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*Judgment: approved by the court for handing down (subject to editorial corrections)**	*Delivered:* **30/04/2024** **Written reasons 20/05/2024**

IN HIS MAJESTY'S COURT OF APPEAL IN NORTHERN IRELAND

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ON APPEAL FROM THE HIGH COURT OF JUSTICE IN NORTHERN IRELAND KING'S BENCH DIVISION (JUDICIAL REVIEW)

Between:

THE SECRETARY OF STATE FOR NORTHERN IRELAND

Applicant/Appellant

and

CORONER FEE

Respondent/Respondent

AND IN THE MATTER OF AN INQUEST INTO THE DEATH OF LIAM PAUL THOMPSON

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Tony McGleenan KC with Phillip McAteer (instructed by the Crown Solicitor's Office) for the Appellant
Oliver Sanders KC with Stephen Ritchie (instructed by the Crown Solicitor's Office) for the Chief Constable of the PSNI
Ian Skelt KC and Rachel Best KC (instructed by the Coroners Service for NI) for the Respondent
Monye Anyadike Danes KC with Sinead Kyle (instructed by the Committee on the Administration of Justice) for the Next of Kin

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Before: Keegan LCJ, McCloskey LJ and Horner LJ

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KEEGAN LCJ (*with whom Horner LJ agrees)*

Glossary

ECHR – European Convention on Human Rights

ECtHR – European Court of Human Rights

NCND – Neither Confirm Nor Deny

NIO – Northern Ireland Office

PII – Public Interest Immunity

PIP(s) – Properly Interested Person(s)

PSNI – Police Service of Northern Ireland

SoSNI – Secretary of State for Northern Ireland

Introduction

[1] This is an appeal brought by the SoSNI against two decisions of Humphreys J (cited at [2024] NIKB 18 and [2024] NIKB 32) wherein he dismissed applications for judicial review brought against a coroner, Ms Louisa Fee, in a legacy inquest.

[2] We received the notice of appeal on Friday 26 April 2024 and having heard substantial submissions that day we convened in closed hearing to view sensitive materials. We reconvened the hearing on 29 April when we heard further submissions in closed and concluded the open hearing on 30 April 2024.

[3] The expedited process we adopted with the invaluable assistance of all parties meant we did not need to consider interim relief as the coroner provided an undertaking to preserve the status quo. Given the expedited process we did not join the Advocate General or Home Secretary to this particular case. We have decided this case on its specific facts. We are also cognisant that these parties are involved in similar cases which are pending; however, we were asked to provide a decision in this particular case immediately.

[4] We provided our reasons for dismissing the appeal in summary on 30 April 2024 with written reasons to follow. These are the reasons of the majority of the court.

[5] As we were informed of an intention to appeal, we heard submissions on a stay upon disclosure of the gist which was granted by the court on terms contained in an annex which we replicate here:

> "**ANNEX**
>
> The appellant agrees and confirms his unequivocal position that:
>
> 1. The Coroner having made her determination to release the second proposed gist by open ruling dated

11 April 2024, and that ruling having been made, superseding her previous decision to release an alternative gist.

2. The determination and ruling not having been given effect by the Coroners Service for Northern Ireland (by disclosing the said gist which was intended to accompany the ruling to the Properly Interested Parties in the inquest) because of a combination of undertakings given in anticipation of and during the course of these proceedings before the High Court and on Appeal and orders made by those Courts, restraining such disclosure.

3. Having regard to the effect of the provision of section 44 of the Northern Ireland (Troubles and Reconciliation) Act 2023 and the amendments thereby introduced to the Coroners Act (Northern Ireland) 1959 and any closure of the inquest by the Coroner consequent upon those provisions before the application for permission to appeal or any consequent appeal has been determined.

4. If the application for permission to appeal or any consequent appeal is unsuccessful or if the appeal or application is not pursued or withdrawn, on the final determination of that application or appeal or withdrawal (whichever is the later), the Coroners Service for Northern Ireland would no longer be inhibited from disclosing the said gist administratively consequent upon the previous ruling and determination made by the Coroner before the Inquest was closed.

5. In the event that permission to appeal is granted and the appeal is allowed the question of disclosure would be a matter for the Supreme Court in considering relief."

[6] We have not found it necessary to issue a CLOSED ruling given the previous CLOSED ruling of Humphreys J which refers to the relevant closed material which we have also seen. Thus, to avoid repetition we will simply refer to a CLOSED annex throughout this judgment which highlights some material aspects.

Factual background

[7] The factual background of this case may be simply stated. The case concerns the death of Liam Paul Thompson on 27 April 1994. On that date he was brutally

murdered by loyalist paramilitaries whilst he was in a taxi at Springfield Park in West Belfast. He was 25 years old, the 30th anniversary of his death occurring on Saturday last.

[8] Notwithstanding the passing of years, Mr Thompson's family do still not have the benefit of a completed inquest. They point out that the inquest was first opened by Senior Coroner Leckey in 1995. It was then placed within the five-year plan as a year 3 case, and it began to be directed upon from 22 January 2022 by way of preliminary hearings until the present.

[9] The affidavit filed by Sara Donnelly Clegg on behalf of the coroner which is dated 19 March 2024 states:

> "It has repeatedly been made clear that the coroner intended to fully complete the inquest before 1 May 2024 which is the guillotine date for legacy inquests in Northern Ireland by virtue of the NI Troubles (Legacy and Reconciliation) Act 2023."

[10] Unfortunately on any read the coroner's hope could not possibly be realised. However, one discrete issue remains which we define thus:

> "whilst the coroner retains her authority over her investigation whether it is lawful for her to release a gist of sensitive information after her comprehensive conduct of a PII exercise."

[11] The chronology of disclosure in this inquest is lengthy and convoluted and need not be recited here save to say the sensitive material upon which the gist is based was examined late in the day. It was subject to PII certificates, the coroner deemed it potentially relevant, acceded to the PII in large part but directed a gist be provided to the next of kin of one aspect of the material comprised in Folder 7 and associated documentation. We do, however, briefly mention how the issue of a gist evolved as follows drawing from the chronology provided to us by counsel.

The gists

[12] The gist issues arise in somewhat unusual circumstances as a result of PSNI material that was disclosed extremely late in the day to the coroner. A PII hearing was scheduled to deal with this on 7 February 2024. On 2 February 2024, it appears that senior counsel for the coroner was notified by senior counsel for the PSNI of the existence of additional sensitive material. This was Folder 7. The first PII certificate was signed by Minster of State Baker on 5 February 2004 relating to Folders 1-6 of the PSNI material. Then a second certificate was signed on 19 February by the Minister as regards Folder 7. Module 3 of the inquest was due to start on

27 February 2024 but there were ongoing issues as regards the sensitive material which the coroner actively case managed.

[13] Thereafter, this coroner proceeded to order a gist of the Folder 7 materials. Both PSNI and SoSNI objected to this, hence, a first judicial review was brought. Then the Chief Constable suggested a second non-identifying gist which the coroner ultimately accepted but the SoSNI remained opposed to. The SoSNI proceeded with a judicial review on this second gist which was unsuccessful leading to this appeal.

[14] Gist 1 is cited as paragraph 1 of the CLOSED annex and Gist 2 at paragraph 2.

The Coroner's rulings

[15] We do not intend to recite all of the coroner's rulings as they are amply summarised by Humphreys J. We refer to the following salient elements of her decision making. 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. Simply stated 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.

[16] 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) which read 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.
>
> 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.

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.

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.

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.

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.

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.

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.

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])

[17] 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."

[18] 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.

[19] However, 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."

[20] Thus, in conducting her judicial balancing exercise the corner asked herself four key questions and answered them as follows guided by *R (Mohamed) v Secretary of State for Foreign and Commonwealth Affairs (No 2)*:

(a) Is the threshold for disclosure overcome? The coroner decided that it was.

(b) Is there a real risk that disclosure of the material would cause serious harm to the public interest? The corner stated: "In regard to the information that is contained in the gist I acknowledge that a

risk of damage to national security does arise, but I do not accept that risk is of a level asserted in the certificate. The reasons for that view are set out in the closed ruling."

(c) Can the real risk of serious harm be mitigated or prevented by other means or by some restricted disclosure? The corner considered that a gist was appropriate.

(d) If not, is the public interest in non-disclosure outweighed by the public interest in disclosure for the purposes of doing justice in the inquest proceedings? In this regard the coroner stated that the material was "highly relevant" and that "… the public interest in non-disclosure of the information contained in the gist is outweighed by the public interest in disclosure for the purposes of doing justice in the proceedings."

[21] To be clear, there is no issue as to the potential relevance of the material under scrutiny. It is also important to state, that notwithstanding judicial support in the first judgment of Humphreys J, the first gist was overtaken by the second gist which the Chief Constable agreed but not the SoSNI.

[22] We detect some concerns about the interplay between these two public authorities which are beyond what we are tasked to do in this court. We note no bad faith argument as we would expect given the interplay and cooperation needed in this area between the PSNI and SoSNI.

Consideration

[23] This is a judicial review case and so any court, first instance or appellate, cannot lose sight of the fact that this is a court of supervisory jurisdiction. This is not a court of merit as has frequently been said. Thus, the appeal requires us to determine whether Humphreys J was wrong in finding that the coroner's ruling was lawful, rational, and procedurally sound and that she had power to order disclosure of the gist.

[24] In Northern Ireland the statutory obligation upon a coroner conducting an inquest is in accordance with section 31 of the Coroners Act (Northern Ireland) 1959 to:

"give, in the form prescribed by rules under section thirty-six, (his) verdict setting forth, so far as such particulars have been proved to (him), who the deceased

> person was and how, when and where he came to his death."

[25] Rule 15 of the Coroners (Practice and Procedure) Rules (Northern Ireland) 1963 is material in that it also provides that:

> "(the) proceedings and evidence at an inquest shall be directed solely to ascertaining the following matters, namely: (a) *who the deceased was*; (b) *how, when and where the deceased came by his death*; (c) the particulars for the time being required by the Births and Deaths Registration (Northern Ireland) Order 1976 to be registered concerning the death." [emphasis added]

[26] In addition, an article 2 ECHR procedural obligation may apply as in this case. This was considered by the ECtHR in *Jordan v UK* (2003) 37 EHRR 2 and in *Nachova & others v Bulgaria* (2006) 42 EHRR 43. The obligation that flows from these decisions is that the essential purpose of an investigation is "to secure the effective implementation of the domestic laws which protect the right to life and, in those cases involving State agents or bodies, to ensure their accountability for deaths occurring under their responsibility" (*Jordan*, para 105); and that the investigation is also to be effective in the sense that it is capable of leading to a determination of whether the force used in such cases was or was not justified in the circumstances and the identification and punishment of those responsible. This is not an obligation of result, but of means. Furthermore, there must be a sufficient element of public scrutiny of the investigation and its results to secure accountability in practice as well as in theory.

[27] As to the margin of discretion afforded to a coroner, Humphreys J recited the dicta of Girvan LJ para [8] from *Re Officer C* [2012] NICA 47 in his ruling. This is criticised by the appellant on the basis that reference to 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" only or at least more easily relates to the procedural aspects of the coroner's function. We find some difficulty with this argument if it is suggested that the coroner's function is more restricted when dealing with substantive matters and that reviewing courts should take a more restrictive view. Rather, we think that the answer is simple.

[28] Clearly in interlocutory matters the wide discretion of the coroner is recognised based upon the fact that those aggrieved can challenge at the end of the inquest. That is why reviews from such interlocutory decisions rarely succeed. When a substantive decision is made, it would, to our mind, be entirely unrealistic to disregard the fact that a coroner is an independent judicial office holder exercising a judicial function, however, he or she is not immune to judicial review on public law grounds. There are numerous decisions of coroners that have been reviewed, see *Re Jordan's Application* [2018] NICA 34. That is the approach we adopt in this case.

[29] We summarise the limbs of challenge thus:

(i) The coroner acted unlawfully and/or irrationally in directing a gist;

(ii) The coroner breached procedural fairness safeguards;

(iii) The coroner did not provide adequate reasons;

(iv) The coroner did not have power to release the gist in any event given the stage the inquest had reached.

[30] We will deal with each limb of appeal in turn. First, however, it is important to state the contextual setting in which this case sits. Matters of national security arise which are of the utmost seriousness. As Mr McGleenan has said, it is uncontroversial that, in order for their efforts to be effective, an element of the work undertaken by security forces and intelligence agencies must be performed in secret.

[31] The doctrine of PII is a well-known part of our domestic law which operates as an exception to disclosure of material. Ministerial certificates are the usual means by which Ministers claim PII. As we have heard in this appeal the government adopted a restrictive contents-based approach to PII following the decision of the House of Lords in *Wiley* and the Scott Report.

[32] The core rationale for the policy of Neither Confirm Nor Deny ("NCND") which is discussed in this case is the need to protect national security. It has, for example, been the policy of successive governments to neither confirm nor deny whether the security and intelligence agencies are investigating or hold information on a particular person or group. The policy has developed to include protection for the confidentiality of operations, methods, capabilities, intelligence gathering and the use of sources and to protect the life of sources and their families. It is self-evident that the NCND policy does not define the scope of PII although it may be raised within such applications.

[33] *Mohamed v Secretary of State for the Home Department* [2014] EWCA Civ 559 addressed the status of the UK government's NCND policy, at para [20]:

> "[This] 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."

[34] In *Flynn v Chief Constable of PSNI* [2018] NICA 3, the Northern Ireland Court of Appeal did some years ago encourage the use of gists when dealing with sensitive material to move on cases in the civil sphere. This sentiment is echoed in the Presiding Coroner's Case Management Protocol for Legacy Inquests (2021) ("the Case Management Protocol"), para [39].

[35] The decision of Carswell LCJ *In the Matter of an Application by Freddie Scappaticci for Judicial Review* [2003] NIQB 56 summarised a number of the key issues and upheld the principle of NCND. Of course, the context in *Scappaticci*, Carswell LCJ noted, was that he was not being asked to adjudicate on the NCND policy generally, but rather on whether in that specific case, where there was an accepted risk to the applicant's life, NCND constituted a breach of his article 2 rights.

[36] There is also a broader body of case law concerning the importance of protecting national security, in the context of the related concept of PII. In civil proceedings, closed material procedures are possible pursuant to the Justice and Security Act 2013, but no such facility exists in respect of an inquest. That is why coroners have to resort to request for a public inquiry in certain cases involving sensitive material where disclosure is precluded due to PII. That is also why the Case Management Protocol in Northern Ireland published in 2021 aimed to streamline the issue of disclosure within inquest and encourages the use of gists in an attempt to strike a balance, save time and effort.

[37] We highlight some relevant parts of this Case Management Protocol as they illustrate the aims and objectives of disclosure in legacy inquests:

> "**F. DISCLOSURE PROCESS**
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> 16. This part of the Protocol has been developed with the aim of promoting an effective and collaborative approach to disclosure in legacy inquests as set out by the Lord Chief Justice in relation to legacy litigation in *Flynn v Chief Constable of the Police Service of Northern Ireland* [2018] NICA 3.
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> 18. Section 8 of the Coroners Act (Northern Ireland) 1959 places an obligation upon the Police Service of Northern Ireland to provide disclosure to the Coroner. That duty is ongoing.
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> 19. Under the 1959 Act, the Coroner may also request information/disclosure from other bodies. In accordance with the European Convention on Human Rights, public authorities are obliged to assist the Coroner in performing his or her function in the holding of an Article 2-compliant inquest. The State's investigative duty under

> Article 2 requires that state authorities provide disclosure. Section 6(1) of the Human Rights Act 1998 renders it unlawful for a public authority to act in a way which is incompatible with a Convention right.
>
> 39. Applications to the Coroner for PII are not covered by this Protocol save to note that, 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 and provision of a corporate witness statement to contextualise the potentially relevant sensitive material."

[38] We also remind ourselves that the coroner is by virtue of the coronial legislation in Northern Ireland required to conduct an investigation into the circumstances of a death and answer the statutory questions, how, where, when a death occurred. Also, the coroner is obliged in this case, as article 2 ECHR is engaged, to conduct an investigation into the broad circumstances of the death.

[39] Such an investigation must be fair, independent, transparent and involve the next of kin. It cannot determine criminal or civil liability. However, there is much domestic and ECHR jurisprudence in relation to the procedural obligations which arise, see *R (Middleton) v West Somerset Coroner* [2004] 2 AC 182, *Jordan v UK* (2003) 37 EHRR 2 and *Nachova & others v Bulgaria* (2006) 42 EHRR 43. The essential purpose of an investigation is "to secure the effective implementation of the domestic laws which protect the right to life and, in those cases involving State agents or bodies, to ensure their accountability for deaths occurring under their responsibility" and that the investigation is also to be effective in the sense that it is capable of leading to a determination of whether the force used in such cases was or was not justified in the circumstances and to the identification and punishment of those responsible.

[40] The coroner is also an independent judicial office holder and has a wide discretion as to how to conduct his or her investigation. In legacy inquests disclosure requires careful handling and can be complicated by PII applications. A coroner will hear such applications and decide if material can be disclosed or not, whether a gist is appropriate and also whether he/she can properly continue with an inquest or request a public inquiry depending on the extent and nature of sensitive material.

[41] At this point we are bound to say on our perusal of the papers Coroner Fee acted diligently and conscientiously in undertaking her judicial task. The only question is whether she has committed an identifiable public law wrong by virtue of the decision she made on the second gist. It is not our task to ourselves conduct a merits-based review of this case and we have been careful not to.

[42] Humphreys J over the course of his two judgments determined that the coroner did not commit any public law wrong, and we are now asked to overturn his decisions on appeal. The decisions at issue are justiciable but involve two layers of decision making namely that of the SOSNI and that of the coroner who is an independent judicial office holder under challenge. Issues of deference therefore arise. However, the standard of public law review is that which applies in any judicial review where unlawfulness or irrationality is alleged, properly informed by the context.

[43] Hence, in a case such as this concerning national security matters, we must apply particularly close attention to the issues. Thus, we have taken time to consider the CLOSED material and gist at issue before determining whether a public law wrong is evident. We are not convinced that a specific test of anxious scrutiny applies or that the decisions in *R (Begum) v Special Immigration Appeals Commission and Others* [2021] UKSC 7 or *Pham v Secretary of State for the Home Department* [2015] UKSC 19 have direct bearing on this consideration.

[44] *Begum* and *Pham* both concerned citizenship and statelessness. The decisions in both instances were issued by the Secretary of State for the Home Department, unlike in this case, where the subject of appeal is the decision of the coroner. The distinction between the decision makers already indicate that different considerations may apply. Moreover, the cases relied upon by Mr McGleenan were instances where the decision-maker was specifically concerned with national security considerations. That is not to say that the coroner was not (there is no doubt that national security factored into her analysis), but that, properly analysed, the coroner also had to consider other factors with a scrutiny that was not placed on the Home Secretary in the citizenship cases. In short, we are concerned with a different decision-making context where other factors are in play to be weighed in the balance.

[45] As regards PII, it is for the party claiming the immunity (here the SoSNI) to make good the justification. National security considerations may well (and often do) form part of that justification. However, while due regard must be paid to it, the SoSNI's assessment is not determinative in every case. The final decision is that of the coroner. This distinction acts, as Humphreys J elsewhere held, as a fundamental protection from the potential abuse of power to withhold information in the coronial setting (see *In the Matter of an Inquest into the death of Noah Donohoe* [2022] NICoroner 3).

[46] Therefore, where in *Begum* or *Pham*, the Home Secretary's assessment of national security acted as a stand-alone decision, the position in the present case is that the national security assessment informed, or played into, a wider assessment of weighing national security requirements against the requirements of the public interest and disclosure to the next of kin of the deceased. That is the coroner's well-established prerogative as a judicial office holder. To conclude otherwise would grant the SoSNI an effective veto over what is actually a nuanced balancing exercise.

[47] With all of that said, as we have stressed, as a reviewing court we have applied close attention to this case and paid appropriate regard to the coroner's CLOSED analysis, as well as that of Humphreys J which in turn considered the SoSNI's position. This means that we have considered the SoSNI's position in full and have fully appraised ourselves as to the import of the PII justifications provided by counsel. When reviewing a decision of the coroner, it is not for this court to engage in a merits-based review. Rather, we undertake our review applying public law principles and by reference to well-established authorities.

[48] A helpful summary of the legal authorities is contained in *Secretary of State for Foreign and Commonwealth Affairs v Assistant Deputy Coroner for Inner North London* [2013] EWHC 3724 (Admin). As Mr Skelt has set out in his argument it is agreed in this case that:

(a) It is for the courts and not the Government to decide whether a PII claim should prevent disclosure of information.

(b) The burden is on the party applying for PII to establish by evidence the claimed risk of damage to national security.

(c) If there is such evidence, and disclosure would have a sufficiently grave effect on national security, that is normally an end to the matter and no disclosure will occur.

(d) If the claimed damage to national security is not plain and substantial enough to render it inappropriate to carry out the balancing exercise, then that exercise must be carried out.

(e) When carrying out the balancing exercise, the Minister's assertion of damage to national security should be accepted unless there are cogent or solid reasons to reject it. Such reasons should be set out.

(f) The minister knows more about national security than the coroner, the coroner knows more about the proper administration of justice than the minister.

(g) A real and significant threat of national security will generally, but not always, preclude disclosure. That is a decision for the coroner.

[49] A final consideration before we engage with the grounds of challenge is this. We are dealing with an issue that is informed by its historical context. The appalling death of Mr Thompson and the issues with which the gist engaged occurred some 30 years ago, and the family have waited just as long to gain answers about the circumstances of his death. The coroner was working within that context and considered the evidence and the issue of whether to disclose the gist with that knowledge in mind.

[50] Of course, this lengthy passage of time has informed the practical consequences of disclosure as well. That the coroner also – commendably – worked with the PSNI (and the Chief Constable with her) to navigate a route to providing what she considered an appropriate gist demonstrates a healthy regard for the interests of the victims and the coroner's own duty to conduct the inquest with care and attention. It is also apparent that further steps were anticipated going forward once the gist was disclosed.

Determination on the four grounds of challenge

[51] As to the first ground of challenge – error of law – we do not think this is sustainable. No counsel highlighted any failure of law to us. That is unsurprising given that the coroner, as Humphreys J said, was cognisant of the law, then clearly applied it. She was also aware of the national security context. This ground of appeal is dismissed.

[52] The next ground of challenge is irrationality. This begs the question did the coroner make a decision which no coroner could make, outwith the boundaries of her discretion? Again, this argument is not sustained for the reasons Humphreys J gives as to our mind the coroner made a judgement which was within the boundaries and open to her.

[53] We next turn to the procedural unfairness claims. In this regard we have established during this appeal that the NIO were sighted throughout on the gist issues and could have made any additional submissions to the coroner. In addition, the SoSNI through the judicial review knew of the content of the impugned gist and so was clearly sighted on it. We acknowledge that the procedure was complicated by the intervening judicial review and some rather unorthodox approaches between the parties which made it cumbersome. However, ultimately, we do not think that any departure from usual coronial processes has caused unfairness or prejudice.

[54] The reality is that all parties were working at speed given the fact that the Northern Ireland Legacy (Troubles and Reconciliation) Act 2023 ("the 2023 Act") provided for inquests to be closed after 1 May 2024. The reality is also that the

highly relevant material we are concerned with was only provided by the PSNI at a very late stage of this inquest process.

[55] Whilst it may have been better for all parties to attend before the coroner and make their views known on the second gist, that luxury was overtaken by a judicial review in which all interested parties were represented and able to make their point. If there is any procedural unfairness by virtue of the forum in which the debate has ensued, the deficit has clearly been remedied. The SoSNI's objection to the second gist being disclosed was clear at all stages.

[56] As to the third ground of appeal we not convinced there is inadequacy of reasons apparent on an overall read of the coroner's decisions. True it is that in places highlighted during the hearing the coroner could have expressed a matter differently or in a better sequence, however, it would be wrong to apply too exacting a standard to her series of decisions if the overall meaning is clear and cogent as to how she reached the decision she did. We consider that her reasons meet the required standard. We have also had the benefit of reading the rulings of Coroner Fee which evidence the exercise she conducted and her reasons. It is not suggested she left any material factor out of account.

[57] Finally, there is a *vires* or validity issue to address given that it is argued that the coroner has no power to order the gist given the 1 May deadline. The argument is made that this was disclosure for disclosure's sake and therefore impermissible. We are unattracted to this line. The fact that the inquest will not complete before 1 May is not a reason to effectively block the coroner's lawful ruling reached after a lengthy process in circumstances where there have been major delays in this inquest, the potentially relevant material was provided at a late stage, and the coroner is cognisant of her duties under article 2, not least to be open and transparent and involve the next of kin in the decision making process. Also, as Mr Sanders persuasively argued the approach of the coroner accords with the important principle of open justice which permeates our law and is particularly important in legacy matters.

[58] To our mind, the coroner's approach represents an important reassurance to the family of the deceased and maintains public confidence in the investigative process employed to date. To suggest otherwise would, to our mind, seriously undermine the administration of justice and perpetuate mistrust and suspicion given the 1 May deadline. We think it too rigid an approach to say that the coroner is only mandated to act in accordance with the statutory questions. Clearly the coroner was also mandated by the article 2 procedural obligation to provide relevant disclosure when it arose as is the normal procedure. This obligation has perhaps been clouded by the 2023 Act cut-off date but is not to our mind undermined. We are quite clear that the *vires* argument should not succeed.

[59] We are bolstered in our conclusion and influenced by the strong support of the Chief Constable for dissemination of the second gist to the family of the

deceased. He did not believe that it will pose a serious risk to national security for the reasons persuasively advanced by Mr Sanders and he thought it should be released.

[60] Having viewed the sensitive material ourselves, we are bound to say that the gist is in truth a partial gist and also a summary of the actions of the coroner to date and proposed actions going forward in the investigation.

[61] Drawing all of the above together, we agree that it is important to differentiate the information in Folder 7, on the one hand, and the information in Gist 2, on the other. The information in Folder 7 was the subject of the substantive PII claim advanced by both the Chief Constable and the Secretary of State and upheld by the coroner - all are agreed that disclosure of this information would damage the public interest and that it attracts PII. The specific information in Folder 7 could not be "gisted" so as to allow its forensic examination or use. However, this did not mean that its general nature could safely be indicated. That is what has happened in a non-identifying, generic and non-specific way which we think strikes the right balance in this case.

[62] The coroner's CLOSED reasons which we find persuasive are cited at paragraph 4 of the CLOSED annex.

[63] Following from same, we are not convinced that disclosure of the information in Gist 2 would breach or depart from the NCND policy because disclosure of the information in Gist 2 would not in fact "confirm" or "deny" anything sufficiently specific to engage the NCND policy or the interests it is intended to protect. If we are wrong on that we think that an appropriate balance has been struck. The only live issue for this court is whether disclosure would damage the public interest and, if so, whether the *Wiley* balance which the coroner conducted favours non-disclosure. The Chief Constable assesses that disclosure of the information in Gist 2 would not damage the public interest. We see the force in this for the reasons the coroner gives in her ruling at paras [11]-[21] of her CLOSED judgment. Otherwise, the logical conclusion is that the SoSNI has an absolute veto by virtue of the PII certificate.

[64] Mr Sanders rightly refers to matters of public record particularly that the Operation Kenova Interim Report is an example of a document which was cleared for publication by government, and which discloses general information about security and intelligence matters, ie the fact that there was an army agent codenamed "Stakeknife" within the Internal Security Unit of the Provisional IRA. The report does not depart from the NCND policy because it does not confirm or deny the identity of the agent.

[65] It goes without saying that each case must turn on its own facts. There is a spectrum of specificity running from general and non-damaging disclosures which will not compromise operations, investigations or sources (eg the Operation Kenova

Interim Report and Gist 2) and more specific disclosure which may be capable of doing this directly or indirectly, by facilitating deductions or through the "mosaic effect" (eg Gist 1 and the contents of Folder 7). In this case the questions which occupy the gist have been in play and are not new. We think that the coroner was justified in the decision she took with the support of the owner of the material, the PSNI.

[66] We also think it would be a retrograde step in the legacy sphere if gists were not to be used to deal with sensitive material after appropriate checks and balances. Otherwise, disclosure will continue to be fraught and arguably impossible in cases of this nature with the consequence that families will not obtain the answers they desire as to how their loved ones died.

Conclusion

[67] We stress that this case depends on its own facts as any PII exercise does. It is not a precedent for other cases whose outcome will depend on their own facts. To our mind it is an exaggeration to say there is some dangerous new trend in coronial cases in our jurisdiction. Even if there was it is short lived given the 1 May deadline for legacy inquests. All inquests are conducted by independent office holders and will be scrutinised by independent judges. The fact that a number of cases have arisen on the same issue at this time is not a reason to deprive this family of the lawful ruling the coroner made.

[68] Accordingly, this appeal is dismissed on all grounds broadly for the reasons given by Humphreys J. The parties may now take whatever steps are necessary before the coroner regarding implementation. We will also hear the parties as to costs and any other matters that arise.