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IN THE HIGH COURT OF JUSTICE IN NORTHERN IRELAND

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KING'S BENCH DIVISION
(JUDICIAL REVIEW)

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IN THE MATTER OF AN APPLICATION BY THE CHIEF CONSTABLE OF THE POLICE SERVICE OF NORTHERN IRELAND FOR JUDICIAL REVIEW

AND IN THE MATTER OF AN APPLICATION BY THE SECRETARY OF STATE FOR NORTHERN IRELAND FOR JUDICIAL REVIEW

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Tony McGleenan KC & Philip McAteer (instructed by the Crown Solicitor's Office) for the Secretary of State for Northern Ireland
Peter Coll KC & Stephen Ritchie (instructed by the Crown Solicitor's Office) for the Chief Constable of the PSNI
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Monye Anyadike-Danes KC & Sinead Kyle (instructed by the Committee on the Administration of Justice) for the Next of Kin as Notice Party
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HUMPHREYS J

Introduction

[1] Liam Paul Thompson was murdered by loyalist paramilitaries at Springfield Park in Belfast on 27 April 1994. The inquest into his death has been the subject of lengthy and egregious delay since it was first opened in August 1995. Eventually it formed part of the then Lord Chief Justice's five year plan to address outstanding legacy inquests and was allocated to Coroner Fee in 2022.

[2] Following a series of preliminary hearings, the inquest commenced in modular form on 3 April 2023.

[3] On 26 February 2024 the coroner heard applications on behalf of the Chief Constable of the PSNI and the Ministry of Defence ('MOD') for Public Interest Immunity ('PII') in respect of a number of documents which would otherwise have been disclosed to the Properly Interested Persons ('PIPs'). The documents were comprised in seven PSNI folders and one MOD folder.

[4] The PII application in respect of six PSNI folders and the one MOD folder was upheld. In relation to Folder 7 of the PSNI material, the coroner determined that aspects of this documentation could be gisted for reasons which she set out in a CLOSED ruling. On 6 March 2024 the coroner produced a draft gist which she indicated would be annexed to her PII ruling which was due to issue the following day.

[5] By these applications for judicial review, both the Chief Constable of the PSNI and the Secretary of State for Northern Ireland ('SOSNI') seek to challenge the coroner's decision with regard to Folder 7. Specifically, the applicants seek to impugn the decision to gist material which they say:

> "would breach the policy of neither confirm nor deny ["NCND"] in a manner that would be contrary to the national security interests of the state."

[6] By reason of the nature of the material under consideration, these judicial review applications were heard partly in a CLOSED hearing. This is the OPEN judgment which will be supplemented separately by CLOSED reasons.

The PII application

[7] The PII application was grounded on two certificates issued by the Rt Hon Steve Baker MP, Minister of State for Northern Ireland. In those documents he sets out his understanding of the legal position in relation to PII and the continuing threat from terrorism faced by the United Kingdom. In that context, he asserts that disclosure of the documents in question would cause a real risk of serious harm to the public interest.

[8] In her OPEN ruling, the coroner set out the relevant legal principles as found in *R v Chief Constable of West Midlands Police ex parte Wiley* [1995] 1 AC 274 and *Al Rawi v The Security Service* [2011] UKSC 34. The judicial role is to carry out a balancing exercise between two potentially competing aspects of the public interest, namely:

(i) The public interest in open justice and the availability of evidence; and

(ii) The public interest in preventing harm being caused to national security.

[9] The coroner also set out the nine important principles articulated by Goldring LJ in *Secretary of State for Foreign and Commonwealth Affairs v Assistant Deputy Coroner for Inner North London* [2013] EWHC 3724 (Admin) (the *Litvinenko* case), as well as my own analysis in *In the Matter of an Inquest into the Death of Noah Peter Donohoe* [2022] NICoroner 3.

[10] Having correctly identified the legal position, the coroner upheld the claim for PII in respect of Folders 1 to 6 in full. As far as Folder 7 was concerned, she raised certain CLOSED enquiries with PSNI and, having received responses, determined that the material contained therein met the coronial threshold for disclosure, namely that of potential relevance. She stated:

> "I explored the possibility of a gist being used to balance the competing interest around disclosure…the PSNI advised that in their view the nature of the information in Folder 7 is not amenable to gisting"

[11] The coroner correctly reminded herself of the need to have proper regard to assertions of the risks of damage to national security contained in ministerial certificates and what she described as:

> "the limited circumstances in which a judge or coroner may depart from such an assertion"

[12] Insofar as the material in question was concerned, she acknowledged that a risk to national security did arise but did not accept that the risk was at the level asserted in the certificate.

[13] In respect of specific aspects of the documents, the coroner ruled:

(i) The disclosure of names, reference numbers and details relating to named individuals would give rise to a real risk of serious harm and, carrying out the balancing exercise, should be redacted;

(ii) Similarly, certain dates and intelligence grading should also be protected from disclosure;

(iii) The content of substantive intelligence should also not be disclosed.

[14] In relation to some of the information in Folder 7, the coroner concluded that there was an alternative means of making disclosure which mitigated against any real risk of serious harm, namely by the use of a partial gist. In the alternative, she considered:

> "the public interest in non-disclosure of the information contained in the gist is outweighed by public interest in

> disclosure for purposes of doing justice in the proceedings…I consider the information in the gist to be highly relevant."

The legal principles

[15] It is important to bear in mind that the judicial review court exercises a supervisory jurisdiction only. In respect of decisions made by inferior tribunals which are exercising statutory functions, it will only intervene when the decision maker has acted unlawfully or irrationally or where there has been some material procedural unfairness.

[16] This court is not a court of appeal, nor a court of second opinion. It will only interfere with coronial decisions or findings in well defined circumstances.

[17] In *Re Officer C* [2012] NICA 47 the Court of Appeal stated:

> "Unless it is apparent that a procedural ruling should not have been made the High Court exercising its supervisory jurisdiction should not intervene. It is not the function of the High Court to micromanage an inquest or to act as a forum for a de facto appeal on the merits against a coroner's procedural ruling. A coroner will have only acted unlawfully if he has exceeded the generous width of the discretion vested in him to regulate the inquest in the interest of what he considers to be a full, fair and fearless inquiry. The coroner will have much greater awareness of the issues involved and the evidence likely to emerge in the course of the inquest. He must, accordingly, be accorded a wide margin of appreciation and the High Court must recognise that aggrieved parties alleging procedural unfairness will have an ultimate remedy at the end of the inquest if there is a case that the verdict should be quashed because the inquest has fallen short of proper standards to such an extent as to call into question the lawfulness of the resultant verdict."

[18] In the *Litvinenko* case referenced by the coroner, the Divisional Court in England & Wales considered a similar challenge to the one in the instant case. In the inquest into the death of Alexander Litvinenko, the Secretary of State claimed PII for a number of documents relating to national security and the coroner found that some of the information contained therein could be disclosed by gist. The court found that the coroner had failed to apply the correct legal test and had not been made aware of the analysis of Lord Neuberger in *R (Binyam Mohammed) v Secretary of State for Foreign and Commonwealth Affairs* [2011] 218 when he said:

> "While the question of whether to give effect to the certificate is ultimately a matter for the court, it seems to me that, on the grounds of both principle and practicality, it would require cogent reasons for a judge to differ from an assessment of this nature made by the Foreign Secretary. National security, which includes the functioning of the intelligence services and the prevention of terrorism, is absolutely central to the fundamental roles of the Government, namely the defence of the realm and the maintenance of law and order, indeed ultimately, to the survival, of the state. As a matter of principle, decisions in connection with national security are primarily entrusted to the executive, ultimately to Government ministers, and not to the judiciary…" (para [131])

[19] The nine principles set out by Goldring LJ were as follows:

> "First, it is axiomatic, as the authorities relied upon by the PIPs demonstrate, and as the Coroner set out in his open judgment, that public justice is of fundamental importance. Even in cases in which national security is said to be at stake, it is for courts, not the Government, to decide whether or not PII should prevent disclosure of a document or part of a document.
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> Second, as I have said, the issues which we have had to resolve only concerned national security. The context of the balancing exercise was that of national security as against the proper administration of justice. Had the issues been such as have been touched upon by the PIPs in their submissions, different considerations might well have applied.
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> Third, when the Secretary of State claims that disclosure would have the real risk of damaging national security, the authorities make it clear that there must be evidence to support his assertion. If there is not, the claim fails at the first hurdle. In this case there was unarguably such evidence. The Coroner did not suggest otherwise.
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> Fourth, if there is such evidence and its disclosure would have a sufficiently grave effect on national security, that would normally be an end to the matter. There could be no disclosure. If the claimed damage to national security is not "plain and substantial enough to render it

> inappropriate to carry out the balancing exercise," then it must be carried out. That was the case here.
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> Fifth, when carrying out the balancing exercise, the Secretary of State's view regarding the nature and extent of damage to national security which will flow from disclosure should be accepted unless there are cogent or solid reasons to reject it. If there are, those reasons must be set out. There were no such reasons, let alone cogent or solid ones, here. The Coroner did not seek to advance any. The balancing exercise had therefore to be carried out on the basis that the Secretary of State's view of the nature and extent of damage to national security was correct.
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> Sixth, the Secretary of State knew more about national security than the Coroner. The Coroner knew more about the proper administration of justice than the Secretary of State.
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> Seventh, a real and significant risk of damage to national security will generally, but not invariably, preclude disclosure. As I have emphasised, the decision was for the Coroner, not the Secretary of State.
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> Eighth, in rejecting the Certificate the Coroner must be taken to have concluded that the damage to national security as assessed by the Secretary of State was outweighed by the damage to the administration of justice by upholding the Certificate.
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> Ninth, it was incumbent on the Coroner to explain how he arrived at his decision, particularly given that he ordered disclosure in the knowledge that by doing so there was a real and significant risk to national security." (paras [53] to [61])

[20] In *Donohoe* I identified the four key questions in any PII application:

(i) Does the material pass the threshold for disclosure?

(ii) Is there a real risk that disclosure of the material would cause serious harm to the public interest?

(iii) Can the real risk of serious harm be mitigated or prevented by other means or by some restricted disclosure?

(iv) If not, is the public interest in non-disclosure outweighed by public interest in disclosure for purposes of doing justice in the proceedings?

[21] The exercise by the UK Government of the policy of NCND has been considered by the courts in a number of cases including *Re Scappaticci's Application* [2003] NIQB 56, *DIL v Commissioner for the Police of the Metropolis* [2014] EWHC 2184 (QB) and *Re JR 209's Application* [2022] NIQB 30. These authorities demonstrate that the NCND policy is both lawful and well-established or, in the words of Colton J in the latter case, "well embedded and approved in our law."

[22] However, it enjoys no special status. It is a government policy not a legal principle. Its use and application in any given case is subject to the same judicial scrutiny as any other claim to withhold disclosure on the grounds of PII.

[23] In *Mohamed v Secretary of State for the Home Department* [2014] EWCA Civ 559 Maurice Kay LJ said that NCND:

> "…is not a legal principle. Indeed, it is a departure from procedural norms relating to pleading and disclosure. It requires justification similar to the position in relation to public interest immunity (of which it is a form of subset). It is not simply a matter of a governmental party to litigation hoisting the NCND flag and the court automatically saluting it." (para [20])

[24] The Cabinet Office guidance on the application of the policy itself stresses the need for consistency but, at the same time, accepts that there are exceptional cases where it may be departed from.

[25] There are several high profile instances of the policy not being applied such as the evidence given by MI6 to the inquest into the death of Princess Diana and, in the criminal justice context, in the cases of Brian Nelson, William Stobie and Gary Haggarty. Most recently, Kinney J directed a gist be provided in the Sean Brown inquest which, on its face, appears to represent a departure from the NCND policy in the exercise of the judicial PII function – see his OPEN ruling on PII at [2024] NICoroner 18.

[26] Courts dealing with disclosure issues, particularly in legacy cases, have been encouraged to use gisting as a means of ensuring access to information whilst preserving the sensitivity of documentation – see, for example, *Flynn v Chief Constable of the PSNI* [2018] NICA 3. Para 39 of the Case Management Protocol for Legacy Inquests, issued by the Presiding Coroner in 2021, states:

> "…where the Coroner determines that sensitive material is potentially relevant, as a general principle and in

> accordance with the overriding objectives of this Protocol, all reasonable steps will be taken by the Coroner and disclosure providers to explore how potentially relevant information contained in sensitive material might be provided to the Properly Interested Persons. Methods which may be considered include, but are not limited to: issuing a gist which describes or summarises the potentially relevant material."

The grounds for judicial review

[27] The applicants seek to challenge the coroner's decision on the following bases:

(i) She misdirected herself as to the applicable domestic law and policy in respect of the NCND principle;

(ii) She departed from the applicable domestic law and policy in respect of the NCND principle without providing any rationale for taking this course of action;

(iii) She made a determination to depart from the NCND principle in deciding to publish the Annex with the proposed gist without addressing the representations made to her by the Chief Constable and the Secretary of State;

(iv) She provided no reasons at all for her decision to breach the NCND principle;

(v) The material in question is neither relevant nor potentially relevant to the scope of the inquest;

(vi) The decision is internally inconsistent in that she has chosen to disclose material that breaches the NCND principle whilst upholding the claim for PII.

[28] The first observation in relation to the pleaded grounds is that they repeatedly, and incorrectly, refer to the 'NCND principle.' As the authorities make clear, there is no such principle: it is a lawful policy, adopted by the executive, the operation of which is subject to the proper application of the law. To seek to elevate it to the status of a 'principle' which is capable of being 'breached' represents a misunderstanding of the legal position and renders much of the pleading redundant. It is difficult to criticise a decision maker for a failure to apply the law correctly when the legal position is itself misstated in the judicial review challenge.

[29] Not surprisingly, the claim in respect of the relevance of the material was not pursued at hearing. It was also evident that the coroner had given reasons, both in her OPEN and CLOSED rulings, albeit that the applicants took issue with those. The challenge therefore resolved to the following:

(i) A claim of illegality based on the incorrect application of the legal test by the coroner; and

(ii) A rationality challenge based on the reasons given by the coroner for the making of the gist of the material.

[30] Insofar as the illegality challenge is concerned, the coroner sets out an unimpeachable articulation of the legal principles underpinning PII applications at paras [6] to [12] of her OPEN ruling. In her analysis at paras [24] to [34], the coroner steps through the four 'key questions', finding both that the material passed the threshold for disclosure and that there is a real risk of damage to national security which could be caused by disclosure. She had already directed herself that any departure from the opinion expressed in a ministerial certificate required cogent or solid reasons. The finding at para [30] that she did not accept the risk was at the level asserted in the certificates must be read in that context.

[31] The coroner upholds the PII claim in full, save for the decision to at para [32] whereby she concludes that there was an alternative means of making disclosure which mitigates against the risk of serious harm (the third 'key question').

[32] Her alternative analysis, in application of the fourth 'key question', is that the *Wiley* balancing exercise resolves in favour of the limited disclosure proposed. The detail of her consideration of this step is set out in the CLOSED ruling.

[33] Having considered both this OPEN ruling and its CLOSED counterpart in detail, I am satisfied that the coroner correctly directed herself on the law and was fully sighted on the authorities in relation to PII and the NCND policy. There is no basis to assert that there was any misdirection as to the law.

[34] The claim of inconsistency in the decision is also untenable. It is perfectly proper for a PII application to be upheld in part. Indeed, this is a frequent outcome of such applications, particularly where some of the material can be gisted as the court is specifically directed to consider by the third 'key question.'

[35] The rationality ground represents a full frontal assault on the merits of the coroner's decision. It must be recognised that in determining this PII application the coroner was exercising a judicial role, in accordance with her statutory function, and accordingly a considerable degree of latitude must be afforded to her. This is particularly so where the exercise in question is a balancing act between competing interests in circumstances where the coroner is fully apprised of all the issues in the inquest. In this type of case, a judicial review court will be slow to impeach the merits of a judicial decision.

[36] Contrary to the pleading in the Order 53 statement, the coroner gave both OPEN and CLOSED reasons. She took into account all material considerations, including the need to have "proper regard to assertions of risks of damage to

national security contained in ministerial certificates and the limited circumstances in which a judge or coroner may depart from such an assertion." In light of the approach adopted to the PII application, it could not be said that this decision in respect of the gist was one which no reasonable coroner could have arrived at.

Conclusion

[37] Accordingly, for the reasons set out in this judgment, and those which appear in my CLOSED ruling, none of the grounds for judicial review have been made out and the applications are dismissed.