Neutral Citation Number: [2013] EWHC 1786 (Admin)

Case No: CO6635/2013

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

Royal Courts of Justice
Strand, London, WC2A 2LL

Date: 27/06/2013

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 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 ADAM STRAW
(instructed by **BLOKH SOLICITORS**) for the **Marina Litvinenko**
MR PATRICK GIBBS QC
(instructed by **HARBOTTLE & LEWIS**) for the **The Investigative Committee of the Russian Federation**

Hearing dates: 14th June 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 Deputy Assistant Coroner (the Coroner) in part upheld the Secretary of State's PII claim, in part rejected it. The Secretary of State seeks judicial review of that part of the Coroner's decision which rejected his claim for PII.

2. The essential issue with which this judgment is concerned is whether the "properly interested persons" (PIPs) in the inquest should be "interested parties" who should participate in the judicial review. Mr. Garnham QC on behalf of the Secretary of State has made it plain that if the law demands that they should, there would be no circumstances in which he would be instructed to conduct that judicial review in public. On the basis that there could be no closed material procedure, a topic upon which Mr. Garnham formally reserves his position, it would mean the Coroner's decision would not presently be open to challenge. (At the time of argument in this case the judgment of the Supreme Court in *Bank Mellat (Appellant) v Her Majesty's Treasury (Respondent) (No. 1)* [2013] UKSC 38, had not been handed down). Implicit in Mr. Garnham's submissions is the assumption that if the only parties to the judicial review were the Coroner and the Secretary of State, a private hearing could take place under CPR 39.2, sub-paragraphs (a) and/or (b) and/or (c).

The witness summons

3. The Coroner asks the court to issue a witness summons under CPR 34.4(1) requiring the Secretary of State to produce to him those documents that he has decided should be disclosed (by means of a gist). Mr. Garnham has made it clear that were the judicial review not to proceed or to fail on the basis that the Coroner was entitled to come to the conclusion he did, the Secretary of State would object to their production on the grounds of PII.

The Intelligence Services Act 1994

4. Should the Court not set aside the witness summons, the Chief of the Intelligence Service would consider whether he would be obliged to refuse to comply with it pursuant to the statutory duty imposed upon him by section 2(2) of the Intelligence Services Act 1994; see paragraph 12 of Claire Jones' witness statement.

The Justice and Security Act 2013

5. Finally, Mr. Garnham and Mr. O'Connor, who as counsel to the Coroner have been instructed to advance his submissions as an amicus, agree that were Part 2 of the Justice and Security Act 2013 in force, the difficulties raised by this case should be capable of resolution were the PIPs interested parties. A closed material procedure in the judicial review could, in the exercise of the court's discretion, take place; see section 6. Although at the time of the hearing it was uncertain when the Act and its accompanying rules will be in place, by the Justice and Security Act 2013 (Commencement, Transitional and Saving Provisions) Order 2013, the relevant provisions of the Act came into force on 25 June 2013.

The background

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 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 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 Certificate

11. The Secretary of State considered relevance (see paragraph 4(1) of the Certificate). As to the "material in question", he said that:

> "The information which accompanies this Certificate was identified by the Coroner's Counsel and Counsel for the Crown as being a representative sample of the information relevant to the inquest on the basis of the Coroner's provisional ruling on scope dated 17 January 2013. I understand that further information may be identified as being required in the future."

The inter partes PII hearing

12. 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" [not confirm, not deny]."

13. There was evidence that Mr Litvinenko worked for United Kingdom intelligence agencies. The Government had refused either to confirm or deny the truth of that matter.

14. 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.

15. There were submissions on PII by other PIPs. The transcript of the inter partes hearing runs to some 94 pages.

16. On 27 February 2013 the Coroner gave an open ruling. Among other things he said that if in the light of his consideration of the PII issues he would be assisted by further submissions by the PIPs, he would reconvene the inter partes hearing.

17. Having considered the material ex parte, on 17 May 2013 the Coroner gave his open ruling on PII. He made it plain there was also a discrete closed ruling. Although we have seen it, it has been unnecessary to consider it for present purposes. The Coroner set out the procedure he followed (paragraph 24 of the ruling):

> "…[The] ex-parte hearing lasted two and a half days. Following that hearing, I gave a written ex-parte ruling on a single issue raised by the PII claim; I decided to take that course because the decision I had reached on that discrete issue had a bearing on the outcome of a number of the other issues that required determination. In that ruling I invited, and subsequently received, further written submissions both from the Secretary of State and from Counsel to the Inquest. There followed, finally, a further ex-parte hearing that lasted half a day, at which I heard further oral argument consequent on the ruling I had made."

18. He said it was his "final ruling" on PII (paragraph 25); that he had in part rejected the Secretary of State's claim for PII; that (paragraph 26):

> "…the best way of making this disclosure is to gist the information in question."

19. In the open judgment the Coroner redacted those parts of the ruling which rejected the Secretary of State's claim and which it was likely he would challenge. He stated that (paragraph 27):

> "These redactions will, of course, be removed in the event either that the Secretary of State does not bring a challenge, or in the event (and to the extent) that a challenge…is unsuccessful."

20. 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, and was one of the matters addressed in my ruling on 27 February 2013.
>
> 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. The information that I have concluded can be given is that the documents that are the subject of the PII claim include material relating to the following lines of inquiry:
>
> i) The possible involvement of Russian State agencies in the death of Mr Litvinenko;
>
> **[Redacted]**
>
> (…) The properties and uses of Polonium – 210;
>
> **[Redacted]**
>
> (…) UK authorities' knowledge and/or assessment of threats or risks to Mr Litvinenko's life in 2000-2006;
>
> (…) Decisions or actions taken to manage any identified risk…
>
> …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 on 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."

21. As to the contents of the sample documents (the first category to which the Coroner had referred) he said (paragraph 33):

> "…I have, again, upheld the Secretary of State's claim in part and rejected it in part. My detailed reasoning and decision on this issue is set out in the ex-parte judgment…In summary:

(i) I have considered the PII claim brought in relation to the issue of the possible involvement of Russian State agencies…and have upheld the claim.

(ii) I have considered the PII claim brought in relation to the material relevant to the Preventability issue…and I have upheld the claim.

(iii) I have considered the PII claim brought in relation to the material relevant to the issue **[Redacted]**. I have concluded that some gists can and should be given in respect of these issues.

(iv) I have concluded the gist should be given are as follows:

[Redacted]

(v) There is further material relating to other issues, in respect of which I have upheld the PII claim."

22. The Coroner considered how he should proceed in respect of the issues where he had upheld the claim for PII (paragraph 38). He contemplated as one possibility removing the issue in question from scope. To do so, he concluded, would mean an incomplete inquiry, and a potentially misleading and/or unfair verdict (paragraph 45). That led him firmly to request a public inquiry.

The law

PIPs

23. By the Coroners Rules 1984 a PIP at an inquest has certain rights. He is to be notified of the inquest arrangements (Rule 19). He may examine any witness (Rule 20(1)). He may object to the admission of documentary evidence (Rule 37(1)). He may require production of, among other things, any post-mortem report, notes of evidence or any document put in evidence in the inquest (Rule 57).

24. Mr. Garnham submitted that possession of those rights does not make the PIP a party to the inquest. In the inquisitorial process which is a coroner's inquest there are no parties. He cited the words of Lord Lane CJ in *R v South London Coroner, ex parte Thompson* (1982) 126 S.J. 625:

> "…it should not be forgotten that an inquest is a fact finding exercise and not a method of apportioning guilt. The procedure and rules of evidence which are suitable for one are unsuitable for the other. In an inquest it should never be forgotten that there are no parties, there is no indictment, there is no prosecution, there is no defence, there is no trial, simply an attempt to establish the facts. It is an inquisitorial process…"

Interested parties

25. CPR 54 contains rules about judicial review. By 54.1(2):

> "In this Section-
>
> …(f) "interested party" means any person (other than the claimant and defendant) who is *directly affected* [my emphasis] by the claim…"

26. By CPR 54.6:

> "…the claimant must…state [in the claim form]-
>
> (a) the name and address of any person he considers to be an interested party…"

27. CPR 54.7(b) requires that the claim form:

> "…must be served on-
>
> unless the court otherwise directs any person the claimant considers to be an interested party…"

28. By CPR 54.8(1), any person who wishes to take part in the judicial review must file an acknowledgement of service.

29. CPR 54.8(4)(a)(ii) states that the acknowledgement of service must:

> "state the name and address of any person the person filing it considers to be an interested party…"

30. Finally, CPR 54.17(1) provides that:

> "Any person may apply for permission…to file evidence; or…make representations at the hearing of the judicial review."

31. Practice Direction 54A (54APD.5), states:

> "Where the claim for judicial review relates to proceedings in a court or tribunal, any other parties to those proceedings must be named in the claim form as interested parties under rule 54.6(1)(a) (and therefore served with the claim form under rule 54.7(b))."

32. The meaning of "directly affected" was considered by the House of Lords in *Regina v Rent Officer Service and Another, ex parte Muldoon* [1996] 1 WLR 1103. At issue was the meaning of RSC Order 53 rule 5(3), which provided that "The notice of motion or summons must be served on all persons directly affected…"

33. The Secretary of State for Social Security applied for an order that he be joined as a respondent in a judicial review in which the refusal or failure of Liverpool City Council to determine claims for housing benefit was at issue. As set out in the speech of Lord Keith of Kinkel, with whom all members of the House agreed, the Secretary of State submitted that he would be directly affected by the outcome of the judicial review. In rejecting the Secretary of State's application, Lord Keith said:

> "That a person is directly affected by something connotes that he is affected without the intervention of any intermediate agency. In the present case, if the applications for judicial review are successful the Secretary of State will not have to pay housing benefit to the applicants either directly or through the agency of the local authority. What will happen is that up to 95% will be added to the subsidy paid by the Secretary of State to the local authority after the end of the financial year. The Secretary of State would certainly be affected by the decision, and it may be said that he would inevitably or necessarily be affected. But he would in my opinion, be only indirectly affected by reason of his collateral obligation to pay subsidy to the local authority."

34. Lord Keith referred to *In re Salmon; Priest v Uppleby* (1889) 42 Ch.D. 351 in which it was said that a third party allegedly providing the defendant with an indemnity in respect of the plaintiff's claim was only indirectly affected by the appeal of the plaintiff against the defendant. The third party would only be affected if the plaintiff succeeded against the defendant.

The argument

35. Mr. Garnham submitted that there was no rule that PIPs should be interested parties. PIPs were not parties to the inquest, as the words of Lord Lane CJ in *R v South London Coroner, ex parte Thompson*, made clear. No obligation to serve them therefore arises under PD54A. Neither does it arise under CPR 54.1(2)(f). That is particularly so on the facts of the present case. The challenge is to a decision taken in the absence of the PIPs. They were not parties to that particular issue. Nothing in the Coroner's open ruling is being challenged. The fact that the PIPs were permitted to make open submissions on issues relating to PII does not change that.

36. Further, there is no question of the PIPs being directly affected by the judicial review. The only person directly affected would be the Coroner. For the judicial review would decide whether the material would be disclosed to him. He would then have to decide

whether or not to disclose it to the PIPs. As Irwin J said in *The Queen on the application of Ahmed v HM Coroner South and East Cumbria* [2009] EWHC 1653, a coroner has a wide discretion (paragraph 48):

> "There is no hard and fast obligation on the part of the Coroner to disclose any witness statements or material: it is a matter of the exercise of discretion."

37. In short, therefore, the Coroner was an intermediate agency between the result of the judicial review and the PIPs. The position was analogous to that in *Muldoon*.

38. In his reply Mr. Garnham suggested that additionally there was no direct effect because any upholding of the Coroner's decision in the judicial review could not directly be enforced. Before it could, the court would have to grant the Coroner's application for a witness summons.

39. Although it was clear from paragraph 33 of the ruling (paragraph 21 above), that the Coroner's view was that the redacted parts should go to the PIPs he was, submitted Mr. Garnham, keeping scope under review. He said as much in his ruling on the topic (paragraph 10 above). He re-considered it in the light of his PII decision. Scope might change in the light of the outcome of the judicial review. Whether the PIPs would be affected by the judicial review depended on the Coroner's exercise of his discretion. The effect was not therefore direct.

40. Mr. Garnham also argued that to enable the court to deal justly with the case in accordance with the overriding objective under CPR 1.1(1), the court had to interpret CPR 54.1(2)(f) in such a way as to mean that the PIPs did not have to be served as interested parties. For, absent a closed material procedure, there could not be a proper disposal of the issues raised by the judicial review. The judicial review could only be heard by disclosing to the PIPs the very material which it is sought to protect. The decision of the Coroner would effectively be non-justiciable.

41. Mr. O'Connor's submissions, which were supported by two of the PIPs and the media, can shortly be summarised. Whether a PIP is directly affected is fact specific. In the present case, in the light of what the Coroner said in his open ruling, it is artificial to speak of material being disclosed by the Secretary of State to the Coroner for onward transmission in the exercise of his discretion. The reality is that disclosure to the PIPs will inevitably follow if the Coroner's ruling is upheld. Paragraphs 29 and 33 of the ruling make that plain. Had the redactions in paragraphs 29 and 33 not been made, what was to be disclosed would have been. The reality is that in his ruling the Coroner was making disclosure directly to the PIPs. That is what would happen were the judicial review to succeed. The Coroner was setting out in broad terms the material which, in the light of the PII decision, would be deployed at the inquest and that which would not. That is different from *Muldoon*. The PIPs would be directly affected. The judicial review will directly decide whether they will be able to exercise their rights in relation to the disputed PII material.

42. Moreover, if not strictly parties in accordance with 54APD.5, the considerations underlying it suggest they should be interested parties.

43. While not determinative of the issue, Mr. O'Connor did not accept that the judicial review would solely be concerned with what happened in the ex parte PII hearings. It would too be concerned with the inter partes hearing as part of a composite whole.

44. Mr. O'Connor finally submitted that the court should await the coming into force of the relevant provisions of the Justice and Security Act 2013.

My conclusion

Public interest immunity

45. PII is a long established part of the Common Law. It may be claimed in both civil and criminal proceedings. Its procedure is well established. It has nothing to do with a closed material procedure; in that regard, see for example the comments of Lord Dyson SCJ in *Al Rawi v Security Service* [2012] 1AC 531 at paragraphs 41 and 49. It is the only means by which, in a case such as the present, a judge is able to consider whether material, the disclosure of which it is believed by the Secretary of State would cause serious harm to the public interest, should be disclosed. It is the only alternative to disclosing the very material which it is said might cause such harm.

46. The process followed here was a perfectly proper one. First, the Coroner sought open submissions from the PIPs on the issues raised by the claim for PII. Second, he held an ex parte hearing.

47. In order to facilitate the whole process there was co-operation between HMG and the Coroner. The Secretary of State permitted the Coroner to examine the material in respect of which PII was claimed on a representative basis. He need not have. He would have been entitled to require the Coroner to seek that material (if necessary document by document) from him. Such a course would have required the Coroner to issue a witness summons. The Secretary of State would have responded by refusing disclosure on the basis of PII.

48. Given that background, it would be very unfortunate indeed if the Coroner's decision to order disclosure of material which in the view of the Secretary of State would cause serious harm to the public interest effectively could not be appealed. However, if the law currently dictates such an outcome, then of course I must abide by it.

What the Coroner decided in respect of the PII material

49. I cannot accept Mr. Garnham's characterisation of the Coroner's decision on disclosure in his open ruling as merely one in principle, leaving open a further exercise of discretion. When read as a whole, the sequence seems to me:

(i) First, on 17 January 2013 the Coroner decided on scope. That decision at the time was necessarily provisional (see paragraph 10 above).

(ii) Second, the PII material provided by the Secretary of State was considered by him and by counsel to the Inquest and for the Secretary of State to be relevant and within scope.

(iii) Third, having considered the material, as he made clear in paragraphs 29 and 33 of his open ruling (paragraphs 20 and 21 above), the Coroner was of the view that it was relevant and should be disclosed to the PIPs. No question of disclosure of PII material could have arisen in the first place unless it was relevant. Had the redactions not been made the "high-level" disclosure as the Coroner described it in paragraph 31 of his ruling would have been made immediately. Such disclosure was made where the Secretary of State indicated he was not challenging the Coroner's decision on PII. There was no question of a fresh consideration of his discretion. In paragraph 27 of his ruling (paragraph 19 above), the Coroner said in terms that the redactions would be removed to the extent that his decision was unsuccessfully challenged. He plainly contemplated immediate disclosure to the PIPs.

(iv) Fourth, given the position in which he then found himself, and as he was bound to, the Coroner went on to consider the implications of his upholding of the Secretary of State's claims for PII. One thing he had then to consider was how that finding might affect scope. He concluded that to remove those items from scope would result in an incomplete inquiry and a potentially misleading and/or unfair verdict to the PIPs. The rationale for wanting a public inquiry was plainly because, in the Coroner's view, the PII material was relevant and necessary for a proper Inquest. That does not suggest that he was contemplating a further exercise of his discretion in respect of the PII material.

(v) Fifth, given what the Coroner said in his open ruling it seems to me self-evident that similar considerations apply to the challenged material. Were it to be excluded from the Inquest the Coroner's complaint regarding the inadequacy of the inquest process would probably be even stronger.

CPR 54

50. The issue as far as CPR54(2)(f) is concerned is whether in those circumstances the PIPs would be directly affected by the claim for judicial review of the Coroner's decision to disclose. That can be tested by considering the consequence of the court quashing the decision. The quashing of the Coroner's decision would mean that the PIPs would not receive the material which the Coroner had decided was relevant and necessary for a proper inquest. They could not exercise their rights in relation to it. They could not make submissions regarding it in pre-inquest hearings. They could not examine any witness regarding it. That, as it seems to me, would be a direct consequence of the claim for judicial review. It would not be indirect, as was the case in *Muldoon.* Applying the plain and natural meaning of CPR 54.1(2)(f) to the facts of this case means, in my view, that the PIPs are interested parties in the judicial review.

51. While I well understand Mr. Garnham's point that the judicial review essentially concerns what happened in the ex parte proceedings, that cannot, as it seems to me, change the position. Moreover, I cannot see that the overriding objective could effectively overrule the plain words and natural meaning of CPR 54.1(2)(f).

52. The fact that in the event of the Secretary of State's challenge being unsuccessful further litigation on the witness summons may follow does not affect my view. One outcome at least of the judicial review (a quashing of the decision) would have a direct affect on the PIPs. That another might not does not seem to me to affect the application of CPR 54.1(2)(f).

The court's discretion and the overriding objective

53. CPR 54.7(b) (paragraph 27 above) deals with the service of the claim form. Without service of the claim form the interested party cannot participate in the judicial review; see CPR 54.8. CPR 54.7(b) provides that the court may direct that the claim form not be served on anyone considered by the claimant to be an interested party. In this case, the claimant does not consider that the PIPs are interested parties. The exercise of the court's discretion under 54.7(b) cannot therefore come into play. What that provision does make clear however, is that the Rules contemplate that a party with a direct interest in the outcome of a judicial review need not inevitably be served; in other words, that an interested party is not necessarily entitled to participate in a judicial review. It is a matter for the court in the exercise of its case management powers, necessarily having regard to the overriding objective to deal with cases justly.

54. It would be an unfortunate consequence of CPR 54.7(b) if, as a result of the claimant's failure to join someone with a direct interest in the outcome of the judicial review, any case management discretion by the court regarding that person's participation in the judicial review were, for that reason, lost. Such an outcome could well in a particular case be contrary to the overriding objective.

55. CPR 19.4(1) requires the court's permission to add a party. Although we have had no formal applications by the PIPs to be added as interested parties under CPR 19.4(2), it is implicit in the present proceedings that they would wish to be. It seems to me, however, there are cogent reasons why, in the particular circumstances of this case, they should not.

56. First, the decision of the Coroner was taken following a proper ex parte procedure in accordance with the law, as the PIPs and counsel to the Inquest appear to have accepted at the time. The PIPs are not seeking to review it. The judicial review will fundamentally be concerned with the outcome of that ex-parte hearing; whether the Coroner's decision in his discrete closed judgment was lawful. Adding the PIPs as parties would mean that that decision probably could not be the subject of an appeal. That is plainly highly undesirable. A court cannot deal justly with a case if in substance it cannot try it.

57. Second, CPR 54.17 (paragraph 30 above) permits the court to grant permission to any person to make representations to the Divisional Court. The interested persons (and the media) could follow an exactly analogous process to that before the Coroner. Mr. Garnham has made it clear he would have no objection. The procedure would, to adopt Mr. O'Connor's phrase, be a composite one as before the Coroner.

58. Third, the parties participating in the judicial review would both be present. CPR 39.2(3) would permit the hearing to be in private. Such a procedure would have nothing to do with any closed material procedure. It is the normal way in which issues concerning national security can be ventilated. That would be so if the hearing concerned any other sort of confidential information.

59. Fourth, such a course would, in the very unusual circumstances of this case, enable the case to be dealt with justly. The Coroner's decision could be reviewed in accordance with accepted legal principles. No injustice would be done to the interested persons or the media.

60. Accordingly, I have concluded that the PIPs are directly affected by the claim. They should not be added as interested parties. They should (as should the media) be able to file evidence or make representations during the open part of the proceedings.

A public inquiry

61. Mr. Garnham indicated that a decision in respect of a public inquiry is very likely to be made by 3 July 2013; that the result of this case will feed into that decision. In the light of that it may be helpful if I mention what, as it seems to me, the position now appears to be.

62. The Coroner has indicated that as things stand no meaningful inquest can be held. Were the Secretary of State to succeed in his present claim for PII, the Inquest would, on the Coroner's analysis, be even less meaningful. The Coroner's reasoning for the need of a public inquiry would be strengthened. Although certainly not a matter for me, it does seem there is much to be said for having a public inquiry.

Lord Justice Treacy :

63. I agree with Goldring LJ.

64. The core question is whether those who were PIPs at the Inquest are properly to be regarded as Interested Parties for the purposes of this judicial review claim. Their status before the Inquest as PIPs cannot assist in this respect. It seems to me that the matter must be determined by reference to CPR 54.1(2)(f). The test is whether the person concerned is "directly affected" by the claim. As explained in *R v Rent Officer Service and Another ex parte Muldoon [1996] 1 WLR 1103*, there is no direct effect if there is some intermediate agency involved before the decision has an impact.

65. At the Inquest the PIPs made submissions as to part of the PII process, not merely as to the general principles and approach to be followed, but also as to at least part of the subject matter to be considered ex parte by the Coroner, namely the NCND policy. Although the PIPs were not present during the ex parte element of the PII hearing, they had therefore played some positive role in the PII process of which the ex parte hearing forms a part.

66. The material subject of the PII claim had previously been identified by the Coroner as relevant to issues within the scope of the Inquest. The claim of PII made by the Secretary of State was to forestall disclosure of material which the Coroner viewed as relevant and which he would, in the absence of the claim of PII, have disclosed to the PIPs.

67. The Coroner's decision resulting from the ex parte element of the PII process was to reject the claims for PII in certain respects and to uphold it in relation to others. Where he rejected the claims, he expressly ordered disclosure of materials which the Secretary of State had sought to protect. See the terms of paragraph 29 of the ruling of 17th May 2013 relating to the particulars of the PII claim form and paragraph 33 regarding the contents of relevant documents. Where the Coroner upheld the Secretary of State's claim for PII, the result was that those materials were withheld from the PIPs.

68. Thus the effect of the decision which is now challenged was to require disclosure of materials which the Coroner had judged to be relevant to the Inquest to the PIPs. This judicial review claim now seeks to prevent that. Had there been no application to

bring judicial review proceedings, the effect of the Coroner's ruling would have been to provide the materials to the PIPs without more.

69. Such a course would not have required any intervening step or decision on the part of the Coroner beyond the insubstantial steps necessarily accompanying the mechanics of copying or providing documents and/or gists to the PIPs. These are in my judgment properly to be disregarded.

70. Whilst it is true that in an earlier ruling the Coroner had kept open the possibility of review of the scope of the Inquest, there is no material to suggest that the disclosure ordered would trigger such a process.

71. I consider that what amounts to an effective order for disclosure of relevant material which could inform and influence the participation of PIPs in the Inquest constitutes something which has a direct effect upon them.

72. I reject the broader submissions made by Mr Bailin QC, representing media interests, that the PIPs could properly be described as directly affected if the Coroner's PII decision resulted in his concluding that the Inquest had become an impracticable process, or if it resulted in his deciding to revise the scope of the Inquest, or if it led to a public inquiry. I consider that those postulated situations are too remote to amount to direct effect as they would, if made, have been the result of decisions made by the Coroner or others after his PII decision.

73. The submission that the overriding objective of the Civil Procedure Rules should be read so as to give an interpretation to the meaning of "interested party" within CPR 54.1 which would exclude these PIPs from judicial review and thus avoid difficulties which would arise from the fact that if the PIPs became interested parties they could not be excluded from part of the judicial review proceedings by use of closed material procedures, is not in my judgment an attractive solution. Firstly, CPR 54.1(2)(f) provides a clear definition of what constitutes an interested party, and there is no difficulty in applying the natural meaning of the words used there together with relevant case law. Moreover, the overriding objective is to deal with cases justly. The adoption of the suggested approach would, in my judgment, run counter to such a principle, and would be seeking instead to address the consequences of a decision in this case as to who is an interested party, rather than the primary question of whether they come within the definition.

74. The one matter which has given me pause is that for pragmatic reasons the Coroner did not have formal disclosure of the material upon which his decision was based. He had been permitted to see the material which remained in the possession and control of the Secretary of State, and was thus enabled to make a sample selection from a greater quantity of documents of relevant materials which was properly representative of the whole. This was a sensible and highly convenient way of dealing with matters, which was undoubtedly calculated not only to do justice but to save unnecessary cost and wastage of time. The process, however, does mean that there had been no formal

disclosure of the material, and the Secretary of State expressly reserved his position as to the basis upon which it had been made available to the Coroner. The position reached, however, appears to me to be highly artificial because the Coroner has in fact seen and evaluated the material, and was in a position to make his decisions on the PII claim with the knowledge of that material, irrespective of whether it had come into his possession by way of any formal disclosure.

75. It is, however, argued that the Coroner has to go through the formal step of applying to this court for a summons to produce the relevant documents pursuant to CPR Part 34.4 before he can disclose to the PIPs. It is to be noted that in those areas where the PII claim was upheld by the Coroner, the Secretary of State is content to retain the benefit of that decision without the need for the Coroner to obtain formal disclosure of the documents underlying that part of his decision. It seems to me that the need to seek a summons is a natural concomitant of the process adopted at the PII hearing at this Inquest and must have been understood as such. In my judgment, it is a step, which for present purposes, is to be regarded as part of the mechanism of disclosure, and thus not a step requiring any additional act or agency of a sort which would result in the conclusion that the PIPs were not directly affected by the decision of the Coroner.

76. Returning to the words of CPR Part 54, in the present circumstances the need to apply for formal disclosure by way of summons does not in my judgment mean that the PIPs are not "directly affected by the claim". "The claim" attempts by way of judicial review to set aside the order for disclosure to the PIPs. It seeks to withdraw from them the benefit which they acquired by virtue of the Coroner's decision below. I do not consider that the fact that the Secretary of State is seeking judicial review and opposing the summons can affect the position. The outcome of both those applications is at present unknown. If the Secretary of State succeeds in either course, then the PIPs will be deprived of the benefit of the Coroner's decision. In those circumstances they should properly be regarded as interested parties.

77. That, however, does not dispose of the matter before the court. Whilst the primary focus of the argument before us was directed to the question of whether the PIPs were properly to be regarded as interested parties in these proceedings, the purpose of the hearing before us was to enable directions to be given for the just resolution of the case. In that context, I am in full agreement with Goldring LJ's analysis and conclusions at paragraphs 53 to 60 of his judgment. The very unusual circumstances of this case do not require, as a matter of justice, that matters which were properly dealt with by the Coroner by way of the PII process because of sensitivities relating to matters of the national interest, should be dealt with differently in these proceedings. I, too, would refuse permission to join the interested parties to the claim.

Mr Justice Mitting:

78. I agree with the conclusion of Goldring and Treacy LJJ that the PIPs should not be joined as interested parties for the reasons which they give and which I set out in my

own words below; but I disagree with their conclusion that they are interested parties as defined in CPR 54.1(2)(f).

79. The issue at the heart of this case is whether or not the Coroner was right or, at least entitled, to refuse to uphold the Foreign Secretary's PII Certificate in the respects identified by him in his ex parte judgments. The Coroners Rules 1984 did not give to him any express power to make that ruling. Nor did they give to him a power to issue a witness summons or to summon a person to produce documents for use in the course of the Inquest. These omissions will be rectified when paragraphs 1 and 2 of Schedule 5 to the Coroners and Justice Act 2009 are brought into force. At present, the Coroner's only power is to apply to the High Court for it to issue a witness summons under CPR 34.4(1). Despite the lack of a relevant formal power for the Coroner to make these decisions, the Foreign Secretary sensibly decided to invite him and his legal team to examine material held by Central Government which bore or might bear upon the issues to be investigated at the inquest. The Foreign Secretary did not object to the Coroner ruling upon his PII Certificate.

80. The Foreign Secretary seeks to challenge the Coroner's ruling. Mr. Garnham QC has, however, made it clear that, in the event that his challenge cannot be determined in judicial review proceedings, he reserves the right to contend that the Coroner's summons under CPR 34.4 requiring him to produce to the Coroner certain sample documents relating to the issue/issues upon which he declined to uphold the PII Certificate, should be set aside under CPR 34.4(2). It would surprise me if he were not to do so, given that it is his duty to uphold the public interest in withholding those documents from the Inquest if, having performed the Wiley balancing exercise, he was of the opinion that they should be withheld. I anticipate, therefore, that whatever our decision on the issue identified by Goldring LJ, this court will have to determine the basic question by one or other of the two procedural routes available.

81. In reality, in neither will any of the underlying material or the Coroner's ex parte judgment be made public or disclosed to any person interested in the outcome even on terms that they remain confidential to that person.

82. The issue which we have to determine is whether or not Marina and Anatoly Litvinenko, the widow and son of the deceased and any other person identified by him as "a properly interested person" for the purpose of rule 20 of the Coroners Rules should be joined as interested parties to the Foreign Secretary's judicial review claim. Both have the right conferred by rule 20 to examine any witness at an inquest, in the case of Marina and Anatoly Litvinenko, because they are given that right expressly by rule 20(2)(a) and the other PIPs because they have been so identified by the Coroner. In addition, they have the right to object to the admission of documentary evidence under rule 37. However, although the issue which we have to determine is whether or not they are, or should be joined as, interested parties, none of them have made formal application to be so joined. Two have argued that they are interested parties: Marina and Anatoly Litvinenko and the Investigative Committee of the Russian Federation. We have not had explained to us precisely what the status of that institution is, save

that it is common ground that it is an emanation of the Russian State. Neither were identified in the Foreign Secretary's claim form as interested parties.

83. CPR 54 contains several references to an "interested party". CPR 54.1(2) provides that

> "In this section - ….
>
> f) "Interested party" means any person (other than the claimant and defendant) who is directly affected by the claim.

CPR 54.6(1)(a) requires the claimant to state in his claim form,

> "The name and address of any person he considers to be an interested party."

CPR 54.7(b) requires the claim form to be served on,

> "Unless the court otherwise directs, any person the claimant considers to be an interested party."

CPR 54.8(2)(b) requires any person served with the claim form who wishes to take part in the judicial review to serve an acknowledgment of service on the claimant and, under CPR 54.8(2)(b)(ii),

> "Subject to any direction under rule 54.7(b) any other person named in the claim form."

CPR 54.8(4)(a)(ii) requires an acknowledgment of service to,

> "state the name and address of any person the person filing it considers to be an interested party."

84. CPR 54 contains no express provision for joining any person as an interested party who has not been served with the claim form under CPR 54.7. The power to add such a person as an interested party must, accordingly, be sought either in CPR 19.4 or in the inherent power of the court. CPR 19.4(1) provides,

> "The court's permission is required to remove, add or substitute a party, unless the claim form has not been served."

An application for permission under paragraph 1 may be made by an existing party or by a person who wishes to become a party: CPR 19.4(2). In principle, because CPR 19.4 makes express provision for the addition of a party, the inherent power of the

court to do likewise is redundant. In either event, the permission of the court is required.

85. In my opinion, the court should not grant permission if to do so would prevent it from dealing with the case justly – the overriding objective identified in CPR 1.1(1). The addition of Marina and Anatoly Litvinenko and the Investigative Committee of the Russian Federation would make it impossible to deal with the Foreign Secretary's challenge justly. It would make it impossible to deal with it at all. *Al Rawi v. Security Service* [2012] 1 AC 531, establishes that legislative sanction is required for the use of a closed material procedure in civil proceedings. I agree with Ouseley J in *AHK v. SSHD* [2012] EWHC 1117 (Admin) that this principle applies to judicial review proceedings. Until Part 2 of the Justice and Security Act 2013 and procedural rules made under it are in force, we have no power to exclude any party to the judicial review from hearing and making submissions about the Foreign Secretary's challenge to the Coroner's decision. That challenge can only be mounted on the basis of materials and submissions which have been and must remain secret, at least until and unless the court decides otherwise. If the would-be interested parties were to participate in that manner, the public interest sought to be protected by the Foreign Secretary would immediately and of necessity be forfeited.

86. Accordingly, and even if persuaded that the would-be interested parties were directly affected by the claim, I would have refused permission for them to be joined as interested parties.

87. In the event, for reasons which I can explain shortly, I am persuaded by Mr. Garnham's argument that they are not directly affected by the claim. Mr. O'Connor, supported by the would-be interested parties and by the media, submits that they are directly affected by the claim because the upshot of the Coroner's decision is that material relevant to the Inquest which they would otherwise not see will be disclosed to them. I do not accept that analysis. What the Coroner has decided is that the material should be deployed in the Inquest and so disclosed to them; but his decision is no more than a decision in principle. To give it practical effect, this court must issue a witness summons under CPR 34.4 and then not set it aside on the Foreign Secretary's application. Their interest in the judicial review claim is, therefore, doubly indirect: because it is a consequence of the Coroner's decision in principle that the material should be deployed in the Inquest; and because, to give effect to that decision, a further step is required to be taken by the Coroner and approved by this court. The facts fall squarely within the observations of Lord Keith of Kinkel in *R v. Rent Officer Service ex parte Muldoon* [1996] 1 WLR 1103 at 1105e,

> "That a person is directly affected by something connotes that he is affected without the intervention of any intermediate agency."

The would-be interveners are no less indirectly affected than was the Secretary of State in *Muldoon*.

88. In my opinion, this claim can and should be dealt with in a conventional manner by a hearing in private under CPR 39.2(3), for both of the reasons identified in CPR 39.2(3)(a) and (b): publicity would defeat the object of the hearing and it involves matters relating to national security. This would not involve the use of a closed material procedure. A closed material procedure is one in which a party to proceedings is excluded from all or part of them. If the would-be interested parties are not joined, the judicial review would take place, throughout, between the two parties to it: the Foreign Secretary and the Coroner.

89. To permit the would-be interested parties to file evidence and to make representations in the judicial review, I would give them permission for both purposes under CPR 54.17. In that way, they would be afforded the limited opportunity to which they might reasonably lay claim to participate in the judicial review.