Neutral Citation Number: [2013] EWHC 3724 (Admin)

Case No: CO/6635/2013

IN THE HIGH COURT OF JUSTICE
QUEEN'S BENCH DIVISION
ADMINISTRATIVE COURT

Royal Courts of Justice
Strand, London, WC2A 2LL

Date: 27/11/2013

Before :

LORD JUSTICE GOLDRING
LORD JUSTICE TREACY
MR JUSTICE MITTING

- -

Between :

The Secretary of State for Foreign and Commonwealth Affairs	**Claimant**
- and -	
Assistant Deputy Coroner for Inner North London	**Defendant**

- -

- **MR NEIL GARNHAM QC AND MR NEIL SHELDON**
(instructed by **THE TREASURY SOLICITOR**) for the **Claimant**
MR ROBIN TAM QC AND MR ANDREW O'CONNOR
(instructed by **FIELD FISHER WATERHOUSE LLP**) for the **Defendant**
MR ALEX BAILIN QC AND MISS LORNA SKINNER
(instructed by **GUARDIAN NEWS AND MEDIA**) for **The Media Parties**
MR BEN EMMERSON QC AND MR ADAM SHAW
(instructed by **BLOKH SOLICITORS**) for **Marina and Anatoly Litvinenko**
MISS CLAIR DOBBIN
(instructed by **HARBOTTLE & LEWIS**) for **The Investigative Committee of the Russian Federation**

Hearing dates: 16 October 2013

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Approved Judgment

Lord Justice Goldring :

Introduction

The judicial review

1. By a Certificate dated 7 February 2013 the Secretary of State for Foreign and Commonwealth Affairs claimed public interest immunity (PII) in respect of a number of documents selected by agreement between counsel to the Inquest and counsel acting on behalf of the Secretary of State as a representative sample in the possession and control of Her Majesty's Government (HMG) of relevance to the issues identified in the Provisional List of Issues to which the inquest of Alexander Litvinenko gives rise. As he set out in an open ruling of 17 May 2013, the Assistant Deputy Coroner (the Coroner) in part upheld the Secretary of State's PII claim, in part rejected it. The Secretary of State challenges that part of the Coroner's decision which rejected his claim for PII and his subsequent ruling regarding disclosure of the subject matter of the documents which are the subject of the Certificate.

The procedure we have followed

2. We have followed the same procedure as did the Coroner and as was envisaged by our judgment of 27 June 2013 in which we considered how the matter should proceed: see *The Secretary of State for Foreign and Commonwealth Affairs and Assistant Deputy Coroner for Inner North London [2013] EWHC 1786*. First, we heard open submissions on PII. Each of the Properly Interested Persons ("PIPs") to the Inquest made such open submissions as they wished. So too did the media. There then followed a hearing under CPR 39.2(3). Sub-paragraphs (a), (b) and (c) applied. Counsel for the Secretary of State made submissions on PII as did Counsel to the Inquest who played a very full part in seeking to uphold the Coroner's decisions. In doing so he had the advantage both of detailed knowledge of the case and the interests of the PIPs.

3. Having heard submissions we indicated that we would quash the Coroner's decision to provide gists of certain documents. We indicated too that we would not remit the matter to him for re-consideration. We indicated that our decision should not be communicated to others until the hand-down of the judgment. In the light of our decision we quashed the Coroner's proposed gists and considered what he anticipated saying publicly about the 'lines of inquiry' dealt with in the PII hearing. We made no decision regarding that. Our closed judgment sets out at some length the reasons for the decisions we announced and deals with the topic of lines of inquiry. In this open judgment we seek to set out as much of what happened and our reasoning as we properly can.

The witness summons

4. There was also before the court an application by the Coroner under CPR 34.4(1) by which the Coroner required the Secretary of State to produce to him those documents that he had decided should be disclosed by means of a gist. Given our decision we did not have to consider that application.

The background

5. Although we set out much of the detail in our previous judgment, it may be helpful to repeat some of it here.

The death of Mr. Litvinenko

6. Alexander Litvinenko died on 23 November 2006. He had ingested a radioactive isotope called Polonium-210. Arrest warrants were subsequently issued in this country in respect of two Russian nationals, Andrey Lugovoy and Dmitri Kovtun. They are in Russia. It has been made clear that they will not come to this country. Any criminal trial is therefore most unlikely.

The PIPs

7. Marina and Anatoly Litvinenko (the widow and son respectively of Mr. Litvinenko), Mr. Litvinenko's children by a previous marriage, the Secretary of State for the Home Department, the Metropolitan Police Commissioner, the Investigative Committee of the Russian Federation, Andrey Lugovoy, Dmitri Kovtun and Boris Berezovsky (until he died) were accorded the status of PIPs. Andrey Lugovoy and Dmitri Kovtun are currently playing no part in the Inquest.

Disclosure

8. On 11 January 2012, at the request of the Coroner for Inner North London, the solicitor to the Inquest, in a detailed letter, requested disclosure from all Government departments and agencies of documents held by them relating to the circumstances of Mr. Litvinenko's death. Following the appointment of the present Coroner an arrangement was reached by which HMG collated documents and made them available for inspection at their premises by counsel and solicitors to the Inquest and, subsequently, the Coroner. As Mr. Smith, solicitor to the Inquest put it:

> "It is to be emphasised that…HMG has allowed inspection of material falling under the search terms…by making the documentation available for inspection at its premises, rather than passing custody or possession of the documents to the Coroner or myself. HMG also made it clear at the outset…that it reserved its position both (a) as to the question of whether documentation was relevant to the inquest; and (b) as to whether disclosure of the documentation to [P]IPs would be objected to on grounds of public interest immunity."

Scope of the Inquest

9. Prior to the Coroner's consideration of the scope of the Inquest, counsel to the Inquest prepared an open note. It set out their provisional analysis of the HMG material insofar as it related to and informed scope. It stated that in their view the material established a prima facie case as to the culpability of the Russian State in the death. It did not establish a prima facie case with respect to culpability of the British State in failing to take reasonable steps to protect Mr. Litvinenko from a real and immediate risk to his life (the Osman/Article 2/Preventability issue).

10. On 17 January 2013 the Coroner ruled on scope. He said (paragraph 10 of his ruling):

> "At this stage of the investigative process any decision as to whether a line of inquiry falls within or without the scope of the inquest is necessarily provisional, and will be subject to continuing review in the light of the evidence as it emerges. But a provisional identification of the lines of inquiry that currently appear to be within the scope of the inquest is necessary for the effective management of the investigation.

> 11. The test that I propose to apply to the inclusion of a line of inquiry is whether:
>
> (1) the line of inquiry is at least potentially of causative relevance to the death of Mr. Litvinenko and/or
>
> (2) it is in the public interest to pursue a line of inquiry so as to allay suspicion of deliberate wrongdoing."

The Secretary of State's open Certificate

11. The Secretary of State made it clear, firstly, that he considered relevance, secondly that:

> "[If relevant] the test is whether there is a real risk that disclosure of the information would cause serious harm to the public interest- in this case, to the national security and/or international relations interests of the United Kingdom. Further, I have considered whether a real risk of serious harm could be prevented by other means (see *R v Chief Constable of the West Midlands Police, ex parte Wiley* [1995] 1 AC 274…"

12. Thirdly he said that:

> "If, applying the "real risk of serious harm" test, the material attracts PII, the…question is whether the public interest in non-disclosure is outweighed by the public interest in disclosure of material for the purpose of doing justice in the proceedings. I must consider and balance the relevant competing public interests and agree to the disclosure of material if I am satisfied that the overall public interest favours disclosure. However, if I am not satisfied that the overall public interest favours disclosure, the proper course is to make a certificate for the assistance of the Judge, who is the ultimate decision-maker, as to whether the material should be disclosed in the public interest (see *Wiley*…)"

13. He said that the approach adopted was "to focus specifically on the damage that would be done by disclosure;" that, as he was advised, the balance was between the interests of national security and of having an open inquest. In that context he referred to the comments of Lord Bingham of Cornhill in *R (Amin) v SSHD* [2004] 1 AC 653. In reaching his views he personally examined the material in question and had been advised by officials and counsel acting for the Crown in the inquest. He said that the view he expressed was his own:

> "In carrying out the balancing exercise, I have considered that Counsel for the Crown has advised that the information is relevant to the issues in the inquest. Nevertheless, due to the particularly weighty interest in non-disclosure of the information in question, I have reached the considered view that the public interest in non-disclosure outweighs the public interest in disclosure of the information. I have reached the same view in relation to the [undisclosed] schedule attached to this Certificate."

The sensitive schedule to the Certificate

14. There were detailed, lengthy and careful documents in which the Secretary of State set out why he was claiming PII.

The inter partes PII hearing

15. On 26 February 2013 there was an inter partes hearing at which PII was argued. Paragraph 1.4 of counsel to the Inquest's written submissions stated:

> "Following discussion with those representing the Secretary of State, [we]…are able to say that the material in question is relevant to a number of lines of inquiry identified in the Provisional List of Issues. Further, in ruling on this Certificate, the Coroner will, amongst other matters, address the application in PII terms of the Government's policy of NCND."

16. Mr Emmerson QC on behalf of Marina and Anatoly Litvinenko made submissions on PII. He complained about lack of particularity in the Certificate. He set out "factors weighing in favour of disclosure." He made plain his submission that the nature of the material was central to the key issue as to how Mr Litvinenko died. As to NCND, he submitted that there must be evidence of the specific harm that it protects in the particular case; that an exception in the present case would not undermine the policy in other cases.

17. Both counsel to the inquest and counsel for the Secretary of State made open submissions regarding the approach the Coroner should take to PII.

The Coroner's open ruling on PII

18. On 17 May 2013, having heard and ruling upon the Secretary of State's claim for PII, the Coroner gave an open ruling. He set out the procedure he had followed. He indicated that the first argument upon which he gave judgment concerned a single issue. He then heard further argument and gave a further ruling (see paragraph 24 of the Coroner's open ruling, paragraph 17 of our previous judgment).

19. The Coroner explained his "approach" to the PII claim. He repeated what he had said in an open ruling of 27 February 2013:

> "9. It is my duty to carry out a full and fearless investigation into the circumstances of the death of Mr. Litvinenko. That I intend to do, and I will take full account of the submissions made to me in the inter-partes hearing. If satisfied that there is a public interest in non-disclosure of any of the material the subject of the certificate, then in balancing that interest against the public interest in disclosure, I will be guided by the observations of Lord Bingham in *R (Amin) v Home Secretary…[2004] AC 653* namely that:
>
> > "In this country…effect has been given to [the duty to investigate] for centuries by requiring such deaths to be publicly investigated before an independent judicial tribunal with an opportunity for the relatives of the deceased to participate. The purposes of such an investigation are clear; to ensure so far as possible that the full facts are brought to light; that culpable and discreditable conduct is exposed and brought to public notice; that suspicion of deliberate wrong-doing (if unjustified) is allayed…"
>
> I will also bear in mind that if a claim to PII in relation to any or any part of the material the subject of the certificate is upheld, such material will be entirely excluded from evidence in the inquest proceedings.

> It follows that the application made on behalf of the Secretary of State must be subjected to the most stringent and critical examination. Insofar as the claim to PII is based on the principle of…NCND, and when considering the balance to be drawn between the conflicting public interests, I shall give most careful consideration as to whether in a formal investigation which raises matters of the gravest concern, any or much weight should be given to any claim that adherence to the NCND policy will promote the public interest in non-disclosure bearing in mind the occasions that have been brought to my attention where there has been a departure from that policy, and taking account of evidence already in the public domain…
>
> 10. …in scrutinising the claim, I propose to address the questions identified by Thomas LJ…in *R (Mohammed) v Foreign Secretary (No 2)* [2009] 1 WLR 2653 at paragraph 34, namely:
>
> (i) Is there a public interest in bringing the material that is the subject of the PII claim into the public domain?
>
> (ii) Will disclosure bring about a real risk of serious harm to an important public interest, and if so, which interest?
>
> (iii) Can the real risk of serious harm…be protected by other methods or more limited disclosure?
>
> (iv) If the alternatives are insufficient, where does the balance of public interest lie?"

20. The Coroner emphasised the importance of open justice and the vital role played by the media: see paragraphs 11 to 17 of his ruling. In paragraph 18 he said:

> "…in…*Mohammed*…Thomas LJ…observed that the public interest in open justice added considerable weight to the inherent public interest in disclosure:
>
> > "…as has been said in Arlidge, Eady and Smith on contempt…it has become apparent that the courts (and indeed Parliament) are now willing to accord the press a 'constitutional' significance that was largely unrecognised at common law.' The importance to the rule of law, freedom of speech and democratic accountability of the media's role in freely reporting what happens in court and the decisions of the court demonstrate such constitutional significance.
>
> 19. I therefore approach the task of determining whether, if I am satisfied that there is a public interest in open justice, on the basis that there is the most powerful presumption in favour of disclosure."

21. As to the "nature of the public interest in disclosure," he said (paragraph 20) that:

> "The issues to which the death of Alexander Litvinenko gives rise are of the utmost gravity and have attracted world wide interest and

> concern…I also recognise…that non-disclosure of material relevant to the issues that I have identified gives rise to a risk that public confidence in the administration of justice will be undermined.
>
> 21. I also take into account…the fact that the inquest is likely to be the only occasion on which the circumstances of [the]…death will be examined in a British court…I further bear in mind that the fullest possible disclosure is necessary to enable Marina Litvinenko and her son…effectively to participate in the investigation.
>
> 22. It follows that the claim to PII in relation to each of the documents the subject of the certificate must be given the most careful, rigorous and critical examination. The claim to PII can only be upheld to the minimal degree necessary for the protection of such public interest in non-disclosure as may be established to my satisfaction."

22. The Coroner said (paragraph 26) that in respect of those parts of the Secretary of State's Certificate which he had rejected, the information would best be disclosed by providing a gist.

23. As to "Outcome", the Coroner said:

> "28. Very broadly speaking the PII claims fell into two parts. First, the Secretary of State claimed PII in respect of the contents of the sample documents… Second, PII was claimed in respect of what might be described as the particulars of the first part of the PII claim – in essence, the subject matter of the sample documents, and the types of sensitivity that are said to underpin the PII claim made in respect of them…this second part of the PII claim was the subject of submissions at the first inter-partes hearing...
>
> 29. Dealing first with the latter of the two categories, I have rejected the PII claim in part and have concluded that more detail can and should be given openly as to the subject matter of the sample documents…
>
> …31. My detailed reasons for this ruling are set out in the ex-parte judgment. I can say, however, that two factors that I took into account in this regard were, first, the relatively limited damage that I considered that would be caused by such high level disclosure, and, secondly, the importance of providing [P]IPs with at least this level of information about this application. Without this disclosure, [P]IPs other than the Secretary of State would know that I had upheld the PII claim on some issues but rejected it on others, but would not know what those issues were. Without knowing the subject matter of the claims, [P]IPs would be ill equipped to decide whether or not to challenge my ruling, nor would they know whether to support or oppose any challenge brought by the Secretary of State. Further, and, perhaps of most importance, they would not be able to make any submissions to me, or even understand, the provisional conclusions that I have reached as to the procedural implications that the outcome of this PII application has for the future conduct of the inquest."

24. The Coroner considered how he should proceed in the light of his decisions upholding the Certificate in respect of preventability and Russian State responsibility. He said that

preventability could not be properly addressed without disclosure of the material the subject of the Secretary of State's Certificate. He said that to leave Russian State responsibility in scope without the material in relation to which he had upheld the claim to PII would cause him "grave concern." He said that to remove the issues from scope would leave uninvestigated two issues of central importance. His provisional view was that to entertain these issues on the basis only of the available open evidence would amount to a failure "to undertake a full, fair and fearless inquiry into the circumstances of Mr. Litvinenko's death. The same could be said of the decision to remove the issues from scope. But the better course was arguably not to address the issues at all rather than to do so on an incomplete, inadequate and potentially misleading basis."

The letter to the Secretary of State

25. On 4 June 2013 the Coroner wrote to the Lord Chancellor and Secretary of State for Justice. Paragraph 15 of the letter underlined his views. It stated:

> "Having given further careful consideration to the issues raised by my PII ruling and taking into account further representations I have received, I have formed the firm view that…[a public] inquiry is necessary if Mr. Litvinenko's death is to be properly investigated. Notwithstanding the submissions made to me to the effect that the inquest could still undertaken (sic) some investigation of the 'Russian State Responsibility' and 'preventability' issues on the basis of other evidence, for the reasons I have given in my PII ruling I do not believe that a proper investigation could be conducted without consideration of the HMG material which I have been shown."

The application for judicial review

The Grounds

26. Before us the argument concentrated on three closely connected grounds. It was submitted by the Secretary of State, first, that the Coroner failed to accord adequate respect to the assessment of the Secretary of State as to how the balance of the competing public interests should be struck; second, he failed properly to undertake the balancing exercise of the competing public interests by treating his desire to conduct what he considered to be a 'full and proper' inquest as a 'trump card' which overrode all other considerations and third, that he reached a decision on the merits of the claim which no reasonable coroner properly applying the correct legal principles to a decision of this nature, could have reached. A fourth submission which suggested that the Coroner mischaracterised the nature and extent of his duty in conducting the inquest and, as a result, accorded too much weight in the *Wiley* balance to objectives identified in the exercise of his discretion, was hardly pursued. Given our conclusions on the first three submissions, it was not necessary to deal with the fourth.

27. If the Secretary of State succeeded in respect of his first three submissions, it inevitably followed that the proposed gists were bound substantially to go. The Secretary of State also submitted the "lines of inquiry" which the Coroner decided should be disclosed to the PIPs would have the effect of revealing to a significant extent those parts of the PII certificate which he upheld and should be quashed.

The principles to be applied

28. Mr. Garnham QC on behalf of the Secretary of State and Mr. Tam QC on behalf of the Coroner agreed in their open skeleton arguments that the PII exercise in which the Coroner was engaged required the striking of a balance between competing public interests in disclosure and in non-disclosure. The difference between them concerned the nature of the

balancing exercise and, in particular, the approach which should be taken by the Coroner when the Secretary of State asserts that disclosure will result in damage to national security.

The authorities

29. In *Conway v Rimmer and Another* [1968] AC 910, in litigation in which the plaintiff probationary police constable was alleging malicious prosecution against his former superintendent, the Secretary of State for Home Affairs claimed PII in respect of five documents on the basis that they fell within a class of document production of which would be injurious to the public interest. The Secretary of State had carried out no balancing exercise in making the claim to PII. The House of Lords held that it was for the court to hold the balance between the public interest in withholding the evidence and the public interest in the due administration of justice. In words emphasised by Mr. Garnham, Lord Reid said (pages 943F and 952A) that:

> "However wide the power of the court may be held to be, cases would be very rare in which it could be proper to question the view of the responsible Minister that it would be contrary to the public interest to make public the contents of a particular document…
>
> I would therefore propose that the House ought now to decide that courts have and are entitled to exercise a power and duty to hold a balance between the public interest, as expressed by a Minister to withhold certain documents or other evidence, and the public interest in ensuring the proper administration of justice. That does not mean that a court would reject a Minister's view: full weight must be given to it in every case, and if the Minister's reasons are of a character which judicial experience is not competent to weigh, then the Ministers view must prevail."

30. Lord Morris said page 955G that:

> "…Some aspects of the public interest are chiefly within the knowledge of some minister and can best be assessed by him…If a responsible minister stated that the production of a document would jeopardise public safety it is inconceivable that any court would make an order for its production. The desirability of refusing production would heavily outweigh the desirability of requiring it."

31. *CCSU v Minister for Civil Service* [1985] AC 374 concerned the consideration of national security in the context of a legitimate expectation by trade unions and employees of consultation. However, in the course of their speeches, members of the House of Lords made a number of observations relevant to the present issue. As it was put by Lord Scarman (page 406G):

> "I conclude…that where a question as to the interest of national security arises in judicial proceedings the court has to act on the evidence…Once the factual basis is established by evidence so that the court is satisfied that the interest of national security is a relevant factor to be considered in the determination of the case, the court will accept the opinion of the Crown…as to what is required to meet it, unless it is possible to show that the opinion was one which no reasonable minister…could in the circumstances reasonably have held. There is no abdication of the judicial function, but there is the common sense limitation recognised by the judges as to what is

> justiciable; and the limitation is entirely consistent with the general development of the modern case law of judicial review."

32. *Wiley* was not a case concerning national security. In the course of his speech Lord Templeman said that (page 281G-H):

> "If [PII] is approached…on the basis that a relevant and material document must be disclosed unless disclosure will cause substantial harm to the public interest, the distinction between a class claim [by the minister] and a contents claim loses much of its significance. As a general rule the harm to the public interest of the disclosure of whole or part of a document dealing with defence or national security or diplomatic secrets will be self-evident and will preclude disclosure."

33. *R (Binyam Mohammed) v Secretary of State for Foreign and Commonwealth Affairs* [2011] QB 218 concerned issues of national security. Simplifying the facts greatly, an issue concerned the disclosure of intelligence material provided by the United States to the British security services, which, as it was certified by the Secretary of State, should remain under the control of the United States and not be disclosed in an open judgment of the court; the 'control principle.' A breach of the control principle, it was argued, would prejudice national security. Those paragraphs of the judgment dealing with the material should accordingly be redacted. In the course of their judgments, Lord Judge CJ and Lord Neuberger MR (as he then was) made a number of observations which, as it seems to me, are highly material to a situation such as the present. Lord Judge said:

> "44…As the executive, not the judiciary, is responsible for national security and public protection and safety from terrorist activity, the judiciary defers to it on these issues, unless it is acting unlawfully, or, in the context of litigation, the court concludes that the claim by the executive for public interest immunity is not justified. Self evidently, that is not a decision to be taken lightly…
>
> 46…Although the Foreign Secretary accepts that the [control] principle is not absolute, he contends that, having made his own examination of the overall interests of justice, the control principle should be upheld. On the basis of all the evidence including sensitive schedules, I have been unable to eradicate the impression that we are being invited to accept that once the Foreign Secretary has made his judgement of all the relevant considerations, including the interests of justice, and notwithstanding that in law the control principle is not absolute, so far as this court is concerned, as a matter of practical reality, that should be that. However, although in the context of public safely it is axiomatic that his views are entitled to the utmost respect, they cannot command the unquestioning acquiescence of the court.
>
> 51. The enormous concentration on the redacted paragraphs may have led us to overlook that this litigation has endorsed the application of public interest immunity and the maintenance of confidentiality over secret information. The Divisional Court has in effect upheld and applied PII principles to a vast body of material."

34. Lord Neuberger summarised the issue in the following way:

"129. The Foreign Secretary has certified in three fully reasoned and carefully worded certificates, supported by accompanying documents, that in his opinion the inclusion of seven paragraphs in the open version of the first judgment would give rise to a real risk to national security, and that the redacted paragraphs should accordingly be redacted from the open version. The court has to decide whether to adopt or to override that view. This assessment potentially involves two steps. The first is to determine whether the publication of the redacted paragraphs would be against the national interest, the second step (which may not arise if the threat to the national interest would not exist or would be very significant) is to weigh that aspect of public interest against the public interest in the…judgment being fully open…

131 While the question of whether to give effect to the certificate is ultimately a matter for the court, it seems to me that, on the grounds of both principle and practicality, it would require cogent reasons for a judge to differ from an assessment of this nature made by the Foreign Secretary. National security, which includes the functioning of the intelligence services and the prevention of terrorism, is absolutely central to the fundamental roles of the Government, namely the defence of the realm and the maintenance of law and order, indeed ultimately, to the survival, of the state. As a matter of principle, decisions in connection with national security are primarily entrusted to the executive, ultimately to Government ministers, and not to the judiciary…In practical terms the Foreign Secretary has unrestricted access to full and open advice from his experienced advisers, both in the Foreign Office and the intelligence services. He is accordingly far better informed, as well as having far more relevant experience, than any judge for the purpose of assessing the likely attitude and actions of foreign intelligence services as a result of the publication of the redacted paragraphs, and the consequences of any such actions so far as the prevention of terrorism in this country is concerned.

132 None the less, the ultimate decision whether to include the redacted paragraphs into the open version of the first judgment is a matter for judicial, not executive, determination. Ever since the decision of the House of Lords in Conway v Rimmer…it has been clear that the question whether a document should be exempted from disclosure in legal proceedings on the ground that disclosure would damage the public interest should ultimately be decided by the court. That is because it is ultimately for a judge, not a minister, to decide whether a document must be disclosed, and whether it can be referred to, in open court. That decision is for a judge not a minister, not least because it concerns what goes on in court, and because a judge is better able to carry out the balancing exercise: see per Lord Woolf in…Wiley page 289C to G, citing Lord Pearson's observations in the Conway case [1968] AC 910, 985. Furthermore, practically any decision of the executive is subject to judicial review, and it would seem to follow that a minister's opinion that a document should not be disclosed in the national interest is in principle reviewable by a court…

> 135….where a minister has concluded that the public interest justifies excluding a passage from the open version of a judgment, the court must first consider whether there is anything in the suggestion, and, if there is, then unless the inclusion of the passage would have a grave effect on the public interest (in which case that would be the end of the matter), the court must then carry out a balancing exercise. In a case such as the present, it is salutary to bear in mind what Lord Reid said in the Conway case…namely "cases would be very rare in which it could be proper [for a court] to question the view of the responsible minister that it would be contrary to the public interest to make public the contents of a particular document." Especially, I would add, when it comes to issues such as national security…
>
> 154…Like the other arms of government, courts have a duty not to do anything which risks national security, unless there is very good reason…
>
> ….the Divisional Court was right to conclude that this was not a case where the public interest in redacting the redacted paragraphs was plain and substantial enough to render it inappropriate to carry out he balancing exercise."

35. In *Mohammed*, however, as Lord Neuberger put it paragraph 139, the view of the Foreign Secretary was not, by the stage of the hearing in the Court of Appeal, supportable:

> "It was logically insupportable and therefore irrational."

36. In other words, the factual basis for the claim for PII on the basis of national security had gone. No-one suggested that was the case here.

The argument

37. In this open judgment I try and encapsulate as much of the argument as I properly can. I should emphasise that this summary does not cover all the submissions made.

The Secretary of State's submissions

38. Mr. Garnham submitted that the authorities required that much greater weight should have been attached to the view of the Secretary of State than did the Coroner. The circumstances where a court is justified in rejecting a certificate in the face of the Secretary of State's personal view that there is a risk of real and significant damage to national security, must be limited and were far removed from the present case. That is particularly so where the Secretary of State has himself in a balanced and coherent way considered the balancing exercise. Mr. Garnham was critical of the Coroner's rulings. He did not follow the authorities. He did not explain how he had balanced a significant risk to national security against his decision to disclose. He took his perceived need for a full and proper inquest as the overriding consideration (the trump card).

39. Had a careful, objective and balanced consideration of the weight to be attached to the competing interests been undertaken in accordance with the legal principles, it could not rationally have resulted in the conclusion reached.

40. Moreover the Coroner should have reconsidered his initial decision in the light of his subsequent rulings on PII. Those subsequent rulings affected the balancing exercise.

41. In the result, submitted Mr. Garnham, if the Coroner had approached the issues as he should have, he could not have reached the decision he did; no rational coroner could.

Counsel to the Inquest's submissions

42. Mr. Tam submitted that Mr. Garnham's submissions to us on the way he should approach the balancing exercise were never made to the Coroner. That is why the Coroner dealt with the matter in the way he did. He was, submitted Mr. Tam, right to do so. He was required to carry out a conventional balancing exercise. Even a real risk of serious damage to national security would not automatically trump the public interest in open justice. While the Secretary of State is in a better position to determine the impact of disclosure on national security, the Coroner is better placed to judge the importance of the material to the task he is undertaking. That was particularly so for a coroner who, alone among those taking part in an inquest, had an overview of the evidence and its significance.

43. The way in which the balancing exercise was carried out by the Coroner could not, submitted Mr. Tam, be criticised. The fact that he substantially accepted the Secretary of State's case demonstrated that he carefully carried out the required balancing exercise. There was nothing in the "trump card" suggestion. The decision regarding Russian State responsibility showed that.

44. Given that dissimilar interests had to be weighed against each other, the Coroner's reasoning could not be impugned. There could not sensibly have been any further rationalisation of how one factor outweighed another.

45. As to the suggestion that the Coroner's decision was irrational, Mr. Tam submitted that in truth it amounted to an argument on the merits.

46. Mr. Tam emphasised the importance of the coronial process. This was not litigation between parties. It required public exposure of wrongdoing and accurate public attribution of it. The more accurate the underlying facts and the more coherent the account disclosed by the investigation, the more secure the investigative process.

47. Mr. Tam took us through part of the evidence which he submitted supported his submissions as to the importance in the narrative of the disclosure ordered by the Coroner.

48. Finally Mr. Tam submitted that were we minded to quash the Coroner's decision we should remit the matter to him for re-consideration.

The submissions of the PIPs

49. Written, and to a more limited extent, oral open submissions were made on behalf of Mrs. Litvinenko and the media. Reliance was placed on the submissions previously made to the Coroner. Obviously, given their limited knowledge of the issues, the PIPs were constrained in what they could say. A number of matters, each of which I readily accept, were drawn to our attention. Open justice is of fundamental importance in the administration of justice. That is particularly so in the context of a high profile inquest of the gravest importance which has attracted worldwide interest and is likely to be the only occasion on which Mr. Litvinenko's death will be investigated in a judicial forum.

50. There were, it was submitted, several matters of real concern. It may be inferred from the Home Secretary's letter of 17 July 2013 that PII is being sought not for reasons of national security, but to avoid antagonising the Russians "if necessary, at the expense of exposing the truth," as it was put on behalf of the media. The ability of the Coroner to conduct a proper inquest has already been severely prejudiced. Excluding further material would exacerbate

that position. The Coroner could be placed in an impossible position. The submissions of counsel to the inquest were repeated as to the correct approach to the balancing exercise. Due deference to the views of the Secretary of State in respect of matters of national security does not mean abasement to his views. The Coroner was better placed to carry out the balancing exercise than was the Secretary of State. The fact that PII is being sought in respect of the identification of the issues to which the material relates made it impossible to consider or assess the merits of the claims to PII.

51. On the assumption that NCND was an aspect of the judicial review, the submissions made to the Coroner and what he said about the topic in his open judgment of 17 May 2013 were referred to. The occasions when NCND has previously been waived were emphasised.

52. The relevant authorities on the importance of open justice (to some extent referred to by the Coroner in his open judgment) were drawn to our attention. In short, the Secretary of State's claim must be subjected to the most rigorous scrutiny.

My conclusions

The balancing exercise

53. First, it is axiomatic, as the authorities relied upon by the PIPs demonstrate, and as the Coroner set out in his open judgment, that public justice is of fundamental importance. Even in cases in which national security is said to be at stake, it is for courts, not the Government, to decide whether or not PII should prevent disclosure of a document or part of a document.

54. Second, as I have said, the issues which we have had to resolve only concerned national security. The context of the balancing exercise was that of national security as against the proper administration of justice. Had the issues been such as have been touched upon by the PIPs in their submissions, different considerations might well have applied.

55. Third, when the Secretary of State claims that disclosure would have the real risk of damaging national security, the authorities make it clear that there must be evidence to support his assertion. If there is not, the claim fails at the first hurdle. In this case there was unarguably such evidence. The Coroner did not suggest otherwise.

56. Fourth, if there is such evidence and its disclosure would have a sufficiently grave effect on national security, that would normally be an end to the matter. There could be no disclosure. If the claimed damage to national security is not "plain and substantial enough to render it inappropriate to carry out the balancing exercise," then it must be carried out. That was the case here.

57. Fifth, when carrying out the balancing exercise, the Secretary of State's view regarding the nature and extent of damage to national security which will flow from disclosure should be accepted unless there are cogent or solid reasons to reject it. If there are, those reasons must be set out. There were no such reasons, let alone cogent or solid ones, here. The Coroner did not seek to advance any. The balancing exercise had therefore to be carried out on the basis that the Secretary of State's view of the nature and extent of damage to national security was correct.

58. Sixth, the Secretary of State knew more about national security than the Coroner. The Coroner knew more about the proper administration of justice than the Secretary of State.

59. Seventh, a real and significant risk of damage to national security will generally, but not invariably, preclude disclosure. As I have emphasised, the decision was for the Coroner, not the Secretary of State.

60. Eighth, in rejecting the Certificate the Coroner must be taken to have concluded that the damage to national security as assessed by the Secretary of State was outweighed by the damage to the administration of justice by upholding the Certificate.

61. Ninth, it was incumbent on the Coroner to explain how he arrived at his decision, particularly given that he ordered disclosure in the knowledge that by doing so there was a real and significant risk to national security.

The real and significant risk to national security

62. The Secretary of State carefully and cogently explained why in his view, disclosure involved a real and significant risk to national security. On any view, Lord Templeman's observation in *Wiley* apart, the nature of the risk of the damage to national security spoken of by him, required that very considerable weight be placed upon what he said. Given the risk described, it must rarely be the case that in such circumstances disclosure could reasonably be ordered.

The Coroner's decision

63. The task which faced the Coroner was a very difficult one. There was the inherent difficulty of balancing two dissimilar interests. The argument as advanced to us by the Secretary of State was different from that advanced to the Coroner. There is nothing to suggest that he was asked to approach the matter in the way analysed by Lord Neuberger in *Mohammed*; or that Lord Templeman's observations in *Wiley* were drawn to his attention. Importantly, he was never asked at the time to re-consider the balancing exercise in the light of his subsequent PII rulings.

64. The Coroner did not really explain the reasoning which drove him to decide that the need for "a full and proper inquiry" outweighed the real risk of damage to national security. There is nothing to suggest he had in mind such observations as those of Lord Neuberger (see paragraph 34 above) to the effect that it would be very rare for a court, especially regarding such issues as national security, to question the view of the Secretary of State that disclosure would be contrary to the public interest. While it is plain that the decision was one for the court, not the Secretary of State, I am driven to the conclusion that the weight the Coroner gave to the views of the Secretary of State was insufficient and amounted to an error of law.

65. Moreover, there was the further problem that the Coroner did not re-consider his first decision in the light of his subsequent ones. (As I have said, he was never asked to). The outcome of the subsequent PII hearing, in which PII was upheld in respect of Russian State responsibility and preventability, with the consequent view of the Coroner as to whether justice could in any event be done, was relevant to the balancing exercise he initially carried out. In broad terms, given that due to his later rulings the Coroner was of the view that "a full and proper investigation" could not take place anyway, it did in my view become correspondingly more difficult to justify a real risk of damage to national security on the grounds of such an investigation.

66. It was clear that the narrative of the inquest would be adversely affected by non-disclosure, although that could to some extent be ameliorated. Although this is not satisfactory, the essential issue is not whether or not the process of the inquest would be prejudiced by non-disclosure; plainly it would be. The question is whether that prejudice outweighs the real risk of significant damage to national security.

67. I had no doubt about the answer. Had the Coroner approached the balancing exercise in accordance with the way I have summarised, he would have been bound similarly to have found. No coroner could reasonably have done otherwise. That is why we quashed the Coroner's decision and declined to remit the matter.

68. It followed that the gists decided upon by the Coroner could not stand. There remained a further gist which related to a single, peripheral issue which could not in the circumstances stand.

Lines of inquiry

69. While this was peripheral to the main issues, we considered the consequences of our ruling for the lines of inquiry. For reasons which I explain in the closed judgment, a number of suggestions have been made. They reflect the importance I attach to open justice. I anticipate that amended lines of inquiry should shortly be available.

Conclusion

70. Finally, I would wish to emphasise a number of things.

71. First, the exercise we have carried out was a conventional PII exercise. It has been recognised by the law for many years. It has nothing to do with recent, controversial changes in the law.

72. Second, the issues which we have been considering concerned the risk of significant damage to national security. Had it been otherwise, different considerations might well have applied. The outcome could well have been different.

73. Third, these were difficult issues, both for the Coroner and us. In his case, he did not have the benefit of the arguments which were made to us. Nothing we have decided reduces the importance of open justice. However, no court can fail to take into account issues of national security, whatever the litigation before it.

Lord Justice Treacy:

I agree.

Mr. Justice Mitting:

I also agree.

74.