Neutral Citation No: [2024] NIKB 32	*Ref:* **HUM12506**
*Judgment: approved by the court for handing down (subject to editorial corrections)**	*Delivered:* **25/04/2024**

IN THE HIGH COURT OF JUSTICE IN NORTHERN IRELAND

KING'S BENCH DIVISION
(JUDICIAL REVIEW)

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

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

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

(NO. 2)

Tony McGleenan KC & Philip McAteer (instructed by the Crown Solicitor's Office) for the Secretary of State for Northern Ireland
Peter Coll KC & Stephen Ritchie (instructed by the Crown Solicitor's Office) for the Chief Constable of the PSNI
Ian Skelt KC & Rachel Best KC (instructed by the Coroners Service for Northern Ireland) for the Respondent
Monye Anyadike-Danes KC & Sinead Kyle (instructed by the Committee on the Administration of Justice) for the Next of Kin as Notice Party
Mark Robinson KC & David Reid (instructed by the Crown Solicitor's Office) for the Northern Ireland Office as Notice Party

---

HUMPHREYS J

Introduction

[1] On 25 March 2024 I delivered an OPEN judgment dismissing the applicants' application for judicial review in respect of Coroner Fee's decision, following a Public-Interest Immunity (PII) application, to direct a gist of material contained within one folder of the documentation under consideration. That judgment was supplemented by CLOSED reasons which were furnished on 28 March.

[2] During the judicial review hearing, on 22 March, it become apparent that the first applicant, the Chief Constable of the PSNI, had proposed an alternative gist in respect of the same information. It was indicated to the court that the coroner was minded to accept this proposal. However, at that stage, her final decision and reasons for so doing were not available and it was therefore agreed that the court would proceed to hear and determine the challenge in respect of the first gist.

[3] It was made clear by counsel for the Secretary of State ('SoSNI') that he maintained an objection to both gists. On this basis, I granted leave for the SoSNI to amend the Order 53 statement (Order 53 of the Rules of the Court of Judicature (NI) 1980) to plead this fresh challenge but adjourned the hearing of that matter until the coroner had provided her ruling and reasons.

[4] This was done on 11 April 2024, and I heard the SoSNI's further submissions in a CLOSED hearing on 19 April. This is the OPEN judgment in respect of the challenge in relation to the second gist, which will be accompanied by CLOSED reasons.

[5] This judgment should be read in conjunction with my first decision in which I set out the relevant background, the course of the PII application and the legal principles.

The Evidence

[6] In respect of the challenge to the second gist, a further affidavit was submitted on behalf of the applicant which deposed to the steps taken in the PII application. This evidence was not before the court when it considered the application in respect of the first gist.

[7] The chronology of events can be summarised as follows:

(i) On 17 January 2024 the Northern Ireland Office ('NIO') received an application made by the PSNI for PII in respect of six folders of material, in order that it could be given ministerial consideration;

(ii) On 18 January 2024 the Chief Constable wrote confirming that he was satisfied the balance fell in favour of asserting PII over the material;

(iii) On 19 January 2024 various issues were raised by the NIO which were responded to on 24 and 26 January;

(iv) On 5 February 2024 NIO provided advice and a review of materials to the Minister, who agreed that the public interest in non-disclosure outweighed the public interest in disclosure and issued a PII certificate accordingly;

(v) On 12 February 2024 a further letter was received from PSNI in respect of one folder of additional materials, not yet provided to the Minister, but which, in the opinion of the Chief Constable, ought also to attract PII;

(vi) On 19 February 2024, the additional folder of material was provided to the Minister who, having carried out the balancing exercise, issued a supplementary PII certificate;

(vii) On 13 March 2024 one further additional subdivided folder of PSNI materials was identified which had not been the subject of any ministerial certificate;

(viii) On 14 March 2024 the Deputy Chief Constable wrote to the NIO in relation to the further additional materials stating that, in his opinion, the balance fell in favour of asserting a claim for PII;

(ix) On 19 March 2024 NIO officials provided the further additional materials and advice to the Minister who, having performed the balancing exercise, determined that a further supplementary PII certificate should be issued. This advice included the statement:

> "PSNI does not consider it feasible to provide a meaningful gist while at the same time ensuring the necessary protection of the identified public interests and their justifications"

(x) On 26 March 2024 SoSNI wrote to the Chief Constable in relation to sensitive disclosure issues in legacy inquests, expressing 'deep concern' about what he describes as a 'developing trend' towards departures from the NCND ("neither confirm nor deny") policy. He also requested that the Chief Constable do not propose or consent to any disclosure of information over which PII has been claimed in any case without affording the SoSNI an opportunity to consider it and make representations;

(xi) On 27 March 2024 the Chief Constable replied to the SoSNI, denying that any action had been taken which would represent a departure from the NCND policy and confirming that he had no intention of allowing the disclosure of any information which would cause serious harm or real damage to national security or the public interest. He also stated:

> "I am independent of the executive and not subject to the direction or control of government ministers, departments or agencies."

(xii) On 28 March 2024 the Home Secretary wrote to the Advocate General for Northern Ireland, asserting that the NCND policy had come under 'considerable pressure' in the context of legacy inquests as a result of coroners

moving to issue gists of sensitive material which would risk damage to national security. He reiterated the importance which the UK Government continues to place on this NCND policy as a means of protecting national security, and annexed a statement in that regard.

[8] The court also received evidence in the course of the CLOSED hearing which is detailed in my CLOSED ruling.

[9] I am conscious that CLOSED hearings represent a substantial departure from the principle of open justice and that OPEN judgments in this context should say as much as can properly be said about CLOSED material and submissions.

The Grounds for Judicial Review

[10] In an Amended Amended Order 53 statement, SoSNI (which is now the only applicant for relief) claims:

(i) The coroner misdirected herself as to the applicable law and in relation to the NCND policy and departed from it without sufficient rational basis;

(ii) The coroner failed to give adequate reasons;

(iii) The coroner took into account an immaterial consideration, namely the Chief Constable's view of what did or did not breach the NCND policy;

(iv) The coroner acted irrationally by failing to take into account the viability of the inquest, namely whether it would be in a position to continue and complete before the date of 1 May 2024 prescribed by section 16A of the Coroners Act (Northern Ireland) 1959, when directing the provision of the second gist;

(v) The decision was one no reasonable coroner could have arrived at;

(vi) The coroner acted in a procedurally unfair manner by failing to invite or receive evidence or submissions from SoSNI in relation to the second gist.

[11] In my CLOSED judgment I analyse these grounds in light of the evidence and submissions provided to me by the parties in a CLOSED hearing. It is therefore difficult for the court to articulate its reasoning in the context of an OPEN judgment.

[12] I have concluded that the coroner properly directed herself as to the relevant legal principles, both in relation to PII applications generally, and also the role of the NCND policy more specifically. She referred to the relevant authorities and correctly considered the nine important principles articulated by Goldring LJ in *Secretary of State for Foreign and Commonwealth Affairs v Assistant Deputy Coroner for Inner North London* [2013] EWHC 3724 (Admin) (the *Litvinenko* case), as well as my own analysis in *In the Matter of an Inquest into the Death of Noah Peter Donohoe* [2022] NICoroner 3.

[13] The coroner was also alive to the importance to be accorded to ministerial assertions in relation to national security, which ought rarely to be departed from, and the need for cogent reasons for any departure in a particular case. She was also fully sighted on the different aspects of harm relied upon by the Minister.

[14] The coroner acknowledged and accepted that a risk to national security did arise but did not accept that the risk was at the level asserted in the certificate, and found that such risk could be mitigated by the use of a partial gist. In doing so, she had regard to both the specific circumstances of this individual case and also the wider picture in respect of the importance of the use of agents in the acquisition of intelligence and the protection of national security. I was not therefore persuaded that there was any misdirection of law, or that the coroner departed from the NCND policy without any rational basis.

[15] In my OPEN judgment in relation to the first gist, I stated:

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

[16] In submissions relating to the second gist, I was invited by counsel for SoSNI to depart from this approach and to adopt instead an "anxious scrutiny" type approach to the coroner's decision making. This obligation on the court was said to arise since the important issue of national security was in play.

[17] No authority was cited to me for this proposition. For the reasons set out in my OPEN judgment in relation to the first gist, I remain of the view that the proper approach of a judicial review court is as I have articulated. It is, of course, important that the coroner is aware of the need for cogent reasons to depart from NCND and the court should be alive to scrutinise the correct identification of the legal principles in this area. However, provided no error of law can be demonstrated, the court should only interfere with the merits of a coroner's decision within the traditional and limited scope of judicial review. This is particularly so because the decision maker is herself a judicial officer, acting with the benefit of her own legal team, and is peculiarly well placed to make the types of judgement required in the PII exercise, relating as they do the scope of the inquest, the issues to be determined and the evidence available.

[18] The reasons challenge lacked any proper particularisation in the Order 53 statement. Having reviewed the coroner's decisions, I am quite satisfied that she did provide proper and adequate reasons.

[19] The claim that the coroner took into account an immaterial consideration, namely the view of the Chief Constable on NCND, was not made out on the evidence as explained in the CLOSED ruling.

[20] Counsel for the SoSNI placed reliance on a failure on the part of the coroner to take account of whether or not the inquest was viable in the balancing process. It was contended that this failure was a fatal flaw in that it was a potentially telling factor against the release of the gist.

[21] This point did not go to the third key question but to the *Wiley* exercise of weighing the public interest in the pursuit of justice against the public interest in the protection of national security interests. By the time the coroner reached that question, she had already determined that the harm to national security could be mitigated by the production of the gist in question for the reasons articulated.

[22] In any event, no one submitted to the coroner that she ought to refrain from issuing any gist by reason of the questionable viability of the inquest. It should be recalled that the NIO is a Properly Interested Person (PIP) in the inquest and could have made this submission at the time of the PII hearings in March 2024 or, indeed at the first judicial review hearing, or any time thereafter. Instead, this was advanced for the first time, in a CLOSED hearing on 18 April 2024.

[23] In light of the decision of the Supreme Court in *Re Dalton's Application* [2023] UKSC 36 and my own decision in *Re Bradley's Application* [2024] NIKB 12, this is an inquest which is subject to the article 2 ECHR investigative obligation. The UK is obliged to investigate the circumstances concerning the death of Mr Thompson in an article 2 compliant manner. That duty persists both before and after the statutory guillotine date of 1 May 2024, and the duties of disclosure and the consideration of any PII applications must be seen in that context.

[24] Even where a determination is made that an inquest will not complete before 1 May 2024, there may still be an ability to achieve some of the goals of the inquest process, to find out how an individual died, or to allay rumour and suspicion, through the disclosure and evidence gathering processes. It could scarcely be regarded as irrational to disclose the contents of a gist to PIPs, in circumstances where the gist has otherwise been ruled to be lawful.

[25] I have therefore determined that this ground of challenge also fails.

[26] Equally, the claimed want of procedural fairness suffers from a similar infirmity. Whilst representations or submissions were not specifically sought from SoSNI on the second gist, the coroner had had the benefit of full submissions from all parties during the course of the PII applications. The NIO is a PIP and could, at any time, have made submissions in writing to the coroner which she would have been obliged to consider, or sought an oral hearing. Coroners repeatedly make it clear that their decisions on disclosure can be reviewed and reconsidered during the course of

the inquest process. PIPs enjoy particular status as the Case Management Protocol for Legacy Inquests explains at para [15]:

> "Designation as a Properly Interested Person shall entitle the individual or organisation to receive disclosure of relevant materials; to be informed of the date and time of preliminary hearings and the inquest hearing; to make legal submissions on matters as required; and to examine witnesses who are called to give evidence. The Coroner will ensure the effective participation in the inquest of each Properly Interested Person."

[27] There was nothing to prevent the NIO or SoSNI from making legal submissions or, indeed, adducing further evidence on the disclosure issues, whether touching on NCND or any other aspect of the coroner's ruling. The time to do this was after she had provisionally indicated on 22 March that she was minded to accept the Chief Constable's proposed gist. It is not open to a party in this position to wait until the last moment and then complain about some procedural unfairness.

[28] In all the circumstances, it could not be said that this decision in respect of the gist was one which no reasonable coroner could have arrived at.

[29] For completeness, I should say that even if the standard of review were elevated to that of anxious scrutiny, I am unpersuaded that a court would take a different view to that adopted by the coroner. The position of the SoSNI seeks to elevate the NCND policy to a matter of legal principle which is, for the reasons set out in my first OPEN judgment, an erroneous approach. If that were the case then there would be no role for the court to play, save for saluting the NCND flag. In the instant case, the gist discloses a very limited amount of information in the context of the coronial investigation. The coroner was quite entitled to form the view that the public interest in this disclosure outweighed the limited harm to national security.

Conclusion

[30] Accordingly, for the reasons set out in this judgment, and those which appear in my CLOSED ruling, none of the grounds for judicial review have been made out and the application in respect of the second gist is dismissed.