Federal Court of Australia

Roberts-Smith v Fairfax Media Publications Pty Limited (No 31) [2022] FCA 271

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| File numbers: | NSD 1485 of 2018  NSD 1486 of 2018  NSD 1487 of 2018 |
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| Judgment of: | **ABRAHAM J** |
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| Date of judgment: | 24 March 2022 |
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| Date of publication of reasons: | 1 April 2022 |
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| Catchwords: | **PRACTICE AND PROCEDURE** – subpoena issued to the Inspector‑General of the Australian Defence Force (IGADF) by the applicant – claim by the IGADF of public interest immunity over documents, if they exist, which relate to Person 24 – where public interest immunity had been previously upheld in respect to the documents sought by subpoena – where there has been a material change in circumstances – claim of public interest immunity not established |
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| Legislation: | *National Security Information (Criminal and Civil Proceedings) Act 2004* (Cth) s 38B |
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| Cases cited: | *Alister v The Queen* [1984] HCA 85; (1984) 154 CLR 404  *Brimaud v Honeysett Instant Print Pty Ltd* (1988) 217 ALR 44  *Browne v Dunn* (1893) 6 R. 67 (H.L)  *Cantarella Bros Pty Ltd v Lavazza Australia Pty Ltd (No 2)* [2021] FCA 894  *Church of Scientology Inc v Woodward* (1982) 154 CLR 25 *Gypsy Jokers Motorcycle Club Inc v Commissioner of Police* [2008] HCA 4; (2008) 234 CLR 532  *Condon v Pompano* [2013] HCA 7; (2013) 252 CLR 38  *Haydon* *v Magistrates Court (SA)* [2001] SASC 65; (2001) 87 SASR 448  *HT v The Queen* [2019] HCA 40; (2019) 269 CLR 403  *Pivotel Satellite Pty Ltd v Optus Mobile Pty Ltd* [2010] FCA 121  *Roberts-Smith v Fairfax Media Publications Pty Limited (No 6)* [2020] FCA 1285  *Roberts-Smith v Fairfax Media Publications Pty Limited (No 8)* [2020] FCA 1630  *Roberts-Smith v Fairfax Media Publications Pty Limited (No 12)* [2021] FCA 465  *Roberts-Smith v Fairfax Media Publications Pty Limited (No 14)* [2021] FCA 552  *Roberts-Smith v Fairfax Media Publications Pty Limited (No 15)* [2021] FCA 582  *Roberts-Smith v Fairfax Media Publications Pty Limited (No 24)* [2021] FCA 1461  *Sankey v Whitlam* [1978] HCA 43; (1978) 142 CLR 1 |
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| Division: | General Division |
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| Registry: | New South Wales |
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| National Practice Area: | Other Federal Jurisdiction |
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| Number of paragraphs: | 44 |
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| Date of hearing: | 18 March 2022 |
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| Counsel for the Applicant: | Mr A Moses SC with Mr P Sharp |
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| Solicitor for the Applicant: | Mark O’Brien Legal |
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| Counsel for the Respondents: | Mr C Mitchell |
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| Solicitor for the Respondents: | MinterEllison |
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| Counsel for the Inspector‑General of the Australian Defence Force and the Commonwealth: | Mr A Berger QC with Mr J Edwards |
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| Solicitor for the Inspector‑General of the Australian Defence Force and the Commonwealth: | Australian Government Solicitor |
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| Counsel for Person 24: | Mr G Cridland |

ORDERS

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|  | | NSD 1485 of 2018 |
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| BETWEEN: | BEN ROBERTS-SMITH  Applicant | |
| AND: | FAIRFAX MEDIA PUBLICATIONS PTY LIMITED (ACN 003 357 720) (and others named in the Schedule)  First Respondent | |

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|  | | NSD 1486 of 2018 |
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| BETWEEN: | BEN ROBERTS-SMITH  Applicant | |
| AND: | THE AGE COMPANY PTY LIMITED (ACN 004 262 702) (and others named in the Schedule)  First Respondent | |

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|  | | NSD 1487 of 2018 |
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| BETWEEN: | BEN ROBERTS-SMITH  Applicant | |
| AND: | THE FEDERAL CAPITAL PRESS OF AUSTRALIA PTY LIMITED (ACN 008 394 063) (and others named in the Schedule)  First Respondent | |

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| order made by: | Abraham J |
| DATE OF ORDER: | 1 April 2022 |

THE COURT ORDERS THAT:

1. The Inspector‑General of the Australian Defence Force’s (IGADF) claim of public interest immunity over the document(s) the subject of the applicant’s subpoena to the IGADF dated 15 March 2022 is not established.
2. Pursuant to s 37AF of the *Federal Court of Australia Act 1976* (Cth) (the Act) and on the grounds referred to in s 37AG(1)(a) and (b) of the Act, there is to be no disclosure, by publication or otherwise, of:
   1. the reasons for judgment of Abraham J in *Roberts-Smith v Fairfax Media Publications Pty Limited* [2022] FCA 271 (*Roberts-Smith (No 31)*) until 2:00 pm, 1 April 2022; and
   2. the confidential reasons for judgment of Abraham J in *Roberts-Smith (No 31)* until further order.
3. Order 2 does not prevent disclosures to and between Authorised Persons within the meaning of Order 1 made by Besanko J on 15 July 2020 (as last amended on 6 December 2021) under ss 19(3A) and 38B of the *National Security Information (Criminal and Civil Proceedings) Act 2004* (Cth) (NSI orders).
4. Order 2 does not prevent disclosures to and between Authorised Persons within the meaning of Order 97 of the NSI orders.
5. Order 2 does not prevent disclosures to and between the Commonwealth and/or a Commonwealth Representative within the meaning of the NSI orders.

Note: Entry of orders is dealt with in Rule 39.32 of the *Federal Court Rules 2011*

REASONS FOR JUDGMENT

ABRAHAM J:

1. In August 2018, Mr Roberts‑Smith commenced proceedings in this Court seeking damages for alleged defamatory publications by Fairfax Media Publications Pty Ltd, The Age Company Pty Ltd, The Federal Capital Press of Australia Pty Ltd and certain journalists. The substantive hearing, which commenced on 7 June 2021, is currently proceeding before Besanko J, with the respondents presenting their case.
2. During cross-examination by the applicant of Person 24, a witness in these proceedings, on the applicant’s request, the Court issued a subpoena (the Subpoena) to the Inspector-General of the Australian Defence Force (IGADF) to produce a transcript of any interview conducted with Person 24 by the Afghanistan Inquiry (Inquiry) in relation to events on 12 April 2009 at Whiskey 108 in the vicinity of Kakarak in the West Dorafshan district of Uruzgan, Afghanistan. This same transcript (along with the transcripts of 11 other current or former Special Operations Command (SOCOMD) witnesses to be called by the respondents) had previously been sought by the applicant by a subpoena issued in July 2021. I upheld a claim of public interest immunity by the IGADF in respect of those documents (if they exist): *Roberts-Smith v Fairfax Media Publications Pty Limited (No 24)* [2021] FCA 1461 (*Roberts-Smith (No 24)*). The IGADF again claims public interest immunity over the transcript, if it exists, which is challenged by the applicant.
3. Person 24 is a witness called by the respondents in these proceedings. He commenced his evidence on 14 March 2022. It is relevant to note that although Person 24 has been stood down from giving evidence, he has not been released, pending the resolution of this application.
4. Orders pursuant to s 38B of the *National Security Information (Criminal and Civil Proceedings) Act 2004* (Cth) (NSI Act) have previously been made, the most recent version being on 6 December 2021 (the NSI orders), which dictates the manner in which certain information must be handled in these proceedings. In addition, a confidential affidavit was relied on by the IGADF in support of his claims. To enable the parties to advance their positions it was necessary to conduct part of this application in closed court.
5. As a consequence, I am constrained as to what can be said in an open judgment and, as such, I elaborate on some of the matters referred to below and the submissions advanced in closed court, in brief confidential reasons which are supplementary to these reasons.
6. For the reasons given below and the confidential reasons, the claim of public interest immunity made by the IGADF is not established.

## Material relied on

1. The applicant read the affidavit of Monica Helen Allen, a solicitor for the applicant, dated 16 March 2022, which annexed a copy of the transcript of Person 24’s evidence given on 14 March 2022.
2. The applicant also tendered the following documents:
3. an affidavit of Peter Llewellyn Bartlett, a solicitor for the respondents, dated 15 March 2021 (which, relevantly, was relied on by the respondents in respect of an application to subpoena certain witnesses, including Person 24, to give evidence: see *Roberts-Smith v Fairfax Media Publications Pty Limited (No 12)* [2021] FCA 465 (*Roberts-Smith (No 12)* at [50]-[52]); and
4. a copy of the transcript of Person 24’s evidence given on 15 March 2022.
5. The IGADF read an open affidavit of Mr James Morgan Gaynor sworn on 20 September 2021 (Open Gaynor Affidavit) and a confidential affidavit of Mr Gaynor sworn on 20 September 2021 (Closed Gaynor Affidavit). It also read the affidavit of Stacey Hahn, a solicitor for the IGADF, dated 17 March 2022, which annexed a bundle of subpoenas to produce documents addressed to the Department of Defence in relation to Whiskey 108.
6. The IGADF tendered extracts of the transcript of certain evidence given in open court by Persons 24, 41, 14, 40, 42, 18 and 43.
7. Both the applicant and the IGADF tendered documents in closed court which I have referred to in the confidential judgment where appropriate.

## Legal principles

1. I have summarised those principles relevant to a claim of public interest immunity in *Roberts-Smith v Fairfax Media Publications Pty Limited (No 14)* [2021] FCA 552 (*Roberts-Smith (No 14)*) at [10]-[26] and *Roberts-Smith v Fairfax Media Publications Pty Limited (No 15)* [2021] FCA 582 (*Roberts-Smith (No 15)*) at [5] and it is unnecessary to repeat them here. They are not in dispute.
2. That said, given this application is made in circumstances where a previous claim of public interest immunity by the IGADF has been upheld in respect to the very material now sought, it is appropriate to briefly address the principles relevant to when an interlocutory ruling can be revisited.
3. In *Brimaud v Honeysett Instant Print Pty Ltd* (1988) 217 ALR 44 at 46-47, McLelland J observed:

Interlocutory orders, of their very nature, create no res judicata or estoppel, and the court retains jurisdiction to set aside, vary or discharge an interlocutory order up to the time of the final disposition of the proceedings. However the general rationale of the principles last referred to applies even in the case of interlocutory orders. It would be conducive to great injustice and enormous waste of judicial time and resources if there were no limit on the power of a party to have any interlocutory application or order relitigated at will.

The overriding principle governing the approach of the court to interlocutory applications is that the court should do whatever the interests of justice require in the particular circumstances of the case. In giving effect to that general principle, and in recognition of the public and private interests earlier referred to, rules of practice have been developed in accordance with which the discretionary power of the court to set aside, vary or discharge interlocutory orders will ordinarily be exercised. Not all kinds of interlocutory orders attract the same considerations. For present purposes one may put to one side orders of a merely procedural nature (as to which see for example *Wilkshire & Coffey v Commonwealth* (1976) 9 ALR 325 and injunctions (or undertakings) made or given by agreement and without contest “until further order” (as to which see for example *Warringah Shire Council v Industrial Acceptance Corp* (unreported, SC (NSW), McLelland J, 22 November 1979).

In the present case I am dealing with an interlocutory order of a substantive nature made after a contested hearing in contemplation that it would operate until the final disposition of the proceedings. In such a case the ordinary rule of practice is that an application to set aside, vary or discharge the order must be founded on a material change of circumstances since the original application was heard, or the discovery of new material which could not reasonably have been put before the court on the hearing of the original application: see *Woods v Sheriff of Queensland* (1895) 6 QLJ 163 at 164–5; *Hutchinson v Nominal Defendant* [1972] 1 NSWLR 443 at 447–8; *Chanel Ltd v F W Woolworth & Co* [1981] 1 All ER 745; [1981] 1 WLR 485; *Adam P Brown Male Fashions v Philip Morris* (1981) 148 CLR 170 at 177–8; 35 ALR 625 at 629–30; *Butt v Butt* [1987] 1 WLR 1351 at 1353; *Gordano Building Contractors Ltd v Burgess* [1988] 1 WLR 890 at 894.

1. And see in this Court: *Pivotel Satellite Pty Ltd v Optus Mobile Pty Ltd* [2010] FCA 121at [26]; *Cantarella Bros Pty Ltd v Lavazza Australia Pty Ltd (No 2)* [2021] FCA 894 at [30].

## Submissions

1. The following summary of the submissions relates to those made in open court.
2. The main thrust of the applicant’s submission was that the IGADF’s claim of public interest immunity should not be upheld because new material has come to light during Person 24’s cross-examination which raises the serious question as to whether he has made prior inconsistent statements in relation to an allegation of a war crime, which substantially affects the witness’ credibility.
3. The applicant submitted that Person 24 is a witness called by the respondents in support of their case. There was no outline of evidence filed by him in circumstances where leave to issue a subpoena to give evidence at the trial to Person 24 was granted in respect to the respondents’ application to lead evidence from Person 24 consistently with the contents of the Potentially Affected Person notice (PAP notice) served on the applicant.
4. The applicant submitted that Person 24 gave evidence-in-chief that he witnessed the applicant murder an unarmed PUC (person under control) during a mission involving a compound known as Whiskey 108 on 12 April 2009. Person 24’s evidence is, relevantly, as follows:

Mr Roberts-Smith walked out of the compound of the spot I’ve indicated. At this stage, he was holding a man in his hand. It appeared that he had come off his feet and he was being held parallel to the ground. He was held by the pants or the back of the shirt. He marched approximately 15 metres directly out from that entrance, dropped the man on the ground and immediately began with a machine gun burst into his back.

1. The applicant submitted the transcript of any prior interview is likely to be probative of, and thereby have a bearing on, the credibility of Person 24. It was submitted that the evidence of Person 24 is a material change of circumstances since the IGADF’s public interest immunity claim was upheld in *Roberts-Smith* (*No 24*), it is inconsistent with what is in the applicant’s PAP notice, and it could not reasonably have been relied on at the time of the hearing in *Roberts-Smith (No 24)*. It was submitted that denying access to the material would materially prejudice the applicant’s ability to challenge Person 24’s evidence and the Court would not have all the relevant evidence and be deprived of an opportunity of making an assessment of Person 24’s credibility informed by the existence of a prior inconsistent statement. The risk of harm of disclosure is limited, as the topic on which production is sought is limited, and it will likely be the subject of cross-examination in closed court. It was submitted that production of the transcript is unlikely to cause substantial hardship to the IGADF. The applicant submitted that “[i]f the documents are not produced, the Court will be shut out from discharging its functions in the administration of justice by having material kept from the Applicant and the Court which demonstrates that the witness has provided inconsistent versions of the allegation of a war crime in 2009”. The applicant directed the Court’s attention to aspects of Person 24’s evidence to support his submission. The applicant also took the Court to authority including, inter alia, *Sankey v Whitlam* [1978] HCA 43; (1978) 142 CLR 1at 38-39 and *Haydon* *v Magistrates Court (SA)* [2001] SASC 65; (2001) 87 SASR 448 at [28]-[31].
2. The IGADF accepted that there had been a material change of circumstances such that, as a matter of principle, the interlocutory ruling can be revisited. However, the IGADF submitted that the change was not sufficient to warrant an alteration in the weighing process such as would result in any different decision. He submitted that the public interest claim now made, should be upheld.
3. The IGADF made six primary submissions. *First*, in *Roberts-Smith (No 24)*, the applicant relied upon the potential for a witness to give an inconsistent account in oral evidence at trial as a principal factor in favour of disclosure of the Inquiry transcripts in the interests of the administration of justice. That such a scenario may now have transpired does not create a new or different circumstance that would cause the Court to revisit its earlier assessment of where the balance lies. The matter has already been taken into account: see *Roberts-Smith (No 24)* at [44] and [75]. *Second*, while the Subpoena is more confined than the subpoena the subject of *Roberts-Smith (No 24)* (noting that the applicant seeks the transcript of only one, rather than 12, SOCOMD witnesses)*,* that does not have the consequence that the harm to the public interest is less acute. Rather, the harm to the public interest described in the Open Gaynor Affidavit and the Confidential Gaynor Affidavit is not contingent on the number of SOCOMD members whose transcripts are to be disclosed. *Third*, the provision of the material would result in ‘information asymmetry’ referred to in *Roberts-Smith (No 24)* at [53]-[55], [77]-[78] and in the confidential reasons which supplemented that judgment at [15]. This is because the respondents are not in a position to ascertain whether or not a witness for the applicant, or the applicant himself, has or may have given a prior inconsistent account to the IGADF by virtue of the Court’s decision in *Roberts-Smith v Fairfax Media Publications Pty Limited (No 8)* [2020] FCA 1630 (*Roberts-Smith (No 8)*) at [2], [16]. *Fourth,*the applicant has been able to challenge Person 24 as to the truth of his account, and to elicit evidence as to the occasions on which Person 24 says he has previously given the same account. *Fifth,*significant evidence has already been adduced from other witnesses (in addition to the applicant himself) to place the evidence Person 24 gave about the Whiskey 108 mission in context, with the IGADF taking the Court to some of that evidence. *Sixth*, for completeness, the IGADF observed that the fact that a successful public interest immunity claim results (or may result) in a court being denied access to relevant evidence is not novel: citing *Church of Scientology Inc v Woodward* (1982) 154 CLR 25 at 61; *Gypsy Jokers Motorcycle Club Inc v Commissioner of Police* [2008] HCA 4; (2008) 234 CLR 532 at [24]; *Condon v Pompano* [2013] HCA 7; (2013) 252 CLR 38 at [148]; *HT v The Queen* [2019] HCA 40; (2019) 269 CLR 403 at [29].
4. The IGADF observed that many public interest immunity claims have been made in the context of these proceedings which were either upheld or not challenged by the parties. This has had an impact on the body of evidence by which the Court will determine the proceedings, but it does not mean that the Court is unable to “discharg[e] its functions in the administration of justice” (as asserted by the applicant). The IGADF also noted that if his immunity claim is rejected, disclosure of the Person 24 transcript could not occur until the Attorney-General for the Commonwealth has acted on the notice that the applicant has issued in respect of the Subpoena under s 38D(1)(c) of the NSI Act.
5. The respondents did not make any submissions.
6. Counsel for Person 24 did not make any submission, but said he relied on the brief written submission he had filed for the purposes of *Roberts-Smith (No 24)*. I have taken those submissions into account, to the extent that they are relevant to this application.

## Consideration

1. As noted above, in support of his claims of public interest immunity, the IGADF relies, inter alia, on the same open and confidential affidavits of Mr Gaynor sworn on 20 September 2021, as were relied on in *Roberts-Smith (No 24)*. That material from the open affidavit is summarised at [12]-[28]. As I observed, although it was inappropriate to recite the evidence in the confidential affidavit, it sufficed to say that it added weight to the IGADF’s claim for public interest immunity. I accepted his evidence in the open and confidential affidavits and concluded, inter alia, that significant weight can be attached to the opinions he expressed about the impact of disclosure of the information sought: at [62]-[63]. Those conclusions apply in this application.
2. In *Roberts Smith (No 24),* the orders made were interlocutory, of a substantial nature, and made after a contested hearing and in contemplation that the order will operate until the final disposition of the matter. The document sought in respect to Person 24 falls squarely within those orders. As such, a material change of circumstances is relied on by the applicant to contend the ruling should be reconsidered in respect to the documents sought.
3. The applicant’s contention that in *Roberts Smith (No 24)* at [75] I held out that the ruling could be reconsidered in the event of a change of circumstances involves a misreading of the passage. That said, it is of no moment to the resolution of this application. In any event, the IGADF accepted that there has been a material change since *Roberts-Smith (No 24)* such as to permit that ruling to be revisited in respect to the material sought in relation to Person 24.
4. The IGADF also properly accepted that in that circumstance, there was a relevant public interest consideration on each side of the equation (that harm would be done by disclosure of the documents sought and the proper administration of justice would be frustrated or impaired if the documents were withheld), and that the balancing exercise described in *Alister v The Queen* [1984] HCA 85; (1984) 154 CLR 404 (*Alister*) is to be performed.
5. The observations made in *Roberts-Smith (No 24)* at [65] ff in respect to the public interest considerations that arose in connection with the documents sought from the IGADF in that matter, similarly apply in this application. I take those matters into account. It is unnecessary to repeat them here.
6. It is appropriate to add the following observations.
7. *First,* this application is based on the evidence given by Person 24 at the hearing in relation to Whiskey 108 which is said to be inconsistent with his version as summarised in the applicant’s PAP notice. The nature of the PAP notice is described by Colvin J in *Roberts-Smith v Fairfax Media Publications Pty Limited (No 6)* [2020] FCA 1285 (*Roberts-Smith (No 6)*) at [60]-[61], recited in *Roberts-Smith (No 14)* at [79]. The applicant repeatedly characterised Person 24’s evidence as false. That characterisation does not assist the argument, as an inconsistency in a witness’ evidence does not, in and of itself, necessarily carry that connotation. Suffice to say, I approach this application on the basis that, on the evidence before me, prima facie there is an inconsistency between the evidence of Person 24 and what is recorded in the applicant’s PAP notice in respect to Person 24’s evidence of witnessing the applicant murder an unarmed PUC during a mission involving a compound known as Whisky 108 on 12 April 2009. I note that the respondents allege in their defence of truth that the applicant murdered a PUC at Whiskey 108: Second Further Amended Defence to Statement of Claim at [40]-[52]. This is a topic of significance. The IGADF did not submit otherwise.
8. *Second*, the material sought in *Roberts-Smith (No 24),* was directed to prior statements of current or former SOCOMD witnesses to be called by the respondents, because of the respondents’ reliance on the defence of truth. The potential relevance of this material was directed to the credit of the witnesses, in the form of prior inconsistent statements. That eventuality was taken into account in the weighing process in *Roberts-Smith (No 24)* at [75]-[79]*.* As the IGADF submitted, this application is based on a factual matter foreseen and considered in that judgment. That the foreseen circumstance eventuated does not, without more, establish there has been a material change of circumstance such as to reopen the ruling. However, this individual application is now advanced on a more concrete foundation, as the applicant points to evidence of an inconsistency, and on a matter of significance. In a context where it is accepted by the IGADF that there is a material change of circumstance, the nature of the topic on which the inconsistency relates and the extent or significance of it, must be part of the weighing process. That must be so given the nature of the balancing exercise being conducted. The topic and the extent of the alleged inconsistency impacts on the Court’s assessment on whether the proper administration of justice might be frustrated or impaired if the document was withheld*.* I note in this context that the applicant also relies on the fact that Person 24 has given evidence that he told somebody in 2017 or 2018 about this account of the events.
9. *Third,* in an attempt to distinguish these circumstances from those described in *Roberts-Smith* *(No 24)* at [82] and to compare them favourably to those of the Afghan witnesses who gave evidence without subpoena (addressed in *Roberts-Smith (No 14)*), the applicant submitted that although Person 24 was subpoenaed to give evidence, he has given evidence that he willingly came to Court to back up his friends and he was “happy” to do so. That, on the evidence before me, at the very least, rather overstates his evidence. On any scenario he was subpoenaed to give evidence without his knowledge, as is apparent from *Roberts-Smith (No 12)*. Although, as the applicant submitted, he did not apply to be excused from doing so by having the subpoena set aside, that does not support a contention that the witness is willing or happy to give evidence. There are limited circumstances in which a witness can be excused from giving evidence, and simply not wishing to do so, would be insufficient. Moreover, this submission fails to grapple with the nature of the broader public interest considerations which arise from disclosure of material of the nature sought. The submission fails to recognise that there are a number of matters which distinguished this matter from the circumstances considered in respect to the Afghan witnesses: see for example *Roberts-Smith (No 24)* at [80].
10. *Fourth*, the IGADF correctly submitted that there is evidence other than that given by Person 24 which is directed to Whiskey 108 and that there have been a substantial number of documents provided to the respondents, as a result of subpoenas being issued, in respect to that mission. The allegations as to the events on 12 April 2009 at Whiskey 108 will be considered in light of all the evidence led on the topic. Also, of course, any assessment of a witness’ evidence (including their credibility) is to be considered in the context of the whole of the evidence. Person 24’s evidence will not be considered in a vacuum. However, the submission that the applicant has been able to challenge Person 24’s evidence on this topic, fails to recognise that putting to a witness that his evidence is false, if denied, does not, without more, advance the applicant’s case. I appreciate in this context that the IGADF submit the rule in *Browne v Dunn* (1893) 6 R. 67 (H.L) does not require that a witness “be cross-examined on every point”, but only that he or she “be given an opportunity to comment on or explain some matter about which the opposing party intends to make comment”, citing *Cross On Evidence* (12th ed, 2020) at [17440]. However, it may be that statements in the PAP notice need to be put into their proper context, the summary may be incomplete or inaccurate, or the witness, if asked, may provide an explanation. That said, I accept the applicant’s submission that the material sought is potentially significant to an assessment of the credit of Person 24 given the nature of his evidence and the topic on which it was given.
11. *Fifth,* the applicant repeatedly submitted, as he has in previous applications, that the only reason the witness is giving evidence is because the PAP notice was provided to the respondents (in a redacted form) as a result of the ruling by Colvin J in *Roberts-Smith (No 6)* and *Roberts-Smith (No 8).* For the reasons previously expressed in *Roberts-Smith (No 24)* at [69], and in the confidential reasons at [14], that does not assist with the resolution of this application. It is to focus on the wrong question. That said, as noted in *Roberts-Smith (No 24)* at [67], the fact that the PAP notice was provided is part of the factual context in which this application arises.
12. *Sixth*, the provision of the material sought will, as the IGADF submitted, result in an information asymmetry between the parties, in that the respondents have not, and cannot, have access to material relating to the applicant and his witnesses: see on this issue, *Roberts-Smith (No 24)* at [53]-[55] and [77]-[78]. However, it is important to recall that the Subpoena relates to only one witness, and has arisen in very particular factual circumstances. Any decision in relation to this witness can have no broader application, for example, in respect to the other SOCOMD witnesses. So much was accepted by the applicant in his submissions. The applicant submitted, relying on the affidavit of Mr Bartlett, that the respondents intended to lead evidence consistent with the content of the PAP notice and that the applicant had not been provided with any advance notice of the evidence that was ultimately given by Person 24. So much may be accepted, although I note that in *Roberts-Smith (No 12),* the ruling in which Besanko J granted the respondents’ application for leave to issue subpoenas to certain witnesses, including Person 24, to give evidence, his Honourat [54] did not order outlines of evidence to be filed on the basis that the PAP notice provided sufficient notice to the applicant of those witnesses’ evidence. In any case, it is unclear how that impacts on this application, other than to indicate that the applicant had a lack of notice of the detail of the evidence ultimately given by Person 24 at the hearing. The respondents have called Person 24 in support of their case, and regardless of any issue of knowledge on their part as to what the contents of his evidence would be before he was called, they have material in the form of the PAP notice which, in part, is prima facie inconsistent. The respondents’ reliance on his evidence must be considered in that context. The respondents did not raise any issue of information asymmetry as a consideration in this application, which is to be contrasted to the submissions made by the respondents in respect to *Roberts-Smith (No 24).*
13. *Seventh,* the applicant’s submission as to the harm done by the release of the document sought largely fails to address the broader public policy considerations referred to in *Roberts Smith (No 24)* at [97]-[98], but focusses almost entirely on his case. That said, it may be accepted that what is sought is much more limited, relating to one person and the events at one location on a specific day, and arises in a very particular factual context, which did not exist at the time *Roberts-Smith (No 24)* was decided. The public policy issues referred to in [97] and [98] are to be considered in that light. On the other hand, the IGADF’s submissions focussed on the broader policy issues that arose at the time of *Roberts-Smith (No 24),* and while plainly still relevant, the weight to be attached to those policy concerns must now be considered in the context of this different factual context.
14. I have addressed Mr Gaynor’s evidence as to the effectiveness of the NSI orders in minimising any potential harm caused by disclosure in previous judgments: see for example: *Roberts-Smith (No 14)* at [92]; *Roberts-Smith (No 24)* at [95]. Again, that must be considered in light of this case being a much more limited application. The IGADF made submissions expressing concern about the number and type of people who could have access to a document if one is released. In that regard, the applicant submitted that he would consent to amendments to the NSI orders which would have the effect of limiting access to any document produced, to the applicant’s lawyers and any cross-examination relating to it would only occur in closed court. Irrespective of the terms of the NSI orders being amended, the applicant’s counsel has given an undertaking that if a document is ordered to be produced, access would be limited to the applicant’s lawyers and any cross-examination relating to it would only occur in closed court. The applicant himself would not have access to the document. Giving an undertaking to the Court is a serious matter and, therefore, I act on that basis. The IGADF also made submissions as to the difficulty it foresaw of the parties to the proceedings agreeing to amendments to the NSI orders to accommodate this document if it is required to be produced, given they have different interests. As just explained, the applicant has made his position clear. Given the circumstances, it is difficult to see a basis the respondents would not agree to that proposed course.
15. The document sought relates potentially to the credibility of Person 24. Denying access to the document sought would likely deprive the applicant of the opportunity to challenge Person 24’s evidence on the basis that, on the material before this Court, he has prima facie made a prior inconsistent statement on a significant aspect of his evidence. In that context it would likely deprive the trial judge of an opportunity of making an informed decision as to the assessment of Person 24’s credibility.
16. During oral submissions, the applicant described his earlier application the subject of *Roberts-Smith (No 24)* as a “fishing expedition”, although that was not the description then proffered. It is not an inapt description. That subpoena was issued relating to 12 current or former SOCOMD persons who were expected to be called as witnesses by the respondents, in anticipation of them giving evidence. Each case must be considered on its own facts. As explained, this application arises in a very different factual context to that which existed at the time of *Roberts-Smith (No 24).* In the present matter, the applicant has relied on the evidence given by Person 24 in the hearing and on material in the PAP notice which prima facie is inconsistent with an aspect of the evidence, on a significant topic. The material sought is limited to the events on 12 April 2009 at Whiskey 108. The probative value of the material in assessing Person 24’s credibility may be high. The credibility of the witness will be a matter for the trial judge to assess in light of all the evidence, at the end of the hearing. It is sufficient to say at this stage that, given the topic of Person 24’s evidence which is sought to be relied on by the respondents, and the nature of the alleged inconsistency, the material sought by the Subpoena may affect the assessment of the credit of this witness.
17. As noted above, some submissions were made in closed court due to the application of the NSI orders to certain material, and I have addressed aspects of those submissions in confidential reasons which supplement this judgment. Those matters have been considered in the balancing process. Balancing all the considerations in the very particular circumstances of this case, I am satisfied that there should be production of the document. This conclusion has no broader application. Rather, and to be clear, this conclusion would be otherwise but for the very particular factual circumstances of this application. The conclusion in respect to the documents in respect to all other witnesses to which *Roberts-Smith (No 24)* relates, still holds. As noted above, the applicant did not contend otherwise.

## Conclusion

1. For the reasons above, and those given in the confidential reasons, there has been a material change of circumstance in respect to the document sought since *Roberts-Smith (No 24)* and the IGADF has not established its claim for immunity over that document. I expect that the amendments to the NSI orders, considered necessary by the IGADF, will be made before the production of the document.
2. Given that conclusion, the IGADF will be provided with an opportunity to consider whether to seek review of this decision, before permitting the documents to be inspected or copied by any person: *Sankey v Whitlam* at 43; *Alister* at 415.

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| I certify that the preceding forty-four (44) numbered paragraphs are a true copy of the Reasons for Judgment of the Honourable Justice Abraham. |

Associate:

Dated: 1 April 2022

**SCHEDULE OF PARTIES**

|  |  |
| --- | --- |
|  | NSD 1485 of 2018  NSD 1486 of 2018  NSD 1487 of 2018 |
| Respondents |  |
| Second Respondent: | NICK MCKENZIE |
| Third Respondent: | CHRIS MASTERS |
| Fourth Respondent: | DAVID WROE |
| **Interested Persons** |  |
| Interested Person: | COMMONWEALTH OF AUSTRALIA |
| Interested Person: | PERSON 24 |