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**K Grady, 'Comment on *Marines A, B, C, D and E* [2014] EWCA Crim 2367' [2014] 7
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There is much in this judgment for lawyers in many fields to ponder. For the criminal lawyer, a key point of interest relates to the guidance given on when a court may prohibit the identification of a defendant in circumstances where his or her human rights may be infringed. In particular, the judgment concerns cases in which the defendant's right to life under art.2, or their right to private and family life under art.8 ECHR, could be threatened by the failure to grant the defendant anonymity.

For the court martial, the power to prohibit the identification of the defendants arose out of r.153 of the Armed Forces (Court Martial) Rules 2009 (SI 2009/2041). This provides that "[t]he court may give leave for any name or other matter given in evidence in proceedings to be withheld from the public" (and was used in this case in conjunction with directions under s.11 of the Contempt of Court Act 1981). The spartan terms of r.153 provides little guidance to courts martial on when to exercise that power. The decision on whether to exercise it must be made in light of the duty on the courts to act in a manner compatible with the ECHR (pursuant to s.6 of the Human Rights Act 1998: see the discussion in *Sir D. Eady and A.T.H. Smith, Arlidge, Eady & Smith on Contempt*, 4th edn (London: Sweet and Maxwell, 2011), para.6-121).

The decision in *Marine A* that "applications to restrict reporting of criminal proceedings should be approached in a structured way" (at [86]) is welcome (if obvious). However, aspects of the judgment leave a lingering sense of uncertainty. In relation to art.2, there is a positive obligation to make an order for anonymity only where the risk to life is "real and immediate" (*Re Officer L and others* [2007] UKHL 36; [2007] 1 W.L.R. 2135 at [20]-[21]). Where such risk arises, the State (in this case, the court) is required to take "reasonable" steps to mitigate that risk (per *Osman v the United Kingdom* (2000) 29 E.H.R.R. 245 at [116]; see also *Keenan v the United Kingdom* (2001) 33 E.H.R.R. 38 (p.913) at [89] et seq.). "The court is therefore not required to make an Order that a defendant be not named where to do so would involve unreasonable practical difficulties" (*Marine A* at [89]). However, the judgment goes on to note that it is unclear from the jurisprudence of the European Court of Human Rights whether "the court is not obliged to make an Order where there are countervailing considerations of public interest" beyond those practical difficulties (*Marine A* at [89], citing *Re Officer L* at [21]). As Clayton and Tomlinson explain, "it may be that public interest factors, such as the credibility of a hearing, are relevant considerations in carrying out an assessment of reasonableness ... In deciding what steps are reasonable when there is a 'real and immediate risk to life' proportionality arise[s]..." (*R. Clayton and H. Tomlinson, The Law of Human Rights* (Oxford: Oxford University Press, 2009), paras 7.32 and 7.38).

At first sight, it appears surprising that a court could refuse to make an anonymity order on public interest grounds, given that the right to life is unqualified. In consequence, this

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“application of the concept of proportionality must be treated cautiously” (Clayton and Tomlinson, para.7.38). Yet, there is a need under the Convention to strike “a fair balance” between the rights of the individual and those of the community at large, and this “is also a feature of ‘absolute’ rights, at least where positive obligations and implied rights are concerned” (A. Lester, D. Pannick and J. Herberg, *Human Rights Law and Practice*, (London: LexisNexis, 2009), para.3.09; cf *E (A Child)* [2008] UKHL 66; [2009] 1 A.C. 536).

In *Re Meehan* [2003] NICA 34, it was held that the court should consider “whether there are cogent reasons in the public interest why it should not take a course of action open to it which would reduce the risk [to life]. It should then balance all these considerations in order to determine whether there has been a breach of Article 2” (at [18]). See also *R. (on the application of A) v Lord Saville of Newdigate* [2001] EWCA Civ 2048; [2002] 1 W.L.R. 1249 at 1262; *R. (on the application of A) v HM Coroner for Inner South London* [2004] EWCA Civ 1439 at [30]; and *Re Donaghy* [2002] NICA 25(1). In *Re Times Newspapers Ltd* [2008] EWCA Crim 2559; [2009] 1 W.L.R. 1015, the Court-Martial Appeal Court was willing to identify a defendant in order to comply with his art.6 right to “a fair and public hearing” where his co-defendants were granted anonymity on the grounds of art.2. The identification of the defendant was made despite the fact that “there must be some risk of the disclosure of his name undermining the integrity of the order in respect of the [anonymous] others ... we have come to the conclusion that his rights must be accommodated at least to the extent of enabling him to be identified” (at [18]). In short, some risk to a defendant’s art.2 right may be justified by the need to comply with another’s right under art.6.

The Strasbourg Court does not seem to have directly addressed this issue. The court has frequently reiterated the principle set down in *Osman* “that the scope of any positive obligation [under art.2] must be interpreted in a way which does not impose an impossible or disproportionate burden on the authorities, bearing in mind the difficulties in policing modern societies, the unpredictability of human conduct and the operational choices which must be made in terms of priorities and resources. Not every claimed risk to life can entail for the authorities a Convention requirement to take operational measures to prevent that risk from materialising” (see *Turluyeva v Russia* (63638/09) at [91], which is the most recent example. See also *Van Colle v the United Kingdom* (2013) 56 E.H.R.R. 23 (p.839) at [88]). Clearly, practical considerations – in particular, financial ones – are relevant to the test of reasonableness. In *Ciechońska v Poland* (19776/04) Unreported June 14, 2011 the court recalled “in this connection that the choice of means for ensuring the positive obligations under Article 2 is in principle a matter that falls within the Contracting State’s margin of appreciation. There are different avenues to ensure Convention rights, and even if the State has failed to apply one particular measure provided by domestic law, it may still fulfil its positive duty by other means” (at [65]). However, there does not seem to have been a definitive indication of whether public interest factors may be taken into account when considering the reasonableness of steps which would mitigate a real and immediate risk to life.

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It is not difficult to imagine cases in which the criminal courts may be faced with public interest factors, such as maintaining public confidence in the tribunal or ensuring the credibility of the trial, when deciding whether an anonymity order would be a reasonable measure to take. Indeed, arguably the public interest could be particularly strong in a case such as *Marine A* (if there had been a real and immediate risk to his life), where a murder was committed in the course of an armed conflict, and the murderer was a member of the armed forces fighting that armed conflict in the name of the British public. In such circumstances, there could be a strong public interest in ensuring that such an individual could be fairly and openly tried by the military justice system, not least given the concerns which gave rise to the Baha Mousa and Al-Sweady public inquiries. Nonetheless, the Divisional Court did not resolve with clarity the question of what impact, if any, those “countervailing considerations of public interest” might have on the assessment of whether an anonymity order would be reasonable. It raises the issue but does not elaborate on the case law. The issue does not appear in the “structured” list of five questions posed in the judgment. By failing to engage with the matter, the judgment leaves to the trial court the decision as to whether, for the sake of credibility and public confidence, a risk to the defendant’s life is a price worth paying.