



Inquest into the death of Alexander Perepilichnyy

Coroner: His Honour Judge Nicholas Hilliard QC

RULING ON PUBLIC INTEREST IMMUNITY AND RELATED ISSUES

1. In his judgment dated 23rd November 2016, Cranston J upheld the Secretary of State for the Home Department's application for an order permitting certain documents to be withheld from use in the inquest on the grounds that their disclosure would damage the public interest (public interest immunity or "PII"). He said that he had no hesitation in finding that the balance came down in favour of non-disclosure.
2. As a result of that judgment, I was appointed as the new coroner in February 2017 because, unlike the previous coroner, Mr Travers, I am able to review the material over which PII was successfully claimed ("the PII material"). I am therefore able to keep the question of PII under review and, as Cranston J indicated at the end of his judgment, I can decide at any hearing whether particular lines of questioning are relevant in light of the PII material and whether particular conclusions would be misleading. I am also able to consider whether it is necessary to ask the Secretary of State to order a statutory public inquiry.
3. Following my appointment, and with the assistance of Leading Counsel to the Inquest ("CTI"), I first appraised myself of the relevant facts and issues in the case and reviewed the PII material. Having done so, I concluded that there was nothing known to me which would provide any basis to disturb Cranston J's ruling that the material should attract PII. That remains the case and I will of course keep that under review as these proceedings progress.
4. Second, I reached a judgment about the significance of that material to the inquest. The Interested Persons ("IPs") cannot review the PII material or receive a gist of its contents

and so are not in a position to assess its significance. I therefore did not invite submissions from them before reaching that conclusion.

5. Following my review of the PII material, I agreed a non-sensitive form of words with the Secretary of State which could be conveyed to the Interested Persons in advance of a pre-inquest review on 13th March 2017 as to the conclusions that I had reached. I also invited submissions on the question of whether the inquest could properly proceed in the absence of the PII material.
6. The form of words was included in a note from CTI dated 10th March 2017, which stated that:

“1. Nothing in the material that was the subject of the Secretary of State’s public interest immunity application materially assists the Coroner in answering the question of how Alexander Perepilichnyy died.

2. Nothing in that material alters the decision on scope”.

7. At the PIR on 13th March 2017 I received written and oral submissions from the IPs and CTI as to this conclusion and as to the question of whether the inquest can properly proceed in the absence of the PII material or whether a public inquiry is needed (referred to by certain IPs as the “*Litvinenko* question”). Given the short space of time between circulation of the note and the PIR, and the importance of this issue, I also invited further written submissions and indicated that I would be happy for there to be a further oral hearing on this issue.
8. I received further written submissions from the legal representatives for Hermitage Capital Management (“Hermitage”) and for Mrs Perepilichnaya, but neither suggested that a further oral hearing was necessary.
9. Hermitage submit that before I determine whether the inquest can properly proceed in the absence of the PII material, I should reconsider the indication I have given as to the materiality of the PII material and provide a reasoned decision, including setting out the factual material that I have considered and the legal test that I have applied. They have made submissions on the question of the relevance and materiality of the PII material and set out a lengthy background to help me “*understand the significance of the information that could be in the withheld material*”.

10. That last submission highlights the problems that the IPs have in addressing me on these issues, given the successful PII application. They have to grapple with what could be in the withheld material, but helpful as that may be, I have the advantage of having reviewed the material and I am in a position to judge its significance in the context of this case.
11. I have reconsidered the conclusion that was recorded in the note of 10th March 2017 in light of all of these submissions. I am not going to take up Hermitage's request that I identify what factual material I have considered, but I am satisfied that I am sufficiently appraised of the relevant facts and issues in the case in order to be able to reach a clear conclusion. And of course since 10th March, further materials have become available which were not in existence then.
12. I remain of the same view as to the significance of the PII material as I expressed in the form of words circulated on 10th March 2017.
13. Hermitage submit that I appear to have applied an intermediate classification of "*materiality*" between relevance and irrelevance. They also question what definition I have used and how the PII material cannot be "*material*" if that means "*something more than negligible*", a definition used in a very different context in *Bailey v Ministry of Defence and another* [2009] 1 WLR 1052, when it appears to bear on central questions.
14. Relevance and materiality are different concepts. The materiality of the PII material in assisting me in my statutory function is not a question of its relevance. The PII material is clearly relevant, otherwise there would have been no justification for a PII application to prevent its use in the inquest. Rather, it is a question of its significance to the statutory purpose of the inquest when set against all the other evidence in the case. That is an exercise of judgment, a judicial function. Given the nature of the PII material, I cannot go into further details openly about *why* it is that I reach that judgment. The same applies to my assessment that nothing in the material alters the decision on scope. I record my reasons for reaching those two conclusions in a 'closed' note to be held with the PII material. In doing so, I am mindful of the guidance given by the Supreme Court in *Bank Mellat v HM Treasury (No 1)* [2013] UKSC 38, [2014] AC 700, at §§68-

69 of the judgment of Lord Neuberger of Abbotsbury PSC (with whom the majority of the Court agreed).

15. Finally, I can assure the IPs that there is no question of my decision being influenced by a desire to resolve this inquest promptly. I would take a different decision if that were the right one.
16. That leaves the question of whether the inquest can properly proceed in the absence of the PII material.
17. In submissions to me as to how to address this question, CTI has drawn my attention to two other inquests in which this issue arose: the inquests into the London bombings of 7th July 2005 (“the 7/7 inquests”) and the inquest into the death of Alexander Litvinenko.
18. In the former, in a decision upheld by the Divisional Court (*R (Home Secretary) v Inner West London Assistant Deputy Coroner* [2011] 1 WLR 2564), the coroner, Dame Heather Hallett, concluded that she *could* properly proceed with the inquests notwithstanding the absence of sensitive evidence over which PII was claimed. She did so on the basis that most or all of the relevant material would be put before her in such a way that national security was not threatened, that she would not allow potentially misleading questions or those she knew to be put on a false premise, and that she would base her conclusions on the open material.
19. In the latter, the coroner, Sir Robert Owen, decided that to continue with the inquest either by disregarding the sensitive material or removing certain issues from its scope would be to fail to discharge his duty to conduct a full, fair and fearless inquiry into Mr Litvinenko’s death. He did so on the basis that the sensitive material bore directly upon one of the central issues in the inquest, namely the responsibility of the Russian state for Mr Litvinenko’s death; and that the absence of the material meant that this issue could only be determined on an incomplete, inadequate and potentially misleading basis.
20. The Divisional Court (*R (Litvinenko) v Secretary of State for the Home Department* [2014] EWHC 194 (Admin)) agreed, finding that the coroner was no longer able to fulfil the legislative purpose of the inquest (§§55-64). In doing so, the Court rejected the

Secretary of State's argument that the inquest could still go a substantial way to addressing or allaying public concern notwithstanding the removal of the Russian state responsibility issue from scope (§§37-42).

21. Drawing on the approaches in these two cases, CTI, with whom Mrs Perepilichnaya agrees, submits that the issue as to whether this inquest can properly proceed may be approached by asking the following two questions:
 - a. In the absence of the sensitive material, will it still be possible to conduct a full, fair and fearless inquiry into Mr Perepilichnyy's death and to determine, in so far as that is possible, how he died?
 - b. In the absence of the sensitive material, will it still be possible for the inquest to go a substantial way to addressing or allaying public concern about Mr Perepilichnyy's death?
22. Hermitage submit that there is a serious level of public concern about whether Mr Perepilichnyy was killed, and in particular at the instigation of Russian officials and/or serious criminals, which is relevant to (i) the extent of the investigation that is necessary to satisfy the "full, fair and fearless" standard and (ii) the extent to which, without the PII material, the inquest can comply with that exacting standard.
23. I agree with Hermitage's submission that the level of public concern is relevant to the extent of the investigation necessary and therefore to the first question posed. But subject to incorporating that into my judgment in answering the first question, broadly the two questions posed are agreed. They address the two main functions of an inquest and I agree with their formulation.
24. Although I will of course keep my decision under review, as I am bound to do, I am satisfied that I am still able to conduct a full, fair and fearless inquiry into the death in the absence of the PII material. Whilst I must leave it out of account, although it is relevant evidence, the impact on the course of the inquest should be minimal because of my conclusion that it does not materially assist me in ascertaining how Mr Perepilichnyy died and because it does not alter the scope of the inquest.

25. We are in a very different position to the Litvinenko inquest where the practical consequence of the absence of PII material was to remove an important issue from the scope of the inquest. The practical consequences in this case of the successful PII application do not constrain me in that way and we are much more closely aligned to the 7/7 inquests.
26. In my judgment the PII material does not alter the scope of the inquest and I will not be deprived of evidence that will materially assist me in addressing the issues within the scope. In my view, this militates strongly in favour of an affirmative answer to the first question.
27. That leaves the second question of whether it will still be possible for the inquest to go a substantial way to addressing or allaying public concern. Open justice is an important feature of the common law and the English legal system. Its importance was emphasised by the House of Lords as far back as *Scott v Scott* [1913] AC 417. In that case Lord Atkinson explained (at 463) that “...*in public trial is to be found, on the whole, the best security for the pure, impartial, and efficient administration of justice, the best means for winning for it public confidence and respect*”.
28. Whilst that principle is not absolute, the consequence of the successful PII application is that certain evidence will not be exposed to public scrutiny. There may also be an impact on the public perception of how thorough the inquest has been and on the extent to which the issues within the scope and any public concerns have been addressed.
29. In my judgment, however, those are inherent in any high-profile case in which there has been a successful PII application. That is likely to have been the case in the 7/7 inquests, for example. I do not believe in this case that the impact will be so detrimental as to prevent the inquest from going a substantial way to addressing or allaying public concern about Mr Perepilichnyy’s death, particularly given that, as I have indicated, the PII material will not materially assist me in determining how Mr Perepilichnyy died.
30. In conclusion, I am firmly of the view that, notwithstanding the absence of the PII material, it will still be possible for the inquest more than substantially to address and allay public concern about Mr Perepilichnyy’s death.

31. In the only other submissions I received on this issue generally, the Insurers submit that in deciding this issue I should consider not only the material for which PII has already been claimed, but also material for which PII may be claimed in the future.
32. I will address any further PII applications if and when they are made, but presently I do not share the Insurers' concerns that this inquest will be hampered by a number of hypothetical future PII applications concerning relevant evidence properly within its scope. If I am wrong about that, then I will have the opportunity to reconsider the issue in the event that it arises in the future.
33. It follows that I consider that this inquest can properly proceed in the absence of the PII material. I intend to take the same approach as Dame Heather Hallett in the 7/7 inquests. I will take care to avoid potentially misleading questions, or questions based on a false premise, and to ensure that the conclusions are based on the open evidence alone.

HHJ Nicholas Hilliard QC

22nd May 2017