Neutral Citation Number: [2014] EWHC 194 (Admin)

Case No: CO/12683/2013

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

Royal Courts of Justice
Strand, London, WC2A 2LL

Date: 11 February, 2014

Before :

LORD JUSTICE RICHARDS
LORD JUSTICE TREACY
MR JUSTICE MITTING

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Between :

The Queen (on the application of Marina Litvinenko)	**Claimant**
- and -	
Secretary of State for the Home Department	**Defendant**
and	
(1) Assistant Coroner for Inner North London	**Interested**
(2) Commissioner of Police of the Metropolis	**Parties**
(3) Investigative Committee of the Russian Federation	

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Ben Emmerson QC, Henrietta Hill and Adam Straw (instructed by **Blokh Solicitors**) for the **Claimant**
Neil Garnham QC, Neil Sheldon and Melanie Cumberland (instructed by **The Treasury Solicitor**) for the **Defendant**
Robin Tam QC and Andrew O'Connor (instructed by **Field Fisher Waterhouse LLP**) for the **First Interested Party**
Richard Horwell QC and Saba Naqshbandi (instructed by **Metropolitan Police Service)** for the **Second Interested Party**
Clair Dobbin (instructed by **Harbottle & Lewis LLP**) for the **Third Interested Party**

Hearing dates: 21-22 January 2014

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Approved Judgment

Lord Justice Richards :

1. The claimant is the widow of Alexander Litvinenko who died in London in November 2006. By this claim she seeks judicial review of the refusal by the Secretary of State for the Home Department to order the setting up of a statutory inquiry under section 1(1) of the Inquiries Act 2005 ("the 2005 Act") into the circumstances of the death. Section 1(1) provides:

> "A Minister may cause an inquiry to be held under this Act in relation to a case where it appears to him that –
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> (a) particular events have caused, or are capable of causing, public concern, or
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> (b) there is public concern that particular events may have occurred."

The Secretary of State had been asked to set up such an inquiry by Sir Robert Owen, the judge appointed to conduct the inquest into Mr Litvinenko's death as Assistant Coroner ("the Coroner").

2. The matter was listed before us as a "rolled-up" hearing of the application for permission to apply for judicial review and, if permission was granted, of the substantive claim for judicial review. At the outset of the hearing we granted permission. We then heard submissions on the substantive claim from Mr Ben Emmerson QC on behalf of the claimant and from Mr Neil Garnham QC on behalf of the Secretary of State. Counsel for the Coroner (Mr Robin Tam QC and, in reply, his junior Mr Andrew O'Connor) made brief submissions for the assistance of the court. Counsel for the Metropolitan Police Commissioner and for the Investigative Committee of the Russian Federation attended the hearing but played no active part save that Mr Richard Horwell QC read out a short formal statement of fact on behalf of the Commissioner.

Factual background

3. Mr Litvinenko was taken ill on 1 November 2006 and died in University College Hospital on 23 November. There appears to be no doubt that the cause of death was radiation poisoning as a result of the ingestion of a radioactive substance, polonium 210

4. An investigation into the death was carried out by the Metropolitan Police Service ("the MPS") with the assistance of the Atomic Weapons Establishment, Public Health England, the Health and Safety Executive, the Forensic Science Service and other external experts. The nature of the investigation is summarised in a witness statement of Mr Robert Hunt, a Home Office official who is head of the National Security Unit within the Office for Security and Counter-Terrorism. The court has also read a redacted version of a report prepared for the Coroner by the MPS Counter-Terrorism Command: the Coroner had previously disclosed that version of the report on a confidential basis to properly interested persons for the purposes of the inquest and it was provided to the court on a basis directed towards securing the maintenance of its confidentiality. The material we have seen shows the investigation to have been

extremely thorough. It involved detailed collaboration with other agencies and independent experts, exhaustive and protracted examination of over 60 sites, visits by police officers to Russia to conduct interviews, requests for mutual legal assistance to 17 countries, and consideration of various other sources of evidence. Whilst remaining technically open, the investigation is in practice at an end: the formal statement of fact read out by Mr Horwell on behalf of the Metropolitan Police Commissioner was that there are no further material or significant inquiries to be conducted by the police.

5. The police investigation led to the conclusion that the fatal dose of polonium 210 was probably consumed by Mr Litvinenko on 1 November 2006 when he was in the company of Mr Andrey Lugovoy and Mr Dmitry Kovtun at a hotel in London. Following a review of the evidence by the Crown Prosecution Service, it was announced on 22 May 2007 that a decision had been taken to prosecute Mr Lugovoy for the murder of Mr Litvinenko and a warrant was issued for his arrest. A formal request for his extradition was made to the authorities of the Russian Federation but was refused on the ground that the Russian constitution prohibits the extradition of its own nationals. Sustained diplomatic efforts by the British Government to secure the extradition have proved unsuccessful.

6. In the light of further evidence, a decision was taken by the Crown Prosecution Service in November 2011 that Mr Kovtun should also be prosecuted for the murder of Mr Litvinenko and a warrant was issued for his arrest. We do not know whether a formal extradition request was made in his case but the stance adopted by the Russian authorities in relation to Mr Lugovoy shows that there is in any event no realistic prospect of securing Mr Kovtun's extradition.

7. An inquest into Mr Litvinenko's death was opened on 30 November 2006 but was adjourned pending the police investigation and any criminal proceedings. On 13 October 2011 the inquest was resumed, it having become clear that there was no realistic prospect of the suspects facing a criminal trial. On 7 August 2012 Sir Robert Owen was appointed to conduct the inquest.

8. A very large quantity of documentation has been disclosed to the Coroner from a variety of sources. This includes material from numerous British Government departments and agencies ("the HMG material"), access to which was provided to the Coroner and his counsel subject to such claims for public interest immunity ("PII") as might be made in due course.

9. In a Note prepared for a pre-inquest review on 13 December 2012, counsel to the inquest set out the results of their analysis of the HMG material in so far as it related to and informed the issues concerning the scope of the inquest. Their assessment as to the effect of the HMG material taken alone was, so far as relevant, that it established a prima facie case as to the culpability of the Russian State in the death of Mr Litvinenko but it did not establish a prima facie case as to the culpability of the British State in failing to take reasonable steps to protect Mr Litvinenko from a real and immediate risk to his life (described as the "*Osman*" issue, in reference to the principles laid down in *Osman v United Kingdom* (2000) 29 EHRR 245).

10. By a ruling dated 17 January 2013 the Coroner determined on a provisional basis, and subject to continuing review, that he would include within the scope of the inquest (a)

the possible culpability of the Russian State and (b) the possible culpability of the British State either by itself carrying out the poisoning by its servants and/or agents (an issue which has since dropped out of the picture) or in failing to take reasonable steps to protect Mr Litvinenko from a real and immediate risk to his life. Following his ruling the Coroner issued a provisional list of issues for examination in the inquest. They included (a) the possible involvement of Russian state agencies in Mr Litvinenko's death, which has become referred to as "the Russian state responsibility issue"; and (b) two linked issues under the heading "preventability", namely UK state agencies' knowledge/assessment of risks/threats to Mr Litvinenko's life, and decisions/actions taken to manage any identified risk/threat, which together have become referred to as "the preventability issue".

11. In January 2013 counsel to the inquest identified the documents within the HMG material that they considered to be relevant to the Coroner's investigation and of which it was expected he would seek disclosure. The Foreign Secretary claimed PII in respect of that documentation. By a ruling dated 17 May 2013 the Coroner upheld most of the PII claim. To the extent that the Coroner dismissed the claim, the Foreign Secretary challenged the decision by way of judicial review and, as explained below, in due course succeeded in that challenge.

12. Since there is no mechanism for any kind of closed hearings in an inquest, the effect of upholding the claim for PII was that the material in question fell to be excluded from further consideration during the inquest process. At paragraphs 43-46 of his open ruling of 17 May the Coroner expressed his provisional view on the implications of his decision to uphold the PII claim on the retention of the Russian state responsibility issue and the preventability issue within the scope of the inquest. As to the preventability issue, it appeared to him, subject to further submissions, that the inevitable consequence of the decision to uphold the PII claim was that the issue would have to be withdrawn from scope, and in consequence his duty to carry out a full, fair and fearless investigation into the death "will be compromised to that extent". As to the Russian state responsibility issue, he considered that the dangers inherent in attempting to address an issue of such sensitivity on very limited, and what in some respects might prove to be inherently unreliable, open evidence were obvious. He continued:

> "45. Option (iii), in relation to both Preventability and Russian State Responsibility, would be to remove the issues from scope. To do so would be to leave uninvestigated two issues that are of central importance. There is relevant material bearing on those issues that, as a consequence of my decision to uphold the relevant parts of the certificate, cannot be considered at the inquest. To attempt to address such issues without being able to take such material into account has the inevitable consequence that the inquiry would be incomplete, and a verdict potentially misleading and/or unfair to IPs [interested persons] or to others who might be implicated, in particular the Russian State.
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> 46. My provisional view is that to entertain these issues on the basis of the available open evidence, but to disregard the evidence in respect of which I have upheld (or would uphold)

> the PII claim, would be to fail to discharge my duty to undertake a full, fair and fearless inquiry into the circumstances of Mr Litvinenko's death. The same could be said of a decision to remove the issues from scope. But the better course is arguably not to address the issues at all rather than to do so on an incomplete, inadequate and potentially misleading basis."

He went on to point out that a statutory inquiry under section 1(1) of the 2005 Act might where appropriate hear evidence in closed session and would enable the relevant material to be taken into account, and to indicate that he would hear further submissions both as to the scope of the inquest and as to whether he should invite the Secretary of State to consider whether the power to hold an inquiry should be exercised.

13. For the purposes of the present proceedings counsel for the Coroner have obtained the agreement of the Secretary of State to the publication of passages in the closed ruling that accompanied the Coroner's open ruling of 17 May. In them the Coroner gave his assessment on whether the HMG material disclosed a *prima facie* case in relation to the Russian state responsibility issue and the *Osman* aspect of the preventability issue. The passages had not previously been published before they were read out by Mr Tam in open court at the hearing before us. For that reason and because of their importance for the present claim, I set them out in full (it should be noted that the three paragraphs were not necessarily consecutive to one another in the closed ruling):

> "As to the content of the material, [counsel to the inquiry] indicated at the open hearing held on 13/4 December 2012 that 'Our assessment is that HMG material does establish a prima facie case as to the culpability of the Russian State in the death of Alexander Litvinenko.' That conclusion has been borne out by my scrutiny of the documents the subject of the certificate."

> "It is to be noted that there is no material within the relevant documents to suggest that, at any material time, AL was, or ought to have been, assessed as being at 'real and immediate' threat to his life. Accordingly, disclosure of the relevant material would not appear to provide an evidential basis for a breach by HMG of its 'Osman' duty to AL, but importantly may serve to dispel suspicion that HMG was in breach of its 'Osman' duty."

> "The argument specific to the 'Osman' material is of course that it relates to the issues of the responsibility of the British State for his death. But the material that I have considered does not suggest that AL was or should have been assessed as being at a real and immediate risk to his life at any material time, and therefore that HMG was not in breach of its 'Osman' duty. I recognise that to uphold the certificate in relation to such material will not have the effect of shielding from public scrutiny evidence suggesting a breach of the 'Osman' duty to AL. That serves to some extent to reduce the weight of the argument for disclosure; and does not in my judgment provide

> a compelling reason for arriving at a different conclusion in relation to such material as to that at which I have arrived in relation to the material relevant to Russian State Responsibility."

14. Having received and considered further submissions following his ruling of 17 May, the Coroner wrote to the Lord Chancellor on 4 June 2013 to request that a statutory inquiry be set up. The letter set out the background, including reference to what the Coroner had said in his ruling of 17 May. It referred to submissions of the Secretary of State in which she had expressed the view that there would be merit in the Coroner continuing with the inquest, with the Secretary of State minded to keep under review the need for a statutory inquiry. The letter continued:

> "15. Having given further careful consideration to the issues raised by my PII ruling and taking into account all the further representations I have received, I have formed the firm view that such an 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 undertake some investigation of the 'Russian State responsibility' and 'preventability' issues on the basis of other evidence, for the reasons I have given in the 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 provisions of sections 19 and 20 of the Inquiries Act 2005 would allow some evidence to be heard in closed session, from which not only the public but also core participants may be excluded. While that is obviously undesirable in some respects, in my view it now provides the only method by which matters of central importance can be properly investigated. I should also record my firm view that any such inquiry should investigate all relevant issues, including the questions which an inquest must address. Any inquiry which takes place after the conclusion of an inquest and which considers the HMG material in those circumstances runs the risk of focusing unduly on the HMG material without the context provided by the evidence heard by the inquest. There is also a substantial risk that such an inquiry would therefore take place almost entirely in closed session. I would regard this as a most undesirable procedure for investigating issues of such importance. In addition, piecemeal consideration of different parts of the evidence in two separate sets of proceedings exacerbates the risk of incomplete investigation and of misleading or unfair outcomes.
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> 16. For the avoidance of doubt, I should say that I regard investigation of the 'preventability' and 'Russian State responsibility' issues as being of central importance to this case. It is a highly exceptional situation when the victim of what appears to have been a murder is interviewed by police

> before he dies, and makes a public statement in which he names those whom he suspects of being responsible for his death, and an independent analysis by counsel of relevant material suggests that it establishes a prima facie case to the same effect, but where the operation of PII serves to exclude that material from evidence in the resulting inquest. In my view, any investigation of this death which excludes a proper analysis of the HMG material will be inadequate and accordingly I request that the only statutory mechanism by which they may be examined should now be deployed.
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> …
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> 20. I should also say that I consider that it is undesirable for me to make any further decisions regarding the scope of my investigation before making this request because, for the reasons set out in my PII ruling, if I were to remove certain issues from scope, that would be likely to lead to the inquest failing to discharge its duty to undertake a full, fair and fearless investigation into the circumstances of Mr Litvinenko's death."

The letter concluded with a formal request that a decision be made as a matter of urgency to order an inquiry under section 1(1) of the 2005 Act.

15. The response to that letter came from the Home Secretary who, by letter dated 17 July 2013, informed the Coroner that the Government had decided not to set up a statutory inquiry at that time. That is the decision now under challenge. The reasons given for the decision are set out in the next section of this judgment.

16. On 27 November 2013 the Divisional Court upheld the Foreign Secretary's challenge to the Coroner's dismissal, by his ruling of 17 May, of part of the PII claim: *Secretary of State for Foreign and Commonwealth Affairs v Assistant Deputy Coroner for Inner North London* [2013] EWHC 3724 (Admin).

17. At a pre-inquest review on 29 November 2013 the Coroner heard further submissions on the scope of the inquest in the light of the upholding of the PII claim. The Secretary of State's position, as set out in a letter of 25 November 2013, was that it was too early for the Coroner to reach any final conclusion on whether the Russian state responsibility issue and the preventability issue should be excluded from the inquest. Leaving them in scope would mean that the investigation could continue to address the objectives identified in cases such as *R v HM Coroner for North Humberside and Scunthorpe, ex parte Jamieson* [1995] QB 1 ("*Jamieson*") and *R v Secretary of State for the Home Department, ex parte Amin* [2004] 1 AC 653.

18. On 18 December 2013 the Coroner issued a ruling in which he confirmed his provisional view that the two issues should be withdrawn from scope. He described the preventability issue as "an issue of the highest importance, involving as it does the possible culpability of the British State for the death of Alexander Litvinenko" (paragraph 21 of his ruling) but concluded that, following the PII decision, he was not in a position to investigate the issue because of the lack of relevant open evidence. He said that the issue of Russian state responsibility remained "of central

importance", raising the question whether agents or institutions of the Russian state deliberately murdered Mr Litvinenko in London, "which has extremely grave implications" and demanded the most thorough investigation of all the available evidence (paragraph 25). He referred to the assessment of counsel to the inquest that the HMG material established a *prima facie* case as to the culpability of the Russian state in the death of Mr Litvinenko. He went on to review the available open evidence going to this issue, referring *inter alia* to certain evidence from which inferences could conceivably be drawn. He concluded:

> "40. However the fundamental problem identified in paragraphs 45 and 46 of my PII ruling remains. Any inferences that could properly be drawn from any such evidence would be arrived at on an incomplete and potentially misleading basis. Alternatively such evidence might not support such inferences. In either case the verdict would sit uneasily with the assessment made by Counsel to the Inquest that the HMG material establishes a prima facie case of Russian State involvement in the death of AL. Given the importance and acute sensitivity of this issue, either outcome would be highly unsatisfactory. I therefore hold to the provisional view expressed in my PII ruling that rather than to attempt to entertain this issue on the basis of open evidence, including that to be derived from the material relied upon by Marina Litvinenko, but without being able to take account of the material subject to PII, the better course is not to address the issue in an inquest. In arriving at that conclusion I am acutely conscious of the point made by Mr Garnham in the course of oral submissions that '... *your investigation may prove to be the only public investigation into the circumstances of his death*" …, a point that has also been made forcefully on a number of occasions by Mr Emmerson. But neither the interests of the IPs nor the public interest will be served by an investigation of this issue on an incomplete and potentially misleading basis.
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> 41. I have therefore reluctantly come to the conclusion that Russian State responsibility should also be withdrawn from the scope of the inquest." (italics in the original)

19. The Secretary of State had said in her decision letter of 17 July that she would keep the Coroner's request for a statutory inquiry under review. She has been informed of the Coroner's ruling of 18 December as to the scope of the inquest but she has maintained her decision not to set up an inquiry at this time.

20. At the pre-inquest review hearing on 29 November the Coroner indicated his intention that if no statutory inquiry was established the inquest should commence in or about May 2014. He stressed, however, that his intention to continue with preparation for the inquest should not be construed in any sense as an observation as to the validity of the present challenge to the decision to refuse his request of 4 June 2013 for a statutory inquiry. He said:

> "I hold the view expressed at paragraph 15 of that letter that such an inquiry is necessary if the death is to be properly investigated."

The Secretary of State's decision letter

21. By the decision letter of 17 July the Secretary of State accepts that the circumstances are such as to give her the power to establish an inquiry under the 2005 Act. The letter states that the Government recognises that a number of considerations point towards establishing such an inquiry but there are factors pointing in the opposite direction which also have to be considered.

22. As to factors pointing in favour, the letter acknowledges that as a result of the detailed consideration given by the Coroner and his legal team to the evidence relating to the case, the Coroner is particularly well positioned to assess the significance of the available evidence; and the Government regards the weight to be attached to his view about the need for a statutory inquiry as "substantial". Secondly, the letter notes that the Coroner had decided to include the Russian State responsibility issue and the preventability issue within the scope of the inquest and that he regarded the two issues as of central importance to the case, and it refers to the effect of the PII claim and to the Coroner's view that a proper investigation could not be conducted without consideration of the HMG material. It states that his views on those matters "are plainly important considerations in deciding whether an inquest should be established". Thirdly, the letter notes that the provisions of sections 19 and 20 of the Inquiries Act 2005 would allow some evidence in an inquiry to be heard in closed session, so that material excluded from the inquest by operation of PII could be included in an inquiry whilst still preserving the sensitivity of the material. Fourthly, it refers to the Coroner's indication of willingness to act as chairman of the proposed inquiry, which would minimise the delay and disruption that might otherwise be occasioned by the establishment of an inquiry in place of the inquest. The letter records the Government's acceptance that "whether taken singularly or together, these are important factors pointing in favour of establishing an inquiry".

23. As to factors pointing in the opposite direction, it is necessary to include an extensive quotation from the decision letter, since the claimant challenges each of the factors relied on by the Secretary of State. There are six such factors (I have added emphasis to the opening word of each relevant paragraph):

> "*First*, it is the view of the Government that, despite the serious concerns you express, an inquest will go a substantial way to addressing or allaying public concern about this incident. It will be able to use open material, for example, to explore the circumstances in which the polonium was brought into this country; to ascertain the likely movement of the polonium and those who were apparently carrying it around the country; to expose the evidence about the events leading up to the murder; to ascertain who the deceased was and when, where and by what means he met his death; to reach a view as to the appropriate verdict and to make recommendations under rule 43 if thought appropriate. All these issues can be explored on

the basis of evidence that will be available to the properly interested persons, including the detailed police report.

The question whether or not public concern remains at the end of that process is a matter primarily for Ministers and one best judged at the conclusion of the inquest. In the meantime the normal legal process following a suspicious death should be permitted to run its course.

Second, there is at present no basis to conclude that Article 2 of the ECHR is engaged in this case. The Government notes that you do not suggest the contrary. In your ruling of 17 February 2013, you robustly rejected the suggestion that the alleged involvement of the Russian authorities in Mr Litvinenko's death led to an Article 2 obligation on the British authorities to investigate the circumstances of the death. There has been no challenge to that ruling. As you point out in your letter, in their undated Note concerning 'HMG material', counsel to the inquest indicated that there was no prima facie case of culpability of the British state either in the death itself of in failing to take reasonable steps to protect Mr Litvinenko from a real and immediate risk to his life. Although you have made clear that you will keep the position under review, at no point have you indicated that you take a different view on these issues from that expressed by your counsel. That being so, Article 2 is not engaged and the question now arising falls to be considered in a domestic, rather than an ECHR, context.

Third, whilst the Government notes and respects your view that in the context of this case you would choose to exercise your discretion as to the scope of the inquest broadly, so as to encompass the issues of Russian state responsibility and preventability, that involves a wider investigation than you are necessarily obliged to conduct as a coroner. As you will be aware, your obligation in circumstances where the ECHR is not engaged is to ascertain who the deceased was, and how, when and where he came by his death. The Court of Appeal held in Jamieson v HM Coroner for North Humberside and Scunthorpe that 'how' in this context means 'by what means' and not 'in what broad circumstances'. In addition, an inquest (just like an inquiry) cannot determine civil or criminal liability (see rule 42 of the Coroners Rules 1984). In those circumstances, the Government believes, with respect, that it would be perfectly possible to conduct an inquest aimed at answering the statutory questions without considering the sensitive material at all. That being so the need for an inquiry to be established to consider that material in order to fulfil the obligations on you as coroner does not arise.

Fourth, the material which cannot be considered in the inquest because of the operation of PII could only be considered by an

inquiry if it were to sit in closed session. The reasons which led to the making of the PII certificate would apply with equal force to the decision whether to make a restriction notice or a restriction order under s.19 of the Inquiries Act. Neither the material itself, nor the questions based upon it, could be made public or revealed to those who are currently designated properly interested persons. The report which followed an inquiry would have to be drafted, or alternatively published, in such a way as to exclude all reference to the sensitive material. The result would be that an inquiry would reveal publicly only that which the inquest would reveal publicly. The persons perhaps most closely concerned with the investigation, namely Marina and Anatoly Litvinenko, would learn no more from an inquiry than they would from the inquest.

The Government is, of course, already aware of the content of the closed material. An inquiry (just like an inquest) cannot rule on or determine any person's civil or criminal liability …. Accordingly, one benefit to be gained from an inquiry in this regard would be that the closed material would be considered by an independent judicial figure That might well be a significant benefit but it does need to occur within the same process as the open consideration of the evidence. The Government could consider the possibility of commissioning an independent review at the conclusion of the inquest, depending on what emerges from the open evidence at the inquest.

It is not obvious to the Government why such an arrangement would create, as you suggest it might, a risk of incomplete investigation, or of misleading or unfair outcomes. On the contrary, in the Government's view it would enable any such closed investigation to be clearly focused on any concerns that remain after the inquest. Certainly, in the Government's view it is not at all obvious that the need to adduce closed evidence necessitates or justifies the establishment of a statutory inquiry at present.

Fifth, an inquiry is almost certain to be more costly of time, money and resources than an inquest. Since the whole point of an inquiry would be to enable the chairman to consider material additional to that which the inquest would consider, the inquiry would be very likely to take considerably longer to complete, in circumstances where there is justifiable public concern to see this matter brought to a proper conclusion. The effect of acceding to your request would be that the consideration of closed material, which can never be revealed publicly, would delay the publication of conclusions that can be drawn from the open material. Furthermore, even allowing for your helpful offer to act as Chairman and to adapt the existing

> administrative arrangements to fit an inquiry, it is the Government's assessment that the exercise would be substantially more expensive than an inquest. In times when the public pursue is under real strain and the whole of Government is required to exercise restraint in incurring additional expenditure, this is a factor of real substance which must be taken into account.
>
> *Finally*, it is true that international relations have been a factor in the Government's decision-making. An inquest managed and run by an independent coroner is more readily explainable to some of our foreign partners, and the integrity of the process more readily grasped, than an inquiry, established by the Government, under a Chairman appointed by the Government which has the power to see Government material, potentially relevant to their interests, in secret. However, this has not been a decisive factor and had it stood alone would not have led the Government to refuse an inquiry. It remains, however, a factor that the Government takes into account."

24. The letter concludes that in the Government's view the factors militating against establishing an inquiry at present substantially outweigh those in favour. Accordingly, and for all the reasons set out in the letter, "considering them both individually and collectively", the Government has decided not to establish an inquiry under the 2005 Act "at this time". The letter gives an undertaking, however, to keep the matter under close review and to revisit the decision if the balance of the competing considerations were to change.

The claimant's case

25. Mr Emmerson QC submitted in summary as follows: (1) There is a strong and overwhelming public interest in establishing whether the murder of Mr Litvinenko was (a) an ordinary crime committed for private criminal purposes by two individuals or (b) a state-sponsored assassination of a British citizen carried out on British territory on the orders of the Russian state. The public interest in determining which is correct lies at the heart of the case. (2) The British Government is in possession of evidence that establishes a *prima facie* case that the murder was committed on the orders of officials of the Russian state. (3) In the light of the PII claim in respect of that material, a statutory inquiry under the 2005 Act is the only means by which the central issue in (1) can be investigated and determined whilst upholding both the public interest in getting at the truth and the public interest in protecting the secrecy of the material. The Coroner has been driven to withdraw the Russian state responsibility issue from the scope of the inquest because it would be a dereliction of duty to allow it to be determined without reference to the HMG material. The only way of proceeding that could reconcile the competing public interests was for the Coroner to ask the Secretary of State to convert the inquest into a statutory inquiry which would enable him to take the evidence into account. The only way in which the Secretary of State could exercise her discretion under section 1(1) of the 2005 Act consistently with the reason why it was conferred was to set up such an inquiry; alternatively, she required overwhelming reasons not to pursue that course. (4) The six reasons given by the Secretary of State in the decision letter for refusing to set up

an inquiry do not stand up to independent scrutiny, whether together or individually. Standing back, the decision was so obviously contrary to the public interest as to be irrational.

26. Mr Emmerson made clear that in the light of the views expressed by the Coroner in the passages of the closed PII ruling that have now been opened up (para 13 above), the claimant's case no longer relied on the preventability issue. The Coroner had found that the HMG material did not provide an evidential basis for a breach by HMG of its *Osman* duty. The claimant accepted that this amounted to an independent judicial determination of that issue after consideration of all the evidence. This aspect of the claimant's case under Article 2 ECHR was formally withdrawn. Whilst the preventability issue as defined by the Coroner was distinct and went wider, and it might be wise to include the issue within a statutory inquiry in order to allay any remaining public concern in relation to it, the claimant was not contending that the Secretary of State had a legal obligation to set up an inquiry for that purpose.

27. In developing his main theme, Mr Emmerson examined in turn each of the Secretary of State's six reasons for refusing to set up an inquiry, placing particular emphasis on the first three, in relation to which he submitted that the issues were interrelated. The specific points he made in this connection are best considered in the discussion that follows. I should, however, mention at this stage that the claimant's remaining case in relation to Article 2 was developed in the context of the second reason given by the Secretary of State and was based on the procedural obligation described in *Menson v United Kingdom* (2003) 37 EHRR CD220 ("*Menson*") to conduct an investigation into a death in suspicious circumstances.

The Secretary of State's case

28. Mr Garnham made three core submissions: (1) Article 2 was not engaged by any of the grounds advanced at the time of the Secretary of State's decision and there was therefore no error in the decision letter on this point. Now that the *Menson* procedural obligation had been raised, Mr Garnham accepted that the duty was engaged but submitted that it had been fulfilled. (2) There was no clear public interest in the immediate establishment of a statutory inquiry to investigate the Russian state responsibility issue. (3) The Secretary of State's decision was entirely rational.

29. In relation to (1), Mr Garnham's initial position was that *Menson* was a point raised by the claimant for the first time after the date of the decision. Following an intervention by Mr Emmerson, however, he accepted that *Menson* had been relied on previously by the claimant, albeit not referred to in the submissions ruled on by the Coroner himself and not referred to by the Coroner in his letter requesting an inquiry. The more important aspect of his case on Article 2 was the submission that the *Menson* duty had already been fulfilled, in particular by the police investigation, and did not require any further step such as the setting up of a statutory inquiry.

30. In relation to (2), Mr Garnham submitted that the existence of a *prima facie* case of Russian state responsibility did not make it irrational for the Secretary of State to decide not to establish an inquiry immediately but to keep the matter under review. As stated in the first reason for refusal, the Coroner would be able to deal in the inquest with a lot of things. The Coroner's investigation had already gone a considerable way in addressing issues of public concern (in particular the *Osman*

point) and had further to go. The Secretary of State had more to take into account than the Russian state responsibility issue. Even if that issue were given the importance attached to it by the claimant, the question of an inquiry was a difficult and nuanced one. There was considerable doubt whether it could achieve the objectives the claimant had identified, that is whether it could provide an answer so as to allay public concern: this tied in with the fourth reason in the decision letter. It was open to doubt whether the public interest would be served: one aspect of this argument was the sixth reason in the decision letter, concerning international relations. Cost was also a factor to be taken into account in striking a balance between competing public interest: this was the fifth reason in the decision letter.

31. In relation to (3), Mr Garnham submitted that opinions on the subject may reasonably differ but the Secretary of State was entitled to take the view that at present the balance came down against an inquiry. It was not unlawful for her to keep the matter under review. In the context of the time elapsed since the death of Mr Litvinenko, it was reasonable to await the conclusion of the inquest. There was no public law duty to take a decision at the earliest possible time. The intervening period was not going to be wasted. The Secretary of State had not taken account of irrelevant considerations or failed to take account of relevant considerations. There were aspects of the case, such as the outcome of an inquiry on public confidence generally, that the Secretary of State was best placed to assess. This was a difficult and controversial decision in relation to which she was much better placed than the reviewing court to decide where the balance should be struck (cf. *R (E) v Chairman of the Inquiry into the death of Azelle Rodney* [2012] EWHC 563 (Admin) at para 24).

32. Mr Garnham relied on his submissions on those three core issues as covering his case in relation to the six reasons given in the decision letter for the Secretary of State's refusal of the Coroner's request, save for the third reason, concerning the scope of the inquest, on which he made additional submissions. His detailed points on all six reasons are again best considered in the discussion that follows.

Discussion and conclusion

33. The focus of attention must plainly be the Russian state responsibility issue. It is at the forefront of the claimant's case and is one of the two issues that on the Coroner's findings are central to the case but cannot be investigated in the inquest because of the PII claim.

34. Although the Coroner himself has attached weight to the second issue, that of preventability, and this should plainly be taken into account in any decision on whether to set up a statutory inquiry, I propose to make no more than incidental reference to it in my discussion. That is primarily because of the way in which the claimant's case is now put (see para 26 above) but also because the issue would appear to have lost much of its significance in the light of the public disclosure of the Coroner's view that the HMG material does not establish even a *prima facie* case of breach of the *Osman* duty. *Osman* is concerned with the duty to protect against a risk that is "real and immediate". A real risk is one that is "not a remote or fanciful one" and an immediate risk is a "present and continuing" one (per Lord Dyson JSC in *Rabone v Pennine Care NHS Trust* [2012] UKSC 2, [2012] 2 AC 72, at paras 38-39). If there was no *prima facie* case of a failure by the British state to protect against a risk of that nature, it is difficult to see what point of substance is left on which public

reassurance may be required. I stress, however, that that is a view reached on the limited material before this court and without prejudice to the Coroner's assessment based on the evidence as a whole, including the HMG material.

35. I should also note that at para 47 of his PII ruling of 17 May the Coroner said that, whilst he had dealt first with the Russian state responsibility issue and the preventability issue, "similar considerations may apply in relation to the other issues in respect of which I have upheld the PII claim in whole or in part"; and at para 5 of his ruling of 18 December on scope he left open the question whether a number of lines of inquiry in the provisional list of issues should or should not be removed from scope as a result of the PII claim. In other words, although I concentrate here on the Russian state responsibility issue, it needs again to be borne in mind that the Coroner's concerns in requesting a statutory inquiry go wider.

36. With that introduction I propose to examine in turn each of the six reasons given by the Secretary of State for refusing the Coroner's request to set up a statutory inquiry, before briefly pulling the threads together and expressing my conclusion. Like counsel, I refer to the Secretary of State's "reasons" for the refusal even though they were expressed in the decision letter as "factors pointing in the opposite direction" from establishing a statutory inquiry. They were the specific matters relied on by her as outweighing what she had accepted to be important factors pointing in favour of establishing an inquiry.

The first reason for the refusal

37. The first reason given in the decision letter for refusing the Coroner's request was the Government's view that an inquest would go a substantial way to addressing or allaying public concern about the incident, and the question whether public concern remained was best judged at the conclusion of the inquest. This reasoning links also with a point made in the context of the fourth reason, where it was accepted that it would be of benefit for the closed material to be considered by an independent judicial figure but that the Government could consider the possibility of commissioning an independent review at the conclusion of the inquest, depending on what emerged from the open evidence at the inquest.

38. Mr Emmerson submitted that there were two possible interpretations of what the letter said: *either* it was saying that an inquest would go a substantial way towards investigating the Russian state responsibility issue *or* it was saying that the inquest would go a substantial way towards investigating other matters. If the former interpretation was correct, the reason given was simply mistaken: the inquest could not go any way towards investigating the Russian state responsibility issue, for the reasons the Coroner had given and which led to his decision, already inevitable at the time of the Secretary of State's letter, to exclude the issue from the scope of the inquest. If the latter interpretation was correct, the reason simply overlooked the most important public interest question in the case. On neither interpretation did the reason provide any valid basis for refusing the request for a statutory inquiry or for adopting a "wait and see" approach.

39. Mr Garnham conceded that the first reason did *not* relate to the Russian state responsibility issue (or the preventability issue) but was concerned with other things the Coroner would be able to deal with. His point, if I understood it correctly, was

that the Secretary of State was not overlooking the central issues but was taking into account, as one of many relevant considerations, what the inquest was capable of achieving otherwise than in relation to those issues.

40. Mr Garnham's concession may have been correctly made but I find it surprising and unsatisfactory that the Secretary of State was putting forward, as her first reason for the refusal of the Coroner's request, that the inquest could go a substantial way to addressing or allaying public concern in relation to matters *other than* the two central issues identified by the Coroner. If that is what she was saying, the point took her nowhere. It simply failed to engage with the Coroner's concern that the inquest could not undertake a proper investigation of the two central issues. It could not provide a rational basis for a "wait and see" approach in relation to the setting up of a statutory inquiry or other form of independent review to investigate those issues: the problem identified by the Coroner was an immediate problem which the inquest could not solve.

41. Despite Mr Garnham's concession, I think it more likely that the Secretary of State intended this first reason to extend to the Russian state responsibility issue and the preventability issue. The Secretary of State had recently submitted to the Coroner that he should retain both issues within scope, contending that work already undertaken by him in investigating the issues on the basis of material not covered by the PII claim, and such further investigation as he might undertake or conclusions he might reach were the issues to remain in scope, would be "likely to assist the Secretary of State in her consideration of whether a statutory inquiry is required" (para 8 of written submissions dated 31 May 2013 by counsel for the Secretary of State). The first reason is more readily understood as a reflection of that line of argument. That construction of it also fits better with the point made under the fourth reason about considering the possibility of an independent review in the light of what emerged from the open evidence at the inquest.

42. If that is how the first reason is to be understood, however, it does not improve the Secretary of State's position. The Coroner's strongly expressed provisional conclusion was that the Russian state responsibility issue and preventability issue should be removed from scope. For the Secretary of State's decision letter to reason on the basis that the issues would remain in scope was unrealistic. In any event the Secretary of State adhered to her decision, without any revision to her reasons, following the Coroner's actual decision to remove the two issues from scope. The result of that decision is that neither issue will be investigated by the inquest. Any suggestion that the inquest will go a substantial way to addressing or allaying public concern in relation to them is therefore plainly unsustainable and again cannot provide a rational basis for a "wait and see" approach in relation to the setting up of a statutory inquiry or other form of independent review.

The second reason for the refusal

43. The second of the Secretary of State's reasons was that Article 2 was not engaged, so that the question of an inquiry fell to be considered in a domestic context rather than an ECHR context. Mr Emmerson submitted that the Secretary of State erred in her conclusion that Article 2 was not engaged and was wrong to dismiss it as a relevant factor. Three bases for the application of Article 2 had been put forward to the Coroner. One was the *Osman* duty, which the claimant no longer pursued. The

second was that Article 2 was engaged by the alleged involvement of the Russian state: this argument was rejected by the Coroner and was not being pursued in the domestic court. The third was the *Menson* duty to conduct an investigation into a death in suspicious circumstances. Mr Emmerson submitted that the duty was plainly engaged in this case. It had been partially fulfilled by the police investigation and by the attempts to secure the extradition of Mr Lugovoy and Mr Kovtun, and the inquest would also go towards fulfilling it, but the obligation was to take the investigation as far as one could and in that respect there was still a shortfall. The HMG material was known to establish a *prima facie* case of culpability of the Russian state in the death of Mr Litvinenko, which meant that there was a *prima facie* case that individual agents of the Russian state were parties to his murder. There was no evidence that this aspect had been fully investigated or brought to a determination by the police. The inquest could not investigate it. A statutory inquiry, however, was capable of taking the investigation further.

44. Mr Garnham rightly conceded that the *Menson* duty was engaged. I have referred above to his initial contention that it was a new point and to his retreat from that contention in the course of his submissions. It follows that the Secretary of State was in error in stating as her second reason that Article 2 was not engaged. In itself, however, this was not an error of any materiality. What matters is whether the *Menson* duty has in practice been fulfilled, as contended by Mr Garnham, or whether there is a shortfall that needs still to be addressed. If the latter is the case, then the Secretary of State failed to take into account a relevant consideration in reaching her decision.

45. *Menson* itself was an admissibility decision of the European Court of Human Rights in a case involving a death in the United Kingdom without any blame on the part of the authorities or any breach of their *Osman* duty. The court described the relevant procedural obligation under Article 2 and its application in the circumstances of the case in the following terms (at (2003) 37 EHRR pages CD229-CD230):

> "However, the absence of any direct State responsibility for the death of Michael Menson does not exclude the applicability of Art.2. It recalls that by requiring a State to take appropriate steps to safeguard the lives of those within its jurisdiction …, Art.2(1) imposes a duty on that State to secure the right to life by putting in place effective criminal law provisions to deter the commission of offences against the person, backed up by law enforcement machinery for the prevention, suppression and punishment of breaches of such provisions ….
>
> With reference to the facts of the instant case, the Court considers that this obligation requires by implication that there should be some form of effective official investigation when there is reason to believe that an individual has sustained life-threatening injuries in suspicious circumstances. The investigation must be capable of establishing the cause of the injuries and the identification of those responsible with a view to their punishment. Where death results, as in Michael Menson's case, the investigation assumes even greater importance, having regard to the fact that the essential purpose

of such an investigation is to secure the effective implementation of the domestic laws which protect the right to life ….

The Court recalls that in its judgments in cases involving allegations that State agents were responsible for the death of an individual, it has qualified the scope of the above-mentioned obligation as one of means, not of result …. Thus, the authorities must have taken the reasonable steps available to them to secure the evidence concerning the incident, including *inter alia* eye witness testimony, forensic evidence and, where appropriate, an autopsy which provides a complete and accurate record of injury and an objective analysis of clinical findings, including the cause of death. Any deficiency in the investigation which undermines its ability to establish the cause of death, or the person or persons responsible will risk falling foul of this standard.

What form of investigation will achieve those purposes may vary in different circumstances …. While there may be obstacles or difficulties which prevent progress in an investigation in a particular situation, a prompt response by the authorities in investigating a use of lethal force may generally be regarded as essential in maintaining public confidence in their adherence to the rule of law and in preventing any appearance of collusion in or tolerance of unlawful acts ….

Although there was no State involvement in the death of Michael Menson, the Court considers that the above-mentioned procedural requirements apply with equal force to the conduct of an investigation into a life-threatening attack on an individual regardless of whether or not death results. The Court would add that where that attack is racially motivated, it is particularly important that the investigation is pursued with vigour and impartiality, having regard to the need to reassert continuously society's condemnation of racism and to maintain the confidence of minorities in the ability of the authorities to protect them from the threat of racist violence.

Against this background, the Court must have regard at the outset to the fact that the police investigation into the death of Michael Menson ultimately led to the identification and arrest of the culprits between March 1999 and May 1999. They were all convicted and received heavy prison sentences later that same year. It is also be observed that a public inquest into the cause of Michael Menson's death was held shortly after he died and a Coroner's jury returned a verdict of unlawful killing September 1998."

46. The court referred to certain defects in the police investigation and to the contention that those defects had their basis in racism. It said that it was not for it to pronounce on those claims. Among points it made in that connection was this:

> "In the first place, the legal system of the respondent State ably demonstrated, in the final analysis and with reasonable expedition, its capacity to enforce the criminal law against those who unlawfully took the life of another, irrespective of the victim's racial origin. For the Court, this must be considered decisive when deciding whether the authorities complied with their positive and procedural obligations under Art.2."

47. The principles set out in *Menson* were restated in materially identical form in *Angelova and Iliev v Bulgaria* (2008) 47 EHRR 7, a substantive decision of the Strasbourg court.

48. Mr Emmerson referred also to passages in *R (Challender) v Legal Services Commission* [2004] EWHC 925 (Admin), *Őneryildiz v Turkey* (2005) 41 EHRR 20 and *Rantsev v Cyprus and Russia* (2010) 51 EHRR 1, and Mr Garnham referred to *Vosylius v United Kingdom* (2013) 57 EHRR SE20, but I do not think that any of those cases takes the relevant principles much further for present purposes:

(1) *Challender* was a decision of mine at first instance. The issue was whether Article 2 required that the family of the deceased be granted publicly funded representation at the inquest. Having held that Article 2 could not apply because the death pre-dated the coming into force of the Human Rights Act 1998, I went on to consider *obiter* the position if Article 2 could apply. Following the approach in *Menson*, I found that there was an obligation to carry out an effective investigation even in cases with no state involvement in the death. It had been held in *R (Khan) v Secretary of State for Health* [2003] EWCA Civ 1129, a case relating to a death while in the care of the state, that under our law "it is the coroner's inquest, when it takes place, which furnishes the natural occasion for the effective judicial inquiry into the cause of a death that the Convention requires. The police investigation, in which the family played no part, and which culminated in a decision not to prosecute, could not act as a substitute …" (para 69); and that for the inquest to fulfil the Article 2 obligation the family of the deceased had to be able to play an effective part in it. Applying that approach, the conclusion I reached on the particular facts was that the Legal Services Commission had been entitled to find that legal representation was not needed for effective participation by the family in the inquest or for effective investigation by the coroner. The point under discussion was far removed from the present issue.

(2) *Őneryildiz* was a decision of the Strasbourg court concerning a death caused by an explosion at a municipal refuse tip for which the local authorities were alleged to have been responsible. The observations of the court in relation to the Article 2 procedural obligation were therefore made in the context of alleged state responsibility for the death and need to be read with caution. That applies in particular to one of the reasons given for the existence of an Article 2 obligation to conduct an official investigation, namely that "often, in

practice, the true circumstances of the death are, or may be, largely confined within the knowledge of state officials or authorities" (para 93). In any event, Mr Emmerson's attempt to transpose that to a situation where, as here, the state is in possession of sensitive material relating to the possible involvement of another state seems to me to read too much into what the court was saying. Moreover the subsequent judgment in *Angelova* contains nothing to suggest that *Őneryildiz* had materially qualified or added to the principles in *Menson*.

(3) *Rantsev* was a decision of the Strasbourg court concerning the death of a young Russian woman by falling from the balcony of an apartment in unexplained circumstances soon after her arrival in Cyprus. There were allegations that she had been the victim of people trafficking. After repeating the substance of the *Menson* duty, the court held that a procedural obligation had arisen to consider the circumstances of the death and that "the investigation was required to consider not only the immediate context of Ms Rantseva's fall from the balcony but also the broader context of Mr Rantseva's arrival and stay in Cyprus, in order to assess whether there was a link between the allegations of trafficking and Ms Rantseva's subsequent death" (para 234). The court concluded that there had been a failure by the Cypriot authorities to conduct an effective investigation into the death, in breach of Article 2 (para 242). One unsatisfactory feature referred to was that despite the lack of clarity of the circumstances of the death (the inquest recorded that Mr Rantseva had died in "strange circumstances" and that she had been trying to escape from the apartment), the police did not carry out an adequate investigation. Another unsatisfactory feature was that although there was a procedure whereby the Cypriot authorities could have sought assistance from Russia in investigating the circumstances of Ms Rantseva's stay in Cyprus and her subsequent death, there was no evidence that they had done so. The case illustrates that, on particular facts, the investigation of the circumstances of a death may need to encompass the broader context as well as the immediate context of the death but it remains an application of the *Menson* principles rather than an extension of them.

(4) *Vosylius* was an admissibility decision of the Strasbourg Court. It contains a convenient summary of general principles (at para 26) but in so far as the summary includes points additional to those in *Menson* I do not think that they affect the issue in this case.

49. Many of the relevant cases were considered by Lord Malcolm in a decision of the Outer House of the Court of Session in *Niven v Lord Advocate* [2009] CSOH 110, a judicial review challenge to a refusal to hold a fatal accident inquiry into a death for which there was no suggestion of state responsibility. The judge noted at para 74 that the purpose of the procedural aspects of Article 2 was "not to ensure that all suspicious deaths are fully explained, but rather that the state is behaving in a manner which is consistent with its obligation to comply with the substantive provisions in article 2". He said that the case law "demonstrates that in circumstances such as the present, the application of the state's general machinery for respecting and protecting human life, for example appropriate prohibitions in the criminal law and the operation of a suitable criminal justice system, are likely to be sufficient". He made a similar point at para 95, that in a case such as he was dealing with "the issue comes to be

whether what has been done, or left undone, undermines the efficacy of the criminal law and indicates an unwillingness on the part of the state to shoulder its full responsibilities under article 2". Those observations seem to me to be equally apposite in relation to the present case. The *Menson* duty of effective investigation is simply an aspect of the duty under Article 2 to put in place effective criminal law provisions, backed up by effective enforcement, to deter the commission of offences against the person. It should not be forgotten that in *Menson* itself the court considered it decisive that the legal system of the state had "ably demonstrated, in the final analysis and with reasonable expedition, its capacity to enforce the criminal law against those who unlawfully took the life of another" (para 46 above).

50. In considering whether the duty has been discharged in the present case, the starting point must be the police investigation. I have referred already to the extremely thorough nature of that investigation (see para 4 above). It is clear that the investigation has not been limited to the immediate context of the death but has taken in the broader context too. The police have had access to all the HMG material made available to the Coroner: a witness statement of Mr Paul Bishop of the Treasury Solicitor's Department states that HMG and the MPS have confirmed to him that the MPS has been provided with all the material it has sought from HMG and has seen all closed material seen by counsel to the inquest. Nor have the police limited their investigation to the United Kingdom. Unlike in the *Rantsev* case, the procedure for requests for mutual legal assistance to other countries has been used extensively. Police officers have also visited Russia to conduct interviews: in fact, three people have been interviewed in Moscow, including Mr Lugovoy and Mr Kovtun.

51. The police investigation led to the decision by the Crown Prosecution Service, on reviewing the evidence, that Mr Lugovoy and Mr Kovtun should be prosecuted. The response to the formal request for the extradition of Mr Lugovoy was that the Russian constitution prohibits the extradition of its own nationals. It is clear from that and from the failure of subsequent diplomatic efforts by the British Government that there is no realistic prospect of securing the extradition of either Mr Lugovoy or Mr Kovtun to face trial in this country.

52. It seems to me that the steps that have been taken are amply sufficient to fulfil the *Menson* duty in relation to the death of Mr Litvinenko. An exceptionally detailed police investigation has led to the identification of two named suspects and to the making of all reasonable efforts to bring them to trial. It is common ground that the duty is one of means not result, so that the failure to secure their extradition despite those efforts is not a ground of objection. The state's capacity to enforce the criminal law so far as it reasonably can against those who unlawfully take the life of another has been demonstrated.

53. Mr Emmerson argues that the existence of a *prima facie* case as to the culpability of the Russian state means that there is a *prima facie* case that individual agents of the Russian state were parties to the murder. In the sense that the state can act only through individual agents, that is no doubt correct. There is no reason to believe, however, that if it were possible to identify individual agents in relation to whom there are sufficient grounds for a prosecution to be brought, the police investigation was inadequate for that purpose. There is nothing more that the police can do to identify individual agents of the Russian state by gathering evidence against them with a view to prosecuting them. Mr Emmerson does not suggest that the

Government is under any obligation under Article 2 to deploy the Intelligence Services to gather intelligence about them for that or any other purpose. Moreover, even if individual agents of the Russian state could be so identified, experience in relation to Mr Lugovoy and Mr Kovtun shows that there is no realistic prospect of securing their extradition to stand trial in this country. Mr Emmerson's suggestion that they might be present in this country, attached to the Russian Embassy, whilst at the same time lacking the protection of diplomatic immunity strikes me as fanciful. So does his suggestion that changes in political climate might leave them vulnerable to being surrendered. In any event there is nothing before the court to gainsay the position of the Russian authorities that the Russian constitution prohibits the extradition of its own nationals. In these circumstances I do not see what further action could reasonably be required in order to demonstrate the capacity of the state to enforce the criminal law.

54. Mr Emmerson stressed the role performed by an inquest in meeting the procedural obligations under Article 2. That point is of particular importance in cases of alleged state responsibility for a death, but I accept that an inquest is also a relevant factor in determining whether there was been a sufficient investigation for the purpose of the *Menson* duty: the court in *Menson* itself noted the existence of the inquest as well as the police investigation and the criminal trial. In this case the inquest will not investigate the Russian state responsibility issue or, therefore, the responsibility of individual agents of the Russian state. That would be a problem, however, only if there had not otherwise been a sufficient investigation, so that there really was a gap that the inquest needed to fill. In terms of the *Menson* duty, for the reasons I have given, I do not think that there is any such gap. There are certainly strong reasons of public interest why the Russian state responsibility issue should be investigated, but I do not accept that there is a requirement to carry out any further investigation for the purposes of meeting the United Kingdom's obligations under Article 2.

The third reason for the refusal

55. The third reason given by the Secretary of State was that the inclusion of the Russian state responsibility issue (and the preventability issue) within the scope of the inquest involved a wider investigation than the Coroner was obliged to conduct and that therefore the need for an inquiry to be established in order to fulfil the obligations on him as a coroner did not arise. Mr Emmerson submitted by reference to *Jamieson* and other authorities that the investigation of matters which the Coroner judged to require investigation in the public interest was a matter of legal obligation and that the Secretary of State's reasoning was therefore wrong. The Coroner had ruled that the Russian state responsibility issue should be included in the scope of the inquest and was an issue of central importance. He had been prevented by the effect of PII from investigating that issue. Initially, Mr Emmerson went so far as to submit that the Coroner had been forced into a position where he was in breach of his duty under the Coroners and Justice Act 2009. Having heard Mr Tam's submissions on behalf of the Coroner, however, he withdrew that contention and fell back on his alternative way of putting the point, namely that the Coroner had been placed in a situation where he was unable properly to fulfil the legislative purpose of the inquest. This was just the kind of situation, in a case of public concern, in which the power under section 1(1) of the 2005 Act was intended to be used. Yet the Secretary of State's reasoning shows that she failed to consider the point.

56. Mr Garnham submitted that beyond answering the statutory questions the Coroner had a broad discretion as to the scope of the inquest. As Lord Mance JSC expressed it in *R (Smith) v Oxfordshire Assistant Deputy Coroner* [2010] UKSC 29, [2011] 1 AC 1, para 208: "Everyone agrees that coroners have a considerable degree of discretion as to the scope of their inquiry, although the verdict that they may deliver differs according to the type of inquest being held". The Coroner had to decide how far back in the chain of causation to go but the Secretary of State was entitled to draw the distinction she did between what the Coroner was mandated to address and what in the exercise of his discretion or judgment he decided to address.

57. The starting point for examination of this issue is *Jamieson*, a case of death in custody in which Sir Thomas Bingham MR set out the conclusions about a coroner's functions that he had drawn from a lengthy survey of the relevant statutory and judicial authority: see [1998] QB at pages 23-26. They included, in paragraph (1), that an inquest is a fact-finding inquiry to establish reliable answers to four important but limited factual questions: the identity of the deceased, the place of his death, the time of his death, and how he came by his death; in paragraph (2) that "how" in this context is to be understood as "by what means"; and in paragraph (5) that, although the coroner and the jury may explore facts bearing on criminal and civil liability, the verdict may not appear to determine any question of criminal liability on the part of any named person nor any question of civil liability. For present purposes, however, it is paragraph (14) that is the most important. It reads:

> "It is the duty of the coroner as the public official responsible for the conduct of inquests … to ensure that the relevant facts are fully, fairly and fearlessly investigated. He is bound to recognise the acute public concern rightly aroused where deaths occur in custody. He must ensure that the relevant facts are exposed to public scrutiny, particularly if there is evidence of foul play, abuse or inhumanity. He fails in his duty if his investigation is superficial, slipshod or perfunctory. But the responsibility is his. He must set the bounds of the inquiry. He must rule on the procedure to be followed. His decisions, like those of any other judicial officer, must be respected unless and until they are varied or overruled."

58. In *R v Inner West London Coroner, ex parte Dallaglio* [1994] 4 All ER 139, at page 155, Simon Brown LJ relied on paragraph (14) for the proposition that:

> "The inquiry is almost bound to stretch wider than strictly required for the purposes of a verdict. How much wider is pre-eminently a matter for the coroner whose rulings upon the question will only exceptionally be susceptible to judicial review."

In the same case, at page 164, Sir Thomas Bingham MR emphasised that the court in *Jamieson* did not rule that the investigation into the means by which the deceased came by his death should be limited to the last link in the chain of causation. He too referred to paragraph (14) of his conclusions in *Jamieson*, going on to say that "[it] is for the coroner conducting an inquest to decide, on the facts of a given case, at what

point the chain of causation becomes too remote to form a proper part of his investigation".

59. *R (Takoushis) v Inner North London Coroner* [2005] EWCA Civ 1440, [2006] 1 WLR 461, to which we were also referred, followed *Jamieson* and *Dallaglio* without adding materially to the principles to be derived from those cases. Nor has the replacement of the former legislation by the Coroners and Justice Act 2009, under which the Coroner is operating, affected the principles.

60. Mr Tam took us to a ruling of Hallett LJ in *Coroner's Inquests into the London Bombings of 7 July 2005* in which she considered whether the "preventability" question as defined in that case might legitimately be explored within the confines of a *Jamieson* inquest. Having referred to *Dallaglio*, she said at para 110:

> "That would appear to indicate I have a broad discretion. Given the breadth of my discretion and the obvious legitimate public interest in investigating broader issues, I have no doubt some sort of independent inquiry conducted in public and involving the families is required on issues which go beyond the immediate aftermath."

Mr Tam submitted that the approach of the Coroner in this case was on all fours with that of Hallett LJ save that the constraints of PII prevented the investigation being conducted in an inquest, so that a different form of inquiry was needed.

61. The Secretary of State's decision letter proceeds on the basis that the Coroner in this case had chosen to exercise his discretion as to the scope of the inquest so as to include within scope two issues, including the Russian state responsibility issue, that he was not obliged to include; and that since there was no obligation to include those issues within scope, the need to establish an inquiry capable of considering the HMG material in order to fulfil the obligations on him as coroner did not arise. In my view that reasoning involves a misunderstanding of the legal position and fails to address the thrust of the Coroner's concerns.

62. It is clear from the authorities to which I have referred that a coroner has to form a judgment on how wide the inquiry should go. In that sense he has a "discretion" as to the scope of the inquest. But his duty is to investigate fully, fairly and fearlessly the matters falling within the scope of the inquest as he has judged it should be. The Secretary of State was therefore wrong to draw the distinction she did between matters that the Coroner had a discretion to investigate and matters that he was obliged to investigate. Once the Coroner had formed the judgment that the Russian state responsibility should be investigated, he was obliged to investigate it. Moreover, his decision on this had to be respected unless and until it was varied or overruled. It was not open to the Secretary of State to treat the Russian state responsibility issue as something that the Coroner was not obliged to investigate.

63. In the end, of course, the Coroner decided to remove the Russian state responsibility issue (and the preventability issue) from the scope of the inquest. But that was because he was placed in an impossible dilemma by the upholding of the PII claim in relation to the HMG material. On the one hand, an investigation of the issue on the basis of the open evidence alone would be incomplete and potentially misleading and

would not enable him to discharge his duty to undertake a full, fair and fearless inquiry into the circumstances of death. On the other hand, to remove the issue from scope was also open to the objection that he could not then discharge his duty to undertake a full, fair and fearless inquiry. He opted for the latter course as the lesser of two evils, carrying through his provisional view that "the better course is arguably not to address the issues at all rather than to do so on an incomplete, inadequate and potentially misleading basis" (para 46 of his open ruling of 17 May).

64. In my view Mr Emmerson was right not to press the contention that this forced withdrawal of the issue from the scope of the inquest placed the Coroner in breach of duty; but I agree with his alternative contention that the Coroner was placed in a situation where he was unable properly to fulfil the legislative purpose of the inquest. The Coroner was prevented from considering an issue that in his judgment required investigation and was indeed of central importance to the case. He requested the setting up of a statutory inquiry as a means of overcoming that problem. By treating the Coroner's approach to the Russian state responsibility issue as merely one of discretion rather than duty, the Secretary of State's third reason for refusing the request was not only legally erroneous but failed to address the real point behind the Coroner's request.

The fourth reason for the refusal

65. The Secretary of State's fourth reason was that a statutory inquiry would reveal publicly only that which the inquest would reveal publicly, since it would have to consider the HMG material in closed session and its report would have to be drafted or published in such a way as to exclude all reference to the material. Mr Emmerson submitted that this was a ridiculous misdirection. The inquiry, unlike the inquest, could *consider* the HMG material together with the open evidence, and its *conclusion* could be stated publicly even if no reference could be made publicly to the HMG material itself. The publication of a conclusion reached by an independent judicial figure after consideration of all relevant material would perform a very important public interest function.

66. Mr Garnham submitted that there was real doubt whether a statutory inquiry could lead to the giving of any answer at all. There was a strong prospect that the evidence would be insufficient to enable a concluded view to be reached. Even if a conclusion could be reached, there was a real possibility that it could not be disclosed. That was because a restriction notice would inevitably be given under section 19 of the 2005 Act to prevent disclosure of the HMG material for which PII had been successfully claimed in the context of the inquest; and to disclose even a single sentence by way of conclusion would be likely to infringe the restriction notice. But even if a single sentence conclusion could be disclosed, that possibility did not justify a lengthy inquiry.

67. Mr Garnham's submissions on this issue went wider than the reason given in the decision letter itself, and it is upon the letter that I think it right to concentrate. The Secretary of State's assertion that an inquiry could reveal publicly only that which the inquest would reveal publicly is at best implausible. Of course, a statutory inquiry would have to consider the HMG material in closed session and would be precluded from disclosing it; but the chairman of the inquiry would almost certainly be able to state publicly *some* useful conclusion based on the material without disclosing the

material itself. It is extremely difficult to envisage a situation in which *no* conclusion could be stated publicly without infringing the restriction notice. All this applies even more forcefully in relation to an inquiry of the kind sought by the Coroner, which would look at all the open evidence as well as the closed material, not only increasing the chances that some useful finding could be made but also making it that much easier to express conclusions without revealing the closed material.

68. The proposition that a statutory inquiry would be incapable of achieving any useful purpose is therefore in my view a bad one. It is also a profoundly unsatisfactory one to rely on in the context of a letter that adopts a "wait and see" approach, since if the proposition were valid it would tell against the setting up of a statutory inquiry at all rather than against setting one up "at this time".

The fifth reason for the refusal

69. The fifth reason given in the decision letter was that an inquiry was almost certain to be more costly of time, money and resources than an inquest. Mr Emmerson did not dispute that cost was a relevant consideration but submitted that the Secretary of State's point about cost was premised on her assumption that the inquest was capable of being conducted in a way that would meet the legislative purpose and could satisfy public concern. Once it was recognised that the inquest could not deal with the Russian state responsibility issue and could not therefore meet those ends, cost could not be a good reason for refusing an inquiry; and in any event the additional cost of turning the inquest into a statutory inquiry so as to include the Russian state responsibility issue within it could not be a strong factor in the overall decision. Mr Emmerson accepted, however, that the cost issue was a subsidiary one, in that it was not needed if he succeeded on the earlier points and it could not get him home if he failed on the earlier points.

70. Whilst Mr Garnham made various points about the relevance of cost, he did not appear to me to meet the thrust of Mr Emmerson's submissions on this issue. For the reasons given by Mr Emmerson himself, however, the issue is not one on which I need dwell.

The sixth reason for the refusal

71. The Secretary of State's sixth reason was that an inquest was more readily explainable to some of the United Kingdom's foreign partners, and the integrity of the process more readily grasped, than would be the case if an inquiry were established. Mr Emmerson submitted that the reason was unsustainable and was inconsistent with the Secretary of State's "wait and see" approach. Again, however, he acknowledged that this point could not be determinative of the claim, all the more so because the decision letter itself stated that this had not been the decisive factor and if it had stood alone would not have led the Government to refuse an inquiry.

72. Despite Mr Garnham's efforts to justify it, I have found the Secretary of State's reasoning difficult to accept, especially in the absence of any evidence from the Foreign and Commonwealth Office to support the professed difficulty of explaining to the United Kingdom's foreign partners the concept of an independent statutory inquiry chaired by a judge. For the reasons given by Mr Emmerson, however, this too is an issue on which I need not dwell.

Conclusion

73. I have upheld the claimant's challenge to the adequacy or correctness of the first, third and fourth of the reasons given by the Secretary of State for refusing the Coroner's request to set up a statutory inquiry. I have also indicated my concerns about the fifth and sixth reasons though they are of subsidiary importance for the claim. As to the second reason, the Secretary of State was wrong to proceed on the basis that Article 2 was not engaged but I have found that the procedural obligation under Article 2 does not require any investigation beyond that already carried out and that the error was therefore immaterial.

74. Taking everything together, I am satisfied that the reasons given by the Secretary of State do not provide a rational basis for the decision not to set up a statutory inquiry at this time but to adopt a "wait and see" approach. The deficiencies in the reasons are so substantial that the decision cannot stand. The appropriate relief is a quashing order.

75. The case for setting up an immediate statutory inquiry as requested by the Coroner is plainly a strong one. The existence of important factors in its favour is acknowledged, as I have said, in the Secretary of State's own decision letter. I would not go so far, however, as to accept Mr Emmerson's submission that the Secretary of State's refusal to set up an inquiry is so obviously contrary to the public interest as to be irrational, that is to say that the only course reasonably open to her is to accede to the Coroner's request. If she is to maintain her refusal she will need better reasons than those given in the decision letter, so as to provide a rational basis for her decision. But her discretion under section 1(1) of the 2005 Act is a very broad one and the question of an inquiry is, as Mr Garnham submitted, difficult and nuanced. I do not think that this court is in a position to say that the Secretary of State has no rational option but to set up a statutory inquiry now.

76. Accordingly, whilst it will be necessary for the Secretary of State to give fresh consideration to the exercise of her discretion under section 1(1) of the 2005 Act and in so doing to take into account the points made in this judgment, I would stress that the judgment does not of itself mandate any particular outcome.

Lord Justice Treacy:

77. I agree.

Mr Justice Mitting :

78. I also agree.