Neutral Citation Number: [2016] EWHC 3001 (Admin)

Case No: CO/4771/2016

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

Royal Courts of Justice
Strand, London, WC2A 2LL

Date: 23/11/2016

Before:

THE HON. MR JUSTICE CRANSTON

- -

Between:

SECRETARY OF STATE FOR THE HOME DEPARTMENT	**Claimant**
- and -	
HER MAJESTY'S SENIOR CORONER FOR SURREY	**Defendant**
- and -	
(1) MRS TATIANA PEREPILICHNAYA **(2) HERMITAGE CAPITAL MANAGEMENT** **(3) LEGAL AND GENERAL ASSURANCE SOCIETY LIMITED**	**Interested Parties**

- -

Mr James Eadie QC and **Ms Melanie Cumberland** (instructed by **Government Legal Department**) for the **Claimant**
Mr Peter Skelton QC and **Ms Leanne Woods** (instructed by **Surrey County Council Legal Services Department**) for the **Defendant**
Mr John Beggs QC and **Ms Cecily White** (instructed by **Seddons Solicitors**) for the **1st Interested Party**
Ms Henrietta Hill QC and **Mr Adam Straw** (instructed by **Hermitage Capital Management**) for the **2nd Interested Party**
Mr Bob Moxon Browne QC and **Mr Lucas Fear-Segal** (instructed by **Legal & General Assurance Society Ltd**) for the **3rd Interested Party**
Written representations by **Ms Heather Williams QC** and **Mr Jesse Nicholls** for **INQUEST** (instructed by **Hickman & Rose**), and by **Ms Caoilfhionn Gallagher** and **Ms Angela Patrick** (instructed by **Zoe Norden**) for **Guardian News and Media**

Hearing date: 14 November 2016

- -

Approved Judgment

Mr Justice Cranston:

Introduction

1. This is an application by the Secretary of State for the Home Department ("the Secretary of State") which the parties describe as unprecedented. She applies for an order permitting the non-disclosure of documents ("the sensitive material") in the context of inquest proceedings on the ground that disclosure would damage the public interest. The inquest proceedings are before Her Majesty's Senior Coroner for Surrey, Mr Richard Travers ("the Coroner"). He is investigating the death of Mr Alexander Perepilichnyy, who died suddenly on 10 November 2012 while jogging near his home in Weybridge, Surrey. One of the issues before the Coroner is whether Mr Perepilichnyy died of natural causes or was unlawfully killed. The inquest itself is due to commence on 13 March 2017, with a time estimate of three to four weeks.

2. The Coroner opened his inquest into the death before the Surrey Coroner's Court in April 2014. The inquest proceedings are governed by the Coroners and Justice Act 2009 ("the 2009 Act"). The interested persons ("IPs") before the Coroner are Mr Perepilichnyy's widow, Mrs Perepilichnaya, Hermitage Capital Management Ltd ("Hermitage"), Legal and General Assurance Society Ltd ("Legal and General"), and the Chief Constable of Surrey Police. Hermitage is an investment company based in London. According to information provided by Mr Perepilichnyy to Swiss prosecutors before his death, Hermitage was used by senior Russian officials to perpetrate a multi-million dollar tax fraud against the Russian Treasury and Hermitage. Legal and General's interest is that it issued a substantial life insurance policy to Mr Perepilichnyy shortly before his death. Both Hermitage and Legal and General have suggested that Mr Perepilichnyy might have been murdered, possibly by agents of the Russian State. The Secretary of State is not an IP in the inquest.

3. During the course of his investigations, the Coroner required both the Secretary of State and the Secretary of State for the Foreign and Commonwealth Office to produce material which he considered might be relevant. Material was produced but some of it was sensitive. The Coroner does not have security clearance to view this material. Consequently, he decided that he was not in a position to decide the Secretary of State's application that it not be publicly disclosed and ordered the Secretary of State to make an application for public interest immunity ("PII") to the High Court.

4. Thus the Secretary of State made the application under Part 8 of the Civil Procedure Rules ("CPR") on 20 September 2016. On 27 September 2016, I ordered an expedited hearing. On 13 and 19 October, and 1 November 2016, I invited the IPs at the inquest to make oral representations during the OPEN part of the hearing, which they did. Later in November, INQUEST, the well-known charity and NGO, and Guardian News and Media ("Guardian News"), were invited to make written representations, which they did, with the exception of the Chief Constable of Surrey Police. All these submissions have been invaluable in my attempt to resolve this very difficult application.

5. The legal issues before me are of narrow compass, (i) whether the High Court has jurisdiction to consider the Secretary of State's application, and (ii) if it has jurisdiction, whether it should exercise it in the case. There is the separate, but related, straightforward task of ruling on the application. However, the future conduct

of the inquest and the position of the Coroner, which are not issues directly before me, bear on the resolution of these legal issues and I have had to say something about them.

Background

6. The Coroner was notified of Mr Perepilichnyy's death two days after it occurred, on 12 November 2012. Surrey Police conducted an investigation, led from 28 November 2012 by Detective Superintendent Pollard. The police investigation concluded in early 2014. In his statement for the Coroner, Det. Supt. Pollard says that the Surrey Police inquiry into Mr Perepilichnyy's death was "perhaps the most rigorous enquiry into a sudden and unexplained death" that he has been involved in and that he reached the following conclusions:

> "a) Mr Perepilichnyy's immigration status: … [T]here was no direct evidence he was seeking refuge in the UK or was in hiding;
>
> b) Travel in and out of the UK: Mr Perepilichnyy was a frequent foreign traveller, travelling without security or concerns for his safety;
>
> c) Status in Swiss enquiry: Mr Perepilichnyy was a willing and co-operative witness, who did not express concerns to the Swiss authorities as to his safety;
>
> d) Safety: [Mr Perepilichnyy] knew what he was "getting into" in assisting Hermitage and did not seek protection;
>
> e) Relationships: Mr Perepilichnyy had a complex private life involving international travel. His activities did not show signs of fear;
>
> f) Toxicology and other expert evidence: The experts involved [i.e. those who attended the multi-disciplinary meetings] did not find any trace of toxins or other substances that would have caused his death;
>
> g) Absence of injuries: The three post-mortems did not find any trace of injuries, wounds or puncture marks on Mr Perepilichnyy's body."

7. Hermitage and Legal and General have expressed concerns about the completeness and adequacy of the police investigation and do not agree with Det. Supt. Pollard's conclusions.

The Coroner's investigation: an overview

8. The Coroner received the police file in February 2014. The first Pre-Inquest Review hearing ("PIR") was held on 1 April 2014. There have been twelve PIRs in all and there has been keen media interest in them. At a PIR prior to 6 August 2015 the Coroner ruled that Article 2 of the European Convention on Human Rights ("ECHR") was not engaged for the purposes of the inquest.

9. Mrs Perepilichnaya as the widow, Legal and General as the insurer, and the Chief Constable of Surrey Police were recognised as interested persons under sections 47(2)(a), (e), and (i), and 47(3) of the 2009 Act. On 10 January 2013, Hermitage

applied to be recognised as an interested person. The Coroner refused the application on the ground that it had not demonstrated a sufficiency of interest for the purposes of section 47(2)(m) of the 2009 Act. However, on 6 August 2015 he reconsidered and Hermitage became an interested person.

10. The inquest was initially listed to commence on 18 May 2015 with a time estimate of four days. That date was vacated and it was re-listed for 21 September 2015 with a time estimate of five days. That date was also vacated and the hearing was relisted for 9 November 2015, with an increased time estimate of ten days. That date was in turn vacated and the matter listed for a split final hearing beginning 29 February 2016, with a time estimate of five days, followed by a further hearing on 4 April 2016, with a time estimate of ten days. The hearing was then listed to commence on 12 September 2016 with a time estimate of 20 days. The current application has set the matter back yet further. The inquest will be held without a jury.

11. The Coroner's initial view was that his inquiry should include, in relation to how Mr Perepilichnyy came by his death, its medical cause; the direct circumstances in which the medical cause arose (i.e. the sequence of events directly leading to this death, including the finding of the body and attempts at resuscitation); and the nature and extent of the toxicological analyses; and their reliability. The Coroner decided that the scope would not include any other deaths of Russian or Ukrainian nationals in the UK; the details of any alleged international fraud or money laundering; and family support after the incident. At a directions hearing on 10 May 2016, however, he widened the scope of the inquest to include:

> "…proportionate background information as to who may have had a motive to murder Mr Perepilichnyy. Such evidence shall include information in respect of the alleged fraud against [Hermitage] and any connection with that incident and Mr Perepilichnyy."

12. The volume of evidence in the inquest is significant, about 5,000 pages of documents. There have also been written submissions and correspondence from the IPs. The current witness list includes evidence from 30 witnesses, and 25 of these will give oral evidence. The medical and toxicological evidence will come from Mr Perepilichnyy's GP, three pathologists, a cardiac pathologist, a consultant in medical genetics, a consultant physician, a consultant cardiologist, a forensic scientist, a senior lecturer in paleoecology, a senior lecturer in environmental radioactivity, a senior natural product chemist at Royal Botanical Gardens, Kew, the director of the Kew Innovation Unit and head of the sustainable uses of plant group at Kew, and a consultant physician and clinical pharmacologist and director of West Midlands Centre for Adverse Drug Reactions.

PII and sensitive material

13. The issue of PII regarding sensitive material first arose when, in a letter dated 20 January 2016, the Secretary of State notified the Coroner that it hoped to assist him at a pre-inquest review to be held on 28 January 2016. Her counsel would make submissions, the letter read, in relation to the 'Neither Confirm Nor Deny' ("NCND") principle in the context of an application for PII to be made on behalf of Surrey Police. The Secretary of State was represented at the hearing on 28 January 2016,

although in the event the application by Surrey Police for PII did not proceed on that date.

14. At the hearing on 28 January 2016, the Coroner was invited by Hermitage and Legal and General to notify the Chief Coroner that this was an appropriate case for a judge to be appointed as Assistant Coroner to consider applications for PII and thereafter to take forward the investigation. The Coroner declined to adopt this course, but indicated that he proposed to instruct counsel to assist him. The Secretary of State invited the Coroner to instruct counsel who had the highest level of developed vetting ("DV") security clearance and offered to assist in identifying counsel with such clearance.

15. This is how Mr Peter Skelton QC came to be instructed in March 2016 as counsel to the Inquest. (A junior, Leanne Woods, was instructed at the end of July 2016.) Mr Skelton is DV cleared. That is the highest level of security clearance. Thus he can have access to sensitive material and participate in any CLOSED hearing relating to it.

16. As explained later in the judgment, senior coroners are not by virtue of their office regarded as DV cleared, unlike High Court and Circuit judges. The Coroner has not been separately DV cleared.

17. A PIR was held on 31 March 2016. The Coroner said that he proposed to make requests for disclosure from the government. In subsequent correspondence the Secretary of State asked to be permitted to make representations as to the terms of any disclosure request. The Coroner refused.

18. On 6 April 2016, the Coroner sent three separate letters requesting disclosure of certain documents. The first required the Secretary of State to provide,

> "[i]nformation in the possession of the Security Service pertaining to: a. Threats to the personal safety or life of Mr. Perepilichnyy in the period 1 January 2012 to 10 November 2012; b. Third party involvement in the death of Mr. Perepilichnyy on 10 November 2012; and c. Contact between Mr. Perepilichnyy and any of the five individuals listed [in a request made of UK Visas and Immigration] in the period 1 and 11 November 2012…"

The evidence was to be provided by no later than 27 April 2016, failing which he would consider issuing a notice for it to be produced pursuant to Schedule 5 of the 2009 Act.

19. The second letter required the Secretary of State for Foreign and Commonwealth Affairs to provide information in the possession of the Secret Intelligence Service along the same lines. It, too, was to be provided by no later than 27 April 2016, failing which he would consider issuing a Schedule 5 notice. There was a third letter, a formal Schedule 5 notice issued against Surrey Police, requiring disclosure of the document in its possession, which it had earlier indicated it was unable to disclose to the Coroner on the grounds of sensitivity. This Schedule 5 notice was revoked by a direction of the Coroner on 6 September 2016.

20. In letters of 26 April 2016, 10 May 2016 and 24 June 2016, the Secretary of State wrote to the Coroner, informing him about the progress in responding to the requests and with some of the information.

21. During this period there were discussions between Mr Skelton and counsel for the Secretary of State with the Coroner's agreement. As a result, the terms on which Mr Skelton was instructed were varied to enable him to review the government's responses to the "Requests for Evidence" in order to assess their relevance. The Coroner did not see the government's responses. Following his review, Mr Skelton worked with government lawyers and policy officials to formulate a confidential gist (a summary) which could be shown to the Coroner.

22. The confidential gist was a one page document intended to reflect the material made available to Mr Skelton insofar as he had identified it as being potentially relevant to the issues arising in the inquest. It was prepared at a level of generality such that it could be shown to the Coroner, unlike the material underlying it. It summarised the relevant sensitive documents contained in two documents in the possession of Surrey Police, together with results of the searches by the Security Service and the Secret Intelligence Service for material relevant to the Coroner's investigation. The confidential gist was made available to the Coroner on a read and return basis on 27 May 2016.

23. On 1 June 2016, the Coroner wrote to the Secretary of State, copied to all interested persons, expressing dissatisfaction with the extent and timeliness of the assistance provided. The Coroner requested clarification as to whether the Secretary of State intended to claim PII in respect of the confidential gist. That day, the Secretary of State confirmed that, in the event that the Coroner requested that the government disclose any part of the gist in the inquest, she would consider claiming public interest immunity protection via a PII certificate before a High Court judge.

24. The Coroner issued directions to the Secretary of State to serve any evidence and submissions in relation to a PII claim by Friday 10 June 2016. In compliance with the Coroner's directions, the Secretary of State provided OPEN and CLOSED PII submissions on time. These submissions were prepared at a level of generality which enabled them to be considered by the Coroner. The submissions explained that:

> "The confidential gist is sensitive for reasons of national security and cannot therefore be disseminated more widely. The Senior Coroner may consider it appropriate and feasible for a procedure akin to that envisaged in *Worcestershire County Council* v. *HM Coroner for the County for Worcestershire* [2013] EWHC 1711 (QB) to be adopted. Should the Senior Coroner propose to disclose the gist, however, HMG has indicated that it would take formal steps to obtain public interest immunity in the High Court in respect of the content of the confidential gist, on national security grounds."

25. The Coroner provided the Secretary of State's OPEN submissions to the IPs some four weeks later, on 6 July 2016. They served submissions in response.

26. On Friday 15 July 2016 the Coroner wrote that he considered that the Secretary of State's submissions were inadequate:

> "[Y]our client's closed submissions are not supported by evidence, notwithstanding the fact that there are several instances in those submissions in which your counsel appear to be giving evidence on your (and their) client's behalf. This is not appropriate in a claim for public interest immunity, which, as is well-established, needs to be advanced based on evidence, not assertion, as to the potential harm to the national interest that could result from the disclosure of the index evidence.
>
> I have made it clear publicly at the hearings in this inquest that I will follow conventional procedures in my determination of any claims for PII and that such claims must be supported evidence. This expectation has also been communicated directly to your counsel by counsel to the inquest."

The Coroner directed the Secretary of State to support the PII submissions with evidence by the following Monday, 18 July 2016. The Secretary of State complied.

27. On 28 July 2016 the Coroner wrote to the Secretary of State rejecting her evidence and submissions on PII.

> "In the directions I made at the PIR on 2nd June 2016, I required the Government to serve evidence and submissions in support of PII application in respect of the document shown to me on 27th May 2016. That, as I understand it, was the procedure adopted in the Litvinenko Inquest, where PII issues also arose in respect of sensitive material that was provided to the Assistant Deputy Coroner but, which, it was argued, could not be disclosed to the Interested Persons or to the public. I therefore expect a proper PII application to be made to this Court, not to be held in reserve until any judicial proceedings in the High Court… [T]he statement does not itself explain why the public interest would be harmed by the disclosure of the document, but… In summary, both the weight and substance of your client's evidence compares unfavourably with the Ministerial Certificate and accompanying closed Schedule that were submitted by the Crown in support of its PII application in the Litvinenko Inquest… [I]n order for me to conduct a proper balancing exercise between that interest and the public interest in non-disclosure, I need to have compelling evidence of the latter."

The Coroner requested the Secretary of State to provide a PII certificate signed by a relevant Minister, with appropriate accompanying documentation by 16 August 2016.

28. The Secretary of State replied to the Coroner on 3 August 2016, offering to correct any deficiencies in the witness statement should the Coroner require this. In relation

to the Ministerial certificate which the Coroner had requested, the Secretary of State's letter read:

> "As you are aware, from the outset [the government] has made clear its position both to you and Counsel to the Inquest that because of the degree of sensitivity and issues of national security surrounding some of the material involved in your Requests, we are unable to produce that material to you for PII evaluation, or indeed to anyone for that purpose except a Circuit or High Court judge, or to Developed Vetted ('DV cleared') counsel. Should it be necessary to do so, [the government] would be willing to produce a formal PII certificate from a government minister in support of an application for PII.
>
> While we are anxious to assist you as far as we can, we should make clear that if a Ministerial certificate is produced asserting PII in respect of the sensitive material, it will contain a Sensitive Schedule and a harm statement which we shall not be able to show you for the same reasons as we could not show you some of the sensitive material itself and for the same reasons that we produced the confidential gist. This would mean that you could not determine whether the claim for PII was properly constituted, because you would not be in a position to evaluate the underlying material and determine if the balance of public interests had been properly struck. Accordingly, in that event it would be necessary for the certificate to be considered in a closed hearing by a judge appointed as Deputy Coroner for that purpose, or on application to the High Court…
>
> Might we therefore respectfully suggest that if this is the course you envisage, you notify the Chief Coroner of the situation so that consideration may perhaps be given to the appointment of a judge as Deputy Coroner to hear a full PII application in a closed hearing, and thereafter take forward this investigation, as soon as is practicable."

The Coroner did not respond.

The PII certificate

29. Accordingly, the Secretary of State signed a PII certificate on 9 August 2016. In it she explained that she had formed the view that a claim for PII ought to be made in respect of the material contained in Bundle A and the sensitive schedule. After setting out the law governing public interest immunity she turned to the context of the Coroner's inquest. She said that she had been advised that the balance was between the interests of having open inquests and the interests of national security. As regards the interests of open inquests, she quoted Lord Bingham in *R (Amin)* v. *Secretary of State for the Home Department* [2004] 1 AC 553, [31]. She then set out the public interest in non-disclosure.

> "10. The reason why disclosure of the documents in Bundle A would bring about a real risk as described is that those documents include national security information of one or more of the following kinds:
>
> a) information relating to operations and capabilities of the security forces, law enforcement agencies and security and intelligence agencies, disclosure of which would reduce or risk reducing the effectiveness of those operations or of other operations either current or future;
>
> b) information relating to the identity, appearance, deployment or training of current and former members of the security forces, law enforcement agencies and security and intelligence agencies, disclosure of which would endanger or risk endangering them or other individuals or would impair or risk impairing their ability to operate effectively or their ability to recruit and retain staff in the future;
>
> c) information received in confidence by the security forces, law enforcement agencies and security and intelligence agencies from foreign liaison sources, disclosure of which would jeopardise or risk jeopardising the provision of such information in the future;
>
> d) other information likely to be of use to those of interest to the security forces, law enforcement agencies and security and intelligence agencies in pursuit of their functions, including terrorists and other criminals, disclosure of which would impair or risk impairing the security forces, laws enforcement agencies and security and intelligence agencies in their performance of their functions.
>
> 11. It is not possible for me to be more specific in this certificate about the particular information in Bundle A, or the precise harm that its disclosure risks causing, since my doing so would be liable to risk causing the very damage that the certificate seeks to avoid. The list above is not exhaustive of the categories of damage which would arise from the disclosure of Bundle A because disclosure of such categories would be liable to risk causing the damage that the certificate seeks to avoid. Full details are, however, given for the benefit of the court in a Schedule to the certificate. Although this certificate is being made available to the Interested Parties, the Schedule is a classified document, which is being provided only to the court."

30. On balancing the public interest in open inquests with this public interest in non-disclosure she concluded that the overall balance of public interest was in favour of not disclosing the material, although she recognised that the court had the final word.

31. In a letter of 16 August 2016, the Coroner was notified that a Ministerial certificate had been issued. On 17 August 2016 Mr Skelton wrote to clarify that the Coroner's request for a PII certificate and supporting schedule related to the confidential gist which had previously been shown to him and not to the sensitive material underlining it. The Secretary of State replied on 18 August 2016:

> "If HMG were to apply for PII for the gist alone, the sensitive schedule attached to the PII certificate would have to include information about the underlying sensitive material in order to explain why the gist is sensitive. This effectively means that a PII certificate for the gist alone would be the same or very nearly the same as the PII certificate that we have obtained that covers the gist and the sensitive material underlying the gist."

32. The Secretary of State wrote to the Coroner on 2 September 2016, stating that she would be represented at the forthcoming PIR on 6 September 2016, but that her counsel would make no submissions in relation to PII in view of the fact that a Ministerial certificate had been issued. At the PIR on Tuesday 6 September 2016, the Coroner made clear that he intended to retain the conduct of the inquest. He ordered the Secretary of State to make her application for PII to the High Court by 20 September 2016 and to serve on him the OPEN part of that application and the OPEN part of the Ministerial certificate in support. He then adjourned the inquest, which had been due to begin the following Monday, until 13 March 2017.

Legal framework

Coroners and the Chief Coroner

33. Coronial inquests into deaths have a long history in this country. The duty of the Senior Coroner to investigate a death is now contained in section 1 of the 2009 Act. It arises when the coroner has reason to suspect that the deceased died a violent or unnatural death; the cause of death is unknown; or the deceased died in custody or otherwise in state detention: s. 1(2). A coroner has important functions prior and ancillary to convening an inquest and at an inquest's conclusion. The wide scope of an initial investigation may be funnelled over time; conversely, the scope may expand: see *R (Lewis)* v. *Mid and North Shropshire Coroner* [2010] 1 WLR 1836. A coroner's discretion in conducting an inquest, and the need for him to do so fearlessly, were highlighted by Lord Bingham in *R* v. *HM Coroner for North Humberside ex p Jamieson* [1995] 1 QB, 260. The coronial process is more inquisitorial than adversarial.

34. The public interest in open inquests is a well-established feature of our law. As ever, the principle was well encapsulated by Lord Bingham. In *R (Amin)* v. *Secretary of State for the Home Department* [2004] 1 AC 653 he said:

> "[31] In this country…effect has been given to the [duty to investigate] for centuries by requiring such deaths to be publicly investigated before an independent judicial tribunal with an opportunity for relatives of the deceased to participate. The purposes of such an investigation are clear; to ensure so far as possible that the full facts are brought to light; that culpable

> and discreditable conduct is exposed and brought to public notified; that suspicion of deliberate wrongdoing, (if unjustified) is allayed."

35. In its written submissions Guardian News underlined the importance of the open justice principle in protecting rights, maintaining public confidence and, in the context of inquests, allaying public concerns (citing authorities such as *Al Rawi* v. *Security Service* [2011] UKSC 34; [2012] 1 AC 531; *Re LM (Reporting Restrictions; Coroner's Inquest)* [2007] EWHC 1902 (Fam), [2008] 1 FLR 1360, [53]; *R* v. *Secretary of State for the Home Department* v. *Inner West London Assistant Deputy Coroner* [2010] EWHC 3098 (Admin), [2011] 1 WLR 2564, [10], [24] and the Coroners (Inquests) Rules 2013, rr9(3), 10(2), 11(1), 11(4)). INQUEST added the point in its written submissions that involvement in the process by the bereaved must be a central consideration.

36. The 2009 Act makes provision for senior coroners, area coroners and assistant coroners: section 23, Schedule 3. Senior coroners are appointed full time for an area based on local government districts; they must satisfy the eligibility condition for judicial appointment on a five year basis: Schedule 3, paragraph 1(1), 3(b).

37. The powers of senior coroners are contained in Schedule 5 of the 2009 Act. A senior coroner may by notice require a person to give evidence at an inquest, to produce relevant documents and to produce things for inspection, examination or testing: paragraph 1(1). Further, paragraph 1(2) provides that a senior coroner conducting an investigation may by notice require a person (a) to provide evidence about matters in the form of a written statement, (b) to produce relevant documents or (c) to produce relevant things for inspection, examination or testing.

38. Paragraphs 1(4)-(5) of Schedule 5 deal with the situation when a person having received a notice from a senior coroner claims that he or she is unable to comply with it or it is not reasonable in all the circumstances to be required to comply. Paragraph 1(4) confers on the senior coroner the power to determine the matter and provides that the notice may be revoked or varied on this ground. Paragraph 1(5) lays down how the senior coroner is to go about the task:

> "(5) In deciding whether to revoke or vary a notice on the ground mentioned in sub-paragraph (4)(b), the senior coroner must consider the public interest in the information in question being obtained for the purposes of the inquest or investigation, having regard to the likely importance of the information."

39. A new post of Chief Coroner was created by the 2009 Act; section 35(1). The Chief Coroner is appointed by the Lord Chief Justice, after consultation with the Lord Chancellor, and must be a judge of the High Court or a Circuit Judge: Schedule 8, paragraph 1(1)-(3). The role of the Chief Coroner is to provide national leadership and guidance to coroners, improve the consistency and efficiency of the service, liaise between central and local government and coroners, and participate in their appointment: see M. Wheeler QC, "The Coroner", in *The Inquest Book*, Caroline Cross and Sir Neil Garnham eds., 2016, p.57.

40. The Chief Coroner has issued guidance to coroners on a range of topics and also "law sheets", explaining discrete areas of coronial law.

Coroners and sensitive material

41. Coroners will not infrequently face a claim from a party disclosing documentation or information to them that there will be damage to the public interest if it is disclosed further to IPs or the public. Prior to the provisions of the 2009 Act coming into force, there were no express provisions for PII applications under the Coroners Act 1988 and the Coroners Rules 1984. However, the practice developed that coroners would hear applications for immunity on public interest grounds ex parte. The procedure was approved by Hallett LJ sitting as a deputy assistant coroner in the inquest for those killed in the 7/7 bombings, followed by Owen J in the inquest into the death of *Alexander Litvinenko*, and approved in the judicial review of that decision: *Secretary of State for Foreign and Commonwealth Affairs* v. *Assistant Deputy Coroner for Inner North London* [2013] EWHC 3724 (Admin).

42. The 2009 Act now makes the express provision under paragraph 2(1) of Schedule 5 that persons may not be required to comply with a notice under paragraph 1 to produce or provide any evidence or document if they "could not be required to do so in civil proceedings in a court in England and Wales." Paragraph 2(2) preserves PII.

> "(2) The rules of law under which evidence or documents are permitted or required to be withheld on grounds of public interest immunity apply in relation to an investigation or inquest under this Part as they apply in relation to civil proceedings in a court in England and Wales."

43. Both before and after the 2009 Act the invariable course for the determination of PII claims in a coronial investigation or inquest has been by the coroner conducting it. Under the 2009 Act this could be a PII claim in respect of sensitive material which the coroner has requested or ordered to be disclosed under Schedule 5 of the 2009 Act. The person ordered to disclose the material can then invoke paragraph 1(4) of Schedule 5 against its disclosure. The coroner then acts under paragraph 2. If unhappy with the ruling that the material can be disclosed publicly, the person who disclosed it to the coroner can apply for judicial review of the coroner's decision: *R (Revenue and Customs Commissioners)* v. *Liverpool Coroner* [2015] QB 481; *R (Secretary of State for Transport)* v. *HM Senior Coroner for Norfolk* [2016] EWHC 2279 (Admin).

44. A more difficult issue of sensitivity arises where the problem is with disclosing sensitive material to the coroner himself. Statute prevents disclosure to coroners of intercept material obtained under the Regulation of Investigatory Powers Act 2000 ("RIPA") (intended to be replaced by the Investigatory Powers Bill). In broad terms, section 17 of RIPA prohibits evidence, questioning or assertion in connection with legal proceedings likely to reveal a communications intercept. Section 18(7)(b) excludes from the prohibition disclosure to a relevant judge in a case in which that judge has ordered the disclosure to be made to him alone. Also excluded from the prohibition is a panel conducting a statutory inquiry under the Inquiries Act 2005: s. 18(7)(c). For our purposes, the interest is that "relevant judge" is defined in section 18(11) as:

> "(a) any judge of the High Court or of the Crown Court or any Circuit judge;
>
> …
>
> (d) any person holding any such judicial office as entitles him to exercise the jurisdiction of a judge falling within paragraph (a)…"

45. Then there is sensitive security and intelligence material. The government has as a matter of policy adopted the distinctions in RIPA as the basis for disclosing it to judicial office holders: it can be disclosed to High Court and Circuit judges but not to others such as senior coroners. One justification is to avoid the position in which different approaches are applied depending on whether the material is sensitive as RIPA intercept material or whether it is sensitive for some other reason. It is said that the distinction may not be easy to draw in practice when the RIPA provisions apply to information which has intercept material as its source. Another justification for the policy is practical: at the High Court, for example, there are established mechanisms in place for the handling of this type of material such as secure storage, DV cleared administrative staff and secure courtrooms. These may not be insurmountable for investigations and inquests conducted by senior coroners but, in the Secretary of State's submission, they support the application of the policy.

46. It is clear from his statement for the purposes of this application that the Coroner is concerned (to put it no higher) about this policy. His view is that the issue of PII should have been dealt with by him during the course of the inquest, and if it had been the inquest would have been completed by now. He asserts that there is no statement setting out the precise nature of the policy of disclosing sensitive security and intelligence material to judicial office holders or its justification. A point he adds is that there is no argument or demonstration on the government's part that there is a real risk of serious harm to the public interest were senior coroners to have access to such material. He states that he could have challenged the policy by serving Schedule 5 notices on the Home and Foreign Secretaries but chose not to do so because of the delay that would cause.

47. At the hearing, Legal and General attacked government policy on the disclosure of this type of sensitive material to judicial office holders because it allowed the Executive to pick and choose the judicial office holder to conduct a coronial inquest. This was an interference with the judiciary, somehow justified by national security. The analogy with RIPA was false, it was said, since that was a division of responsibility sanctioned by Parliament. In Legal and General's submission, Parliament in the 2009 Act had conferred on coroners the power to decide PII issues. If that power were to be cut down so that it did not apply to certain types of sensitive material that required express Parliamentary approval.

48. There is no need to rule on these submissions since there is no challenge before me to the policy. But I should observe, that in my view government policy in this regard is unassailable. The threshold to challenging government policy on conventional judicial review lines is difficult enough: see, for example, *R (Tabbakh)* v. *Staffordshire and West Midlands Probation Trust* [2014] EWCA Civ 827, [2014] 1 WLR 4620 and the cases applying it. Here government policy is centred on national

security so the bar is set even higher. If a discrimination claim could be raised in some way there are powerful justifications the Secretary of State could advance in support of it. In my view the justifications for the policy are legal, rational and take relevant factors into account. It is wrong to characterise the policy as somehow the Executive interfering with the judiciary. It is a pragmatic response to the very real practical problems when courts handle security and intelligence material.

49. In light of government policy, practical solutions have been reached in coronial inquiries when this type of sensitive material has been involved. The 2014 *In Amenas inquest* arose from the deaths of British hostages in Algeria. Sir Neil Garnham outlines what occurred (*The Inquest Book*, at 477):

> "The West Sussex senior coroner, who originally had conduct of the inquests, had set a wide scope which included consideration of the security of the site and whether there was information known relating to the impending attack. When the question was raised as to whether the UK authorities had any such material, three significant changes to the conduct of the hearing were put into effect.
>
> First, with the assistance of the Chief Coroner, arrangements were made for the inquest to be heard by the Recorder of London, sitting as an assistant coroner, in the place of the senior coroner. Second, a silk who had been subject to what is known as 'developed vetting' (and who is described therefore as being 'DVed') was instructed by the coroner (in addition to the junior counsel already acting for him) to advise him on the relevance of UK Government material which had not been disclosed to the interested persons. Third, on 15 December 2014, the Foreign Secretary issued a PII certificate.
>
> The advantage of the appointment of the assistant coroner was never publicly articulated but the obvious benefits were that he was able to see material made subject to the PII certificate and was a 'relevant judge' within the meaning of that expression in section 18 of the RIPA…"

In their written submissions, Hermitage add the gloss to this account, that when the Recorder of London was first appointed it was to deal with PII, with the senior coroner retaining conduct of the inquest, but that this hybrid approach was abandoned with the Recorder conducting the entire inquest.

50. The legal basis for the appointment of someone like the Recorder of London as with the *In Amenas inquest* lies in section 41 and Schedule 10 of the 2009 Act. That provides for an investigation into a person's death by the Chief Coroner, a High Court or Circuit judge, or a former High Court or Court of Appeal judge. Indeed it seems that with all coronial inquests conducted in recent times, where information of a high level of sensitivity has had to be considered, a High Court or Circuit judge has been appointed as assistant coroner. As with the *In Amenas inquest*, this meant that issues of disclosure and PII were able to be considered within the inquest process without troubling the High Court.

51. In December 2014 the then Chief Coroner, HHJ Thornton QC, issued guidance entitled "Duty to Notify Chief Coroner in Certain Cases". It addressed for senior coroners the course to be adopted when this type of sensitive material was in play. The guidance stated, in part:

> "16. A few cases involve consideration of very sensitive material held by government agencies. This may arise, for example, in cases of terrorism abroad, a death in this country involving agents of the state and in other similar types of case.
>
> 17. The material may include interception material under Part 1 of the Regulation of Investigatory Powers Act 2000 (RIPA) which may only be viewed by 'a relevant judge': section 18. Coroners are not relevant judges within the definition of that term in section 18(11). Coroners are therefore not permitted to see such material.
>
> 18. Government agencies may also choose to refuse to show coroners other 'very sensitive' material on the grounds that for these purposes coroners are not judges of sufficient rank nor are they likely to have 'developed vetting' security clearance.
>
> 19. The possible existence of RIPA or other very sensitive material may not be apparent to a coroner at an early stage of a coroner investigation. It may not become apparent until late in the investigation. This has caused problems in the past.
>
> 20. The Chief Coroner therefore needs to discuss this type of case with the senior coroner and any potential for investigation by a 'relevant judge' as early as possible. The Chief Coroner does not want to take interesting cases away from coroners, but there are some cases which, under the law as it stands, may require a judge to conduct the investigation. Otherwise the process of investigation by the coroner may be incomplete.
>
> 21. In due course the Chief Coroner will have a wider discussion with senior coroners, the Coroners' Society and senior judges about handling this type of case and whether there needs to be a change in the law to include coroners or some selected coroners as RIPA judges. In the meantime the Chief Coroner would be grateful for early notification of any such case."

52. On 27 September 2016 HH Judge Thornton QC issued further, confidential advice to coroners entitled "Sensitive Material". It states that in a small number of cases coroners may be faced with the possibility of RIPA or other material which is highly sensitive for national security or other public interest reasons. Paragraph 4 of the document states that:

> "Coroners are not permitted by law (either in RIPA or draft IPA) to view RIPA material. Only Circuit judges and more

> senior judges may do so in certain circumstances. Similar principles apply to other sensitive material."

53. The document then sets out the procedure senior coroners should adopt. First, if the senior coroner believes there may be sensitive material in existence relating to a particular case he or she should notify the Chief Coroner as soon as possible, who will give advice as to how to proceed: para. 7. If the case is obviously one for a nominated judge the Chief Coroner will so advise. If not the senior coroner is advised to consider instructing DV counsel, who may review sensitive material without being under the obligation to disclose such material to the senior coroner: para. 11. DV counsel will conduct a review for relevance, without informing the senior coroner of the nature or content of the material: para.13. If some material is identified as relevant or potentially relevant, DV counsel will inform the Coroner and seek to obtain disclosure in a redacted or summarised (gisted) form: para. 15. If the material can be gisted, the senior coroner is to decide whether it can be disclosed after submissions from the relevant parties: para. 16. If not, DV counsel advises the senior coroner that a High Court or Circuit judge should take over the investigation and inquest: para. 17.

54. In my view the Chief Coroner's guidance is lawful and sensible, reflecting best practice as it has developed over the years.

Jurisdiction of High Court re PII

55. There was acceptance by all parties, albeit in the case of some with considerable reluctance, that the High Court has in theory jurisdiction to decide issues of PII in the context of coronial inquests. In my view that derives from the High Court being a superior court of record with general jurisdiction: Senior Courts Act 1981, s.19. There is nothing in the 2009 Act to require all PII applications in the context of an inquest to be decided by the coroner. Nor is there any express ousting of the High Court's general jurisdiction to decide issues of PII. That, in my view, would require clear words. Paragraph 2(2) of Schedule 5 of the 2009 Act preserves in plain words the law on PII. It evinces no intention to deprive the High Court of its jurisdiction in this respect.

56. The High Court's inherent power or inherent jurisdiction is always confined. In referring to the inherent power or inherent jurisdiction of the High Court in *Bremer Vulkan* v. *South India Shipping* [1981] AC 909, Lord Diplock said at 977 G-H:

> "It would I think be conducive to legal clarity if the use of these two expressions were confined to the doing by the court of acts which it needs must have power to do in order to maintain its character as a court of justice."

In quoting this passage in *Taylor* v. *Lawrence* [2002] EWCA Civ 90; [2003] QB 528, Lord Woolf CJ referred to the court's residual jurisdiction "to avoid a real injustice in exceptional circumstances…": [54]. More recently, in *Bank Mellat* v. *HM Treasury* [2013] UKSC 39; [2014] AC 700, the Supreme Court indicated that the inherent jurisdiction should be exercised only as a matter of last resort where less onerous alternatives are not available: at [2]. It cannot be exercised so as to conflict with

statute: *Baxter Student Housing Ltd* v. *College Housing Co-operative Ltd* [1976] 2 SCR 475, per Dickson J for the Canadian Supreme Court.

57. If the High Court has in exceptional cases jurisdiction to rule on PII in the course of a coronial investigation or inquest, the first issue arising is the procedural base. The Secretary of State contended that this is CPR r. 31.19. This is the part of the Civil Procedure Rules which provides for claims to withhold inspection or disclosure of a document. Under CPR r. 31.19(1) a person may apply, without notice, for an order permitting this course on the ground that disclosure would damage the public interest. The procedure is ex parte unless the court otherwise orders: CPR r. 31.19(2). CPR r.31.19(3) requires the applicant to set out the grounds in writing on which the claim to a right or duty to withhold inspection of a document is made. CPR r.31.19(5) then provides that the person may apply to the court to decide whether a claim made under paragraph (3) should be upheld. The court may require production of the document to it and may invite representations from persons, whether or not a party to the claim: CPR r. 31.19(6)(b).

58. In the Secretary of State's submission, CPR r. 31.19 applies to claims - except a claim on the small claims track – and a "claim" is not confined to a civil or public law claim. A claim can arise as in this case by the Secretary of State lodging a Part 8 claim form. In the Secretary of State's submission, CPR r. 31.19 offers a tailor made process for a freestanding application to be made before the High Court for an order for non-disclosure, based on PII or other considerations.

59. While the Coroner accepts that the High Court has jurisdiction to rule on the Secretary of State's application for PII, he submits that the application should have been made for a declaration under CPR r. 40.20, by reference to the Court's inherent jurisdiction. The declaration would be whether the public interest in the disclosure of the material outweighed the public interest in its non-disclosure on grounds, for example, of a real risk of serious harm to national security. The Coroner contends that there are no live civil proceedings and that, as a coroner, he cannot become a party to civil proceedings under CPR r.31.19 and will not do so unless he is subject to an application for judicial review. If CPR r.31.19 applied it would undermine the status of coroners by placing them on the same footing as civil litigants. The discretion of coroners to manage their own proceedings would be fettered.

60. Doubt as to whether CPR r.31.19 is the appropriate procedural avenue for this application is supported by Hermitage, who point out that CPR 31.2 is confined to "claims", which seems to mean civil litigation claims, and that there is no statement of claim by the Secretary of State in the present case. In its written submissions INQUEST and Guardian News add that CPR r.2.1(1) applies the Civil Procedure Rules, including CPR 31, to proceedings in the High Court, County Court and Court of Appeal, Civil Division, but not to inquests. There is no "claim" in inquests which, unlike civil proceedings, are inquisitorial in character. Further, the 2009 Act makes no reference to the Civil Procedure Rules, and no provision for CPR 31 to apply to inquest proceedings.

61. To my mind there is no real difference between the procedure to be followed with the present application if CPR r.31.19 is used or CPR r.40.20. On balance, I favour the application of CPR r.31.19 for the reasons advanced by the Secretary of State. But either under CPR r.31.19 or CPR r.40.20 the court can deal with the application. In

both cases the principle of open justice applies to the extent that it does with any PII application. I accept the point made by INQUEST and Guardian News that under neither CPR r.31.19 nor CPR r.40.20 is there is a right for IPs to be involved in the hearing before the High Court. That compares with the position before the inquest where they are there by right. But as in this case, the High Court can and should make an order that they be able to attend and make submissions to the same extent as they could before the inquest.

Exercise of jurisdiction by High Court

62. The real issue in this case is whether the High Court should exercise its jurisdiction to consider the Secretary of State's PII application. Her case was simple: the Coroner issued requests for evidence directed at the Security Service and the Secret Intelligence Service; from an early stage he accepted that there was material which he was not able to review because of its sensitivity so that DV cleared counsel, Mr Skelton, was appointed; the Coroner was then provided with the confidential gist, as well as confidential submissions and evidence, prepared at a level of generality to enable him to consider the material with Mr Skelton; he did not regard that to be sufficient but required a PII application by way of a Ministerial certificate; a Ministerial certificate was provided.

63. In other words, the Secretary of State submitted that she attempted to have the question of PII resolved by the Coroner within the inquest. That had proved not to be possible. The Coroner now accepts that he cannot determine whether that PII claim is properly made because he is unable to conduct a balancing exercise by reference to the documents supporting the Secretary of State's PII certificate, because that is the information he cannot see. The issue has to be determined because the Coroner's position is that the inquest cannot proceed without the question being resolved. There is simply no alternative.

64. With reluctance the Coroner accepted before me that the High Court should exercise its inherent jurisdiction to rule on the PII application. The inquest cannot proceed until the PII issue is resolved. He requested, however, that the court should rule that with such PII claims against a coroner, it is not sufficient to rely on the assertion of a general policy not to provide coroners with such material. Rather the Secretary of State must go further and demonstrate to the requisite evidential standard, ordinarily through a Ministerial certificate, that disclosure to the coroner will in itself result in a real risk of serious harm to national security.

65. That I decline to do. Quite apart from anything else it would be invidious to prepare a damage assessment based on anything to do with an individual coroner. In any event, as I have said earlier, the policy of refusing coroners access to sensitive material, unless they are High Court or Circuit judges, is appropriate and lawful.

66. The IPs, INQUEST and Guardian News all raised objections to the High Court deciding this PII application. Essentially the argument was that if the High Court rules on the application, in favour of the Secretary of State, the Coroner will not be able to determine, without access to the sensitive material, whether it will be possible to hold a full and fair investigation into Mr Perepilichnyy's death. It was not an adequate response for the Secretary of State to say that the Coroner had seen the confidential gist. Only with access to the sensitive material as a whole can the

Coroner consider, in an informed and fair way, whether issues can be removed from scope, whether they can be considered on the basis of open material alone, and whether what is now required is a public inquiry at which closed material could be considered. While Mr Skelton has seen the material, these are all judicial decisions which can only properly be made by the Coroner.

67. Moreover, Hermitage submitted, there would be further logistical issues in the Coroner retaining conduct of the inquest, having had no part to play in the PII process. Thus the Coroner must ensure on an ongoing basis that all relevant material has been disclosed to the interested persons in an inquest. He must continue to ensure that disclosure decisions are kept under review, which includes keeping the PII claim under review, since it is conceivable that a change in circumstances could alter the PII balance. The Coroner cannot perform that task properly given that he does not know the content of the withheld material or the reasons for upholding the PII claim. Nor for this reason will the Coroner be able to meet his obligation to ensure that he stops any lines of questioning which he knows to be based on a false premise or which he knows to be misleading in light of the closed material: see *R (Secretary of State for the Home Department)* v. *Assistant Deputy Coroner for Inner West London* [2011] 1 WLR 2564, [31]. The same applies to the obligation to ensure that no findings are returned which are misleading in light of the closed material or to return no findings where there is a tension with the closed material. In none of these cases is the Coroner able to comply with his obligations when not knowing what is in the closed material.

68. These submissions were echoed by Legal and General. In particular it produced a schedule listing a number of other issues which could give rise to PII applications. It would be highly undesirable for the High Court to become involved on a regular basis for PII rulings in the inquest.

69. The case for Mrs Perepilichnaya was that I should decline jurisdiction for the reasons advanced by Hermitage and Legal and General. The thrust of the submissions on her behalf were, however, that the inquest must go ahead in March 2017 and must be conducted by a different coroner. Mrs Perepilichnaya had simply lost confidence in the Surrey senior coroner. First, there was the delay: it was four years since her husband's death and, after a dozen PIRs, when she had finally prepared herself for the inquest in September, that was aborted. Secondly, the Coroner had known from early this year, certainly by June, that the government would not give him access to the sensitive material, yet still he persisted. What was needed was for the Senior Coroner to act and have a High Court or Circuit judge appointed as an assistant coroner who could deal with the PII application. I should decline jurisdiction.

70. The High Court can only exercise its inherent jurisdiction as a last resort. In my view this is one such exceptional case where the High Court must act to avoid a real injustice. I can well accept the importance of determining PII in the wider context of the inquest and the disadvantages of separating it from the fact-sensitive nature of the public interest considerations involved. However, there are two factors which determine my conclusion.

71. First, there is the delay which has already occurred in this case. That presses especially hard with Mrs Perepilichnaya. Inquests should normally occur within six months of the death. Although this is a more intricate coronial investigation than

usual, and the twelve PIRs and abortive hearings may be justified, this PII issue should have been resolved earlier in the year and the September 2016 date for the inquest hearing maintained. The Coroner seems unfortunately to have overlooked the guidance the Chief Coroner sent to senior coroners in December 2014, quoted earlier in the judgment. That clearly set out government policy and spelt out its implications, that the coronial task may have to be transferred to a High Court or Circuit judge sitting as an assistant coroner. The December 2014 guidance also made clear that senior coroners need to discuss the type of case with the Chief Coroner as soon as possible with a view to the future conduct of any coronial investigation. Moreover, both Hermitage and the Secretary of State have made these points to the Coroner during the course of this year, to no avail. So there has been unjustified delay in this inquest. Any further delay would be intolerable.

72. Secondly, there is the related point that the inquest cannot proceed unless the PII issue is resolved. The Coroner accepts this, hence his ordering the Secretary of State to make the application to the High Court. What the IPs have suggested – the replacement of the Coroner by a High Court or Circuit judge to conduct the inquest – is not within my power. The fact is that this coronial inquest has reached an impasse and the only way that it can be lawfully resolved is by the High Court assuming jurisdiction and deciding the PII issue.

The PII application

73. The Secretary of State's claim for PII is in respect of certain material which the Coroner has identified as relevant to various lines of inquiry falling within the scope of his inquest. She has set out the basis for this in her certificate of 9 August 2016. In the certificate, the Secretary of State refers to *R* v. *Chief Constable of West Midlands Police, ex parte Wiley* [1995] 1 AC 274 and then goes on to use the procedure described there to balance the public interest in disclosing that material against the public interest in its non-disclosure. She recognises the public interest in holding open inquests and quotes the objectives Lord Bingham identified in *R (Amin)* v. *Secretary of State for the Home Department* [2004] 1 AC 653.

74. Both Hermitage and Legal and General argue that in this case the public interest in disclosure is extremely powerful given that it is the death of a Russian national in the UK in circumstances arousing suspicion as to whether it was with the knowledge of the Russian authorities. An analogy was drawn with the *Litvinenko* inquiry and attention focused on Sir Robert Owen's approach favouring disclosure in that case: see *R (Secretary of State for Foreign and Commonwealth Affairs)* v. *Assistant Deputy Coroner for Inner North London* [2013] EWHC 3724 (Admin), [53]. In their written submissions, Guardian News make the additional point that the Secretary of State did not expressly take into account such factors in favour of disclosure. To my mind it is obvious that these factors are subsumed in the Secretary of State's analysis set out in the certificate.

75. On the other side of the balance, there is the risk of harm to the public interest if the relevant material is disclosed. Having considered the certificate in OPEN and having seen the material and heard submissions in CLOSED, this is clearly a case where what Lord Templeman described as the general rule applies, namely that the harm to the public interest of the disclosure of the material is self-evident and precludes disclosure: *Wiley* case, p. 281G-H; see also *R (Binyam Mohammed)* v. *Secretary of*

State for Foreign and Commonwealth Affairs [2011] QB 218, [34], [63]. In *R (Secretary of State for Foreign and Commonwealth Affairs)* v. *Assistant Deputy Coroner for Inner North London* [2013] EWHC 3724 (Admin), Goldring LJ noted that 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: [57]. I cannot see cogent or solid reasons for rejecting the Secretary of State's view in this instance that there would be real and significant damage to national security from disclosure.

76. For the reasons advanced in OPEN and given separately in CLOSED by both the Secretary of State and counsel to the inquest, I have no hesitation in finding that the balance comes down in favour of non-disclosure and upholding the Secretary of State's certificate. I will therefore make an order permitting the non-disclosure of documents into the inquest proceedings on the ground that disclosure would damage the public interest. The ruling covers the gist, Bundle A and the sensitive schedule.

77. The implication of this conclusion is that the Coroner's position becomes untenable. He cannot have sight of relevant, sensitive material which is the subject of the PII ruling. To my mind that puts him in a position in which he cannot conduct a full and fair inquest. It is for the Chief Coroner to arrange for a replacement who is able to view the sensitive material and continue the inquest.

78. I do not accept the arguments of the Coroner that appointing a new coroner will involve delay. The new coroner will have the assistance of Mr Skelton, as counsel to the inquest, who has seen all the evidence including the sensitive material. The March date can be maintained. As to the additional cost, doing justice sometimes demands additional expenditure.

79. Any coroner needs to keep the question of PII under review. The new coroner will need to do this when informed of the relevant facts and issues. Within the hearing the new coroner will need to decide whether particular lines of questioning are relevant in light of the PII material and whether particular conclusions would be misleading. The new coroner will also need to consider whether a public inquiry is needed.

Conclusion

80. Public interest immunity is granted in the terms indicated in the judgment.