this case require the same response from the defence as that in Davis. On the particular facts of the Davis case, there may have been a risk of counsel inadvertently conveying information to his client which might identify the witness, in breach of his professional obligation to the court, and counsel might have felt constrained in regard to consulting with his client in those circumstances. So far as I am aware, no counsel in Northern Ireland, in a case where undercover soldiers or police officers have been screened from the accused, has ever felt it necessary to deny themselves the opportunity of seeing the witnesses, and I have difficulty in understanding why screening the soldiers from the accused in this case should place any meaningful constraint on counsel's ability to consult with their clients.

66. In any event, the consequence complained of as a result of counsel taking this approach is that they will be unable to observe the demeanour of the witnesses. I take into account the importance accorded to the ability of counsel to see the witness by the Court of Appeal in Northern Ireland in the case of Doherty v The Ministry of Defence. Nevertheless, I do not consider that the consequence complained of, even if it occurs, will render the committal unfair. The court will be able to see and assess the demeanour of the witnesses. Further, demeanour is, except in extreme circumstances, a matter which goes to weight, and is therefore less relevant in deciding whether there is a case to answer than in determining guilt or innocence. I do not consider that the inability of counsel to see the witness, if they choose to deny themselves that opportunity, will have any significant bearing on the decision whether or not there is sufficient evidence to return the accused for trial. It may well be that different considerations would apply at the trial itself, but that is a matter for another day.

67. As counsel conceded, the court cannot be held to ransom. The court is not denying counsel the right to see the witnesses. Unless one takes the view that the decision to screen the witnesses from the accused in the circumstances of this case requires counsel to take the approach adopted by defence counsel in the Davis case, counsel have a choice. If they choose not to see the witnesses when they could see them consistently with their duty to their clients and the court, then they must be regarded as having consented to not seeing them, the one circumstance referred to by Higgins J. in Doherty in which screening from counsel could be permitted.

68. I am therefore satisfied, taking account of the considerations set out in section 5(2), that Conditions A-C are all met. Taking account of those same considerations, and having regard to the consequences if an order is not made, I conclude that it is appropriate to exercise my discretion in favour of making a witness anonymity order in the terms requested by the prosecution.

69. I therefore order that the witnesses referred to in the committal papers as Soldiers B,C,D,E,F,G,H and I, are permitted to be referred to by those letters in their witness statements and when giving evidence. In order to preserve the anonymity of those witnesses, their names are to be withheld from the accused and their legal representatives, they are not to be asked questions which might lead to their identification and they are to be screened, when giving evidence, from everyone except the Judge and court staff, the prosecution and the legally qualified representatives of the accused.

A.T.G.White
District Judge (Magistrates' Court)
3 October 2008