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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 KINGS BENCH DIVISION (JUDICIAL REVIEW)

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

BETWEEN:

SECRETARY OF STATE FOR NORTHERN IRELAND

Appellant:

-and-

ONE OF THE NORTHERN IRELAND CORONERS

Respondent:

____

Before: Keegan LCJ, McCloskey LJ and Horner LJ

____

Mr Tony McGleenan KC and Mr Philip McAteer (instructed by the Crown Solicitor's Office) for the Appellant
Mr Ian Skelt KC and Rachel Best KC (instructed by Coroner's Service NI) for the Coroner
Oliver Sanders KC and Stephen Ritchie (instructed by the Crown Solicitor's Office) for the Chief Constable PSNI, qua interested party
Monye Anyadike-Danes KC and Sinead Kyle (instructed by the Committee on the Administration of Justice) for the Thompson family, qua interested party

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OPEN JUDGMENT

McCLOSKEY LJ (***dissenting***)

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Preface

This judgment is to be read in conjunction with my related CLOSED judgment.

Introduction

[1] The impetus for the judicial review proceedings giving rise to the appeal to this court is a disagreement between the Secretary of State for Northern Ireland ("SOSNI") and the Chief Constable of the Police Service of Northern Ireland (the "Chief Constable") relating to disclosure issues which have arisen at a late stage of the inquest into the death of Liam Paul Thompson (the "deceased"). Both the Chief Constable and the Thompson family, together with the Northern Ireland Office ("NIO"), have the status of "properly interested party" in the inquest proceedings.

[2] In a nutshell, the Chief Constable, by a Ministerial Certificate, asserted public interest immunity ("PII") in respect of certain documentary materials. The PII claim included the elements of outright non-disclosure of certain materials and disclosure of others in redacted form. The Coroner, in the usual way, examined these materials. The Coroner's determination had in essence two components. First, the PII claim was upheld in relation to the majority of the documents. Second, she ruled, a "gist" of the documents belonging to one discrete category of the PII materials (in "Folder 7") should be disclosed to all participating parties. This was followed a little later by a second "gist" ruling overtaking the first.

The two judicial reviews

[3] There is a chronology of the judicial review proceedings at Appendix 1. In brief, the Chief Constable's judicial review application was lodged on 11 March 2024. The impugned decision is described in the Order 53 Statement in these terms:

> "A determination made in an Open Ruling provided on 8 March 2024 which indicated that the Coroner would issue a ruling on a PII application advanced by the Applicant with an accompanying gist. The Coroner determined that the accompanying gist would include material in the form of a gist that, in the view of the Applicant, would breach the policy of neither confirm nor deny ["NCND"] in a manner that would be contrary to the national security interests of the State."

SOSNI brought a separate judicial review challenge to the same impugned decision on 12 March 2024. The two cases were conjoined. Humphreys J granted leave to apply for judicial review in both cases on 13 March 2024. SOSNI brought a separate judicial review challenge to the same impugned decision, initiated on 12 March 2024. Both applications were considered together. The substantive hearing of both applications was scheduled for 22 March 2024.

[4] Meantime, in parallel, events in the inquest forum continued apace. In what appears to have been a period of less than 24 hours: (a) a second, revised gist was proposed to the Coroner by the Chief Constable; and (b) this stimulated the Coroner's second open ruling, given orally initially on 22 March 2024, determining to disseminate this second gist in substitution of the first.

[5] Back to the High Court: this development prompted an application by SOSNI during the High Court hearing on 22 March 2024 to amend the Order 53 Statement to challenge this second gist. The court permitted this amendment but stayed further consideration of this new challenge. The hearing, thus confined to the challenge to the first gist only, was completed. The reserved judgment of Humphreys J was delivered, with commendable expedition, on 25 March 2024. The judge's related closed judgment and the court's related order of dismiss are dated 28 March 2024.

[6] The Coroner's closed ruling in respect of the determination made on 22 March followed on 11 April 2024. Reacting, SOSNI amended his Order 53 Statement (on 16 April 2024 pursuant to the grant of leave on 22 March 2024) advancing its challenge to the second ruling. This was followed by brief Open and Closed substantive hearings on 18 April 2024. The Chief Constable's involvement in the proceedings at this stage was passive only. By his (second) open judgment, again delivered with admirable speed on 24 April 2024, the judge dismissed the amended challenge of SOSNI substantively. The judge's closed judgment is dated 24 April 2024. Both judgments were followed by the court's order dated 26 April 2024.

[7] SOSNI appealed to this court against both orders of the High Court. The appeals were, very sensibly, conjoined in a single Notice of Appeal. They were processed in this court with high priority, entailing hearings on 26, 29 and 30 April 2024. In the late afternoon of 30 April this court, by a majority of 2/1, dismissed the appeals. Still later that day, this court (a) refused the application of SOSNI for leave to appeal to UKSC and (b) made an order staying its decision/order. Pausing, neither version of the gist has been provided by the Coroner to any other party, by a combination of the stay, provisions of rules of court and an appropriate undertaking from the Coroner.

Chronology of the Inquest

[8] The material dates and events in this regrettably delayed inquest are rehearsed in Appendix 2 to this judgment. As this shows, the Thompson family have had to endure the experience of interaction with the Northern Ireland legal system for fully 30 years, with no outcome. This is profoundly disturbing.

The Ministerial Certificates

[9] The agencies in dispute are SOSNI and the Chief Constable. The court has been informed that judicial review litigation between these two agencies has no precedent. Their dispute can be traced in the following way. On 18 January 2024 the Chief Constable, having considered six folders of material, including redactions, "all of which are relevant to the above inquest", communicated the following to SOSNI:

> "I have performed the required balancing test in respect of competing public interests and I have concluded that disclosure of the materials provided to me, without redaction, would cause real risk of serious harm to the public interest. I am therefore satisfied that the balance falls in favour of asserting a claim for public interest immunity **in respect of the proposed redactions to certain portions of the materials before me.**"
> [emphasis added.]

Pausing, the (sole) public authority asserting the PII claim was, therefore, the Chief Constable. In accordance with long established practice, any ensuing PII certificate would fall to be made by a Government Minister, as occurred subsequently.

[10] This gave rise to a submission from a senior civil servant in the NIO to The Right Honourable Steve Baker MP, Minister of State for Northern Ireland (the "Minister"). This submission recommended that the Minister make a certificate asserting a claim for PII in accordance with the course proposed by the Chief Constable. This submission and its appendix are couched in conventional terms.

[11] One particular feature of the submission is the section dealing with the discrete issue of "gist." This advised the Minister that "gisting" is "an alternative to seeking PII, where information will be disclosed, albeit in a form of words (a gist) provided by the relevant Authorising Officer as suitable for release." The relevant passage continues:

> "Gists seek to protect sources and methodology while providing balance and appropriate information to Properly Interested Persons. They allow information to be shared with any properly interested party and, once it is in the public domain, shared openly. **In this case, 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."**
> [emphasis added.]

Pausing, as subsequent events demonstrate the Chief Constable later abandoned this stance (see paras [54]–[58] *infra).*

[12] In the event, the Minister made three separate PII certificates, on separate dates. The explanation appears to be that the PSNI materials in question were provided to him in piecemeal fashion. Nothing of substance turns on this. The dominant certificate is the first of the three. It is dated 5 February 2024. The second and third certificates in essence adopted the first, in relatively formulaic terms, albeit accompanied by updated amended "Sensitive Schedules."

[13] The dominant PII certificate enshrines inter alia the following inter-related assessments on the part of the Minister: the material under scrutiny was relevant for the purposes of the inquest proceedings; the disclosure of the material would give rise to "a real risk of serious harm to an important public interest" (being national security); and the public interest in non-disclosure was not outweighed by the public interest in making disclosure in the inquest proceedings.

[14] The certificate elaborates on the public interest in play in the following way. It identifies the enduring threat of terrorist violence posed by "residual terrorist groups [who] continue to regard violence as a way of furthering their objectives", as evidenced by specified recent incidents. The Minister continues:

> "Any disclosure of the identities of individuals working to counter terrorism as well as of tactics, techniques or procedures would damage capabilities for countering terrorism in Northern Ireland."

Continuing, the certificate avers that among the types of information contained in the PII materials is the following:

> "… information provided in confidence to the PSNI, disclosure of which would endanger or risk endangering the persons concerned or other persons or would impair or risk impairing their ability or willingness to continue providing information or assistance, or the ability of the PSNI to obtain information and assistance from the person concerned or other persons."

This must be linked to a later passage:

> "As regards the gathering of intelligence information, those who supply such information do so on the basis that what is imparted is in confidence and any disclosure in breach of confidentiality creates **a serious risk that such information will be less readily forthcoming in the future.** In addition, anything that might lead to identification of the individual source or sources of the information could result in grave danger to the persons concerned."
> [emphasis added]

[15] A further important feature of the PII certificate was the compilation of a schedule containing "… the particular information [and] … the precise harm that its disclosure would cause" prepared for the exclusive consideration of the Coroner and described as a "highly classified document." This forms part of the materials considered by this court in closed session.

The Coroner's First Two Rulings

[16] On 4 March 2024 the Coroner, having considered the contents of Folders 1 to 6, pronounced a brief open oral ruling upholding the PII claim. In respect of Folder 7, the Coroner added that the possibility of a gist was under contemplation. A draft gist was provided by her, and the Chief Constable's legal representatives were given the opportunity of taking instructions. Three days later still further documents were provided on behalf of the Chief Constable to the Coroner. These reinforced the Coroner's view that the documents in Folder 7 were "highly relevant to the inquest." On the same date, in a closed session, the Chief Constable's legal representatives intimated to the Coroner that the information in Folder 7 "**was not amenable to gisting."** The Coroner maintained her contrary view and made a ruling accordingly (followed by a closed written ruling). Later that day the Chief Constable wrote to the Coroner inviting her to revoke her ruling. The following day the Coroner replied, rejecting this invitation.

[17] On the same date (8 March 2024) the Coroner promulgated her written open ruling: see para [62] *infra.* Three days later, on 11 March 2024, there were two noteworthy events, namely (a) the provision of the Coroner's closed ruling and (b) the initiation of the first judicial review. Events thereafter belonging to this discrete phase

are detailed in paras [3]–[7] above and Appendix 1. I shall examine all four of the Coroner's rulings *infra*.

The "Closed" Material

[18] It is appropriate to highlight at this juncture that the sensitive materials which this court has considered in closed session are the following:

(a) The first draft gist.

(b) The revised draft gist.

(c) The Coroner's closed ruling.

(d) The two closed judgments of Humphreys J.

(e) The contents of "Folder 7."

(f) The sensitive schedule (noted above), as amended.

These are addressed in my "CLOSED" judgment, which must be considered in tandem with this judgment. None of these materials has been provided by the Coroner to any interested party. Their contents are known to the Coroner, the Chief Constable and SOSNI only.

Appeal to this court

[19] The first three grounds of appeal, summarised, are error of law, irrationality and lack of reasons. Summarising, the Coroner's decision is criticised on the basis that it betrays a misunderstanding of the governing legal rules and policy; it involves a departure from the governing legal rules and principles and the relevant policy without adequate (or any) reasons; it is based partly on an unsustainable and unexplained view that the risk to national security belonged to a tier lower than that asserted in the Ministerial certificate; cogent reasons for the outcome of the Coroner's balancing exercise were absent; the Coroner's decision was based upon her adoption of the Chief Constable's erroneous view that the disclosure which the revised gist would entail would not be damaging to national security and did not breach the NCND policy; and given the fact that the inquest could not be completed, the Coroner acted *ultra vires.*

[20] The further, discrete, grounds of appeal are that the High Court should have applied a more elevated standard of review; the High Court (and Coroner) failed to take into account the highly material consideration that the proposed disclosure of information would unfold in a context wherein the inquest had no prospect of reaching completion and/or acted *ultra vires* in this respect; the assessment that the proposed disclosure would achieve "some of the goals of the inquest process, to find

out how an individual died, or to allay rumour and suspicion" (second open ruling, para [24]) is unsustainable; the judge erred in characterising the Coroner's decision regarding the revised gist as provisional in nature; and the judge erred in failing to conclude that the Coroner had:

> "… acted in a procedurally unfair manner in that she made her determination without inviting or receiving any evidence, submissions or representations from [SOSNI] and without convening any further hearing to consider same."

[21] The appeals before this court have mixed ingredients of Government policy and legal principle. Before examining the grounds of appeal I shall first outline the frameworks of policy and legal principle.

The Policy Framework: National Security

[22] National security is a complex and multi-faceted subject. In the pithy words of Lord Bridge of Harwich in *Brind v SSHD* [1991] 1 AC 696 at 749:

> "In any civilised and law-abiding society the defeat of the terrorist is a public interest of the first importance."

The discrete dimension of national security which features in these proceedings is counter-terrorism. The protection of society against terrorism is one of the most recognisable facets of national security. For as long as one can remember this has involved the phenomenon of the state agent (or "CHIS" – covert human intelligence source). Certain aspects of this phenomenon are matters of public knowledge through, for example, the mechanism of Ministerial certificates asserting PII in legal proceedings and reliable press reporting. Thus, it is well known that in the particular sphere of counter-terrorism state agents, typically, are or become members of terrorist organisations or infiltrate such organisations or otherwise associate themselves with their members. This involvement is designed to procure information which the agent then conveys to the relevant public authority which determines what action (if any) to take. The conduct of state agents and security personnel and the arrangements under which both operate are invariably wrapped in a veil of secrecy, for very good reason.

[23] It is important to recognise that, at heart, in the sphere of national security all arrangements and activities involving state agents have the overarching goal of protecting the population and saving innocent lives. One rationale for asserting PII in relation to the existence, identity or conduct of a state agent in any given litigation context is to protect the person concerned. A related rationale is to protect family members and associates or neighbours of the agent, innocent people who might be mistakenly identified by the terrorist as a state agent.

[24] The maintenance of the foregoing protections in turn protects the population because it facilitates the continuing activities of the person concerned. This, however, is not the only dimension. A careful reading of the main Ministerial certificate in this case (as in countless others) discloses that there are other wider and more nuanced, aims and objectives, each inextricably linked with the overarching goal identified above.

[25] In particular, the assertion of PII in the national security context addresses the mischief of impairing or risking the impairment of the ability or willingness of state agents to continue to provide information or assistance and, correspondingly, the ability of state agencies, particularly (though not exclusively) PSNI, to discharge their statutory responsibilities: see the Ministerial certificate, para 14(b). Further, it serves to encourage the recruitment of new agents who, without the protection of secrecy, could be deterred from providing their services.

[26] Successive governments have deemed it appropriate and necessary to protect the population via the mechanism of state agents. There is another discrete aspect of national security arrangements which must be addressed. Successive governments have also deemed it not less than essential to adopt the "Neither Confirm Nor Deny" ("NCND") practice, or policy. It is believed that this policy was first adopted by the CIA in 1975, during the height of the Cold War. (In passing, when the CIA joined Twitter in 2014, its first tweet was "We can neither confirm nor deny that this is our first tweet.") It is sometimes known as the "Glomar Response." It has been the consistent judgement of successive governments that this discrete policy is an essential element of the arrangements, practices and activities designed to protect the population under the aegis of the "mother" policy of national security. This is their overarching aim.

[27] The practical operation of the NCND policy entails the adoption of an "official" stance by, for example, a security agency, a government minister or some other public authority neither confirming nor denying something. The "something", in principle, belongs to a wide spectrum. It might relate to, for example, the involvement of British armed forces or police forces in certain overseas contexts, such as possible extradition or counter-terrorism or the Government's investment in certain overseas projects or administrations; or Government negotiations in matters of arms sales or acquisition. In the specific context under scrutiny in these proceedings, the policy is applied by neither confirming nor denying the existence of a state agent and/or the conduct or involvement of a state agent in any given situation or circumstances. This principle, I would add, has the further virtue that it avoids the spectre of a government lying to its electorate.

[28] In a letter dated 28 March 2024 to the Attorney General, the Home Secretary wrote:

> "You will be aware that the 'neither confirm nor deny' (NCND) policy has come under considerable pressure in recent weeks in the context of Northern Ireland legacy

> inquests, with Coroners moving to issue gists of sensitive material which would, in the view of the government, risk damage to national security and the public interest. I therefore thought it would be useful at this stage to reiterate the wider importance and utility of the NCND policy as a means of protecting national security and the public interest …"

Attached to the letter was an official government "Statement on the NCND Policy." This contains the following salient passages:

> "The NCND principle remains as relevant today as it has ever been in the protection of sensitive material in the fields of national security, defence, law enforcement and other vital public interests. The protection of information, techniques and sources is of critical importance in a world which is becoming increasingly unstable, with conflict across the globe and domestic threats from terrorism, espionage and organised crime."

Continuing, the text adverts to the government policy of assuming a <u>duty</u> to state agents "… relating to the identities and activities of agents during their lifetimes and beyond …" The text continues:

> "Further, foreign partners also trust the UK's agencies and departments to protect sensitive material which they share with the UK. The policy of NCND is one of the most effective tools in maintaining such confidence …
>
> It is vital that the approach to the protection of the kind of sensitive material described above, as well as current and former agents' identities **or the fact that agents were involved at all,** remains consistent across government agencies and departments …"
> [emphasis added.]

[29] Next there is a quotation from the judgment of the Right Honourable Lord Hughes of Ombersley in his Restriction Order ruling of 3 November 2023 in the Dawn Sturgess Inquiry:

> "A particular example of a risk to national security relates to the principle that the State will neither confirm nor deny whether any individual was or is an agent of the intelligence agencies. I am wholly satisfied that this principle ('NCND') is justified. It is maintained not primarily for the benefit of any single person, nor for that

> matter for any single case. It is maintained in order to safeguard those who either have served, or may serve, the country as agents. The principle only holds good if it is generally maintained and known to be maintained. Once the principle is departed from, it inevitably follows that a decision in another case not to depart from it will be understood to amount either to confirmation or denial and the essential safeguarding is lost."
> [emphasis added.]

In the remainder of the Statement there is an acknowledgement of the possibility of making exceptions to the NCND policy, exceptionally, "… where national security would not be served by its application …" It continues:

> "The NCND policy relies on its consistency of approach and that approach itself allows for departures when the judgement is made that national security would be best served by a departure. In respect of those agents who work on national security matters at great risk to themselves, it remains the government's firm policy to seek to protect their identities and activities **during their lifetime and beyond – the latter taking account of the extension of risks to families and associates.**"
> [emphasis added.]

The policy is encapsulated in the following sentence:

> "The consistent consideration and application of the policy of NCND has always been, and continues to be, a vital means by which national security and the wider public interest are protected …
>
> It remains a critical tool in ensuring the safety of the UK's interests both domestically and overseas."

[30] The NCND policy has been the subject of judicial consideration. In the case of *Frank-Steiner v SIS* [IPT/06/81/CH] the Investigatory Powers Tribunal stated at para [4]:

> "4. The standard response in a case where it is not desired to disclose whether or not a requested party is in possession of any documents or knowledge was thus given, namely such as to "neither confirm nor deny" ("NCND") that any such documents exist. This NCND response, if appropriate, is well established and lawful. Its legitimate and significant purpose and value has been discussed and

ratified by the courts, as explained and reiterated by this Tribunal in **IPT/01/62** and **IPT/01/77** Judgment of 23 January 2003 at paragraphs 46-54 and in **IPT/03/01** Judgment of 31 March 2004 at paragraphs 15-18. It is essential for there to be a consistent response in such a situation. If, in a hypothetical case, whether or not it might be legitimate not to disclose any documents that do exist, no documents in fact exist, an answer is given to an applicant that "there are no documents", then an NCND response given to a different applicant in another case will reasonably lead that other applicant to conclude that, because he has not been told that the documents do not exist, he is entitled to assume that they do. Similarly if the documents do exist, the very disclosure of their existence, though coupled with a justification for retaining them, may be itself damaging, depending upon the identity and purpose of the applicant, and may indeed be all that the applicant wants to know. This Tribunal itself is bound by a similar regime and a similar requirement. S68(4) provides that where a complainant fails before the Tribunal, the Tribunal, in determining any such proceedings, complaint or reference, shall give notice to the unsuccessful complainant which "… shall be confined … to … a statement that no determination has been made in his favour." Even without considering the specific statutory framework in issue before us, to which we shall return, it is obvious that this protection is needed for the security services, subject of course to the statutory supervision by this Tribunal."

The Tribunal added at paras [28] and [45]:

"28. The next and important Hansard reference is a recorded statement by the then Foreign and Commonwealth Secretary Mr Robin Cook on 12 February 1998 under the heading "MI6":

"The records of the Secret Intelligence Service are not released: they are retained under Section 3(4) of the Public Records Act 1958. Having reviewed the arguments, I recognise that there is an overwhelmingly strong reason for this policy. When individuals or organisations co-operate with the service, they do so because an unshakeable commitment is given never to reveal their identities. This essential trust would be undermined by a perception that undertakings of confidentiality were honoured for only a

> limited duration. In many cases, the risk of retribution against individuals can extend beyond a single generation …
>
> 45. For an NCND policy to be effective in ensuring that information is not revealed about individual cases, **the NCND response must be provided invariably.** This is not a novel point: it lies at the heart of the NCND policy as it is, and always has been, applied by the security and intelligence agencies."
> [emphasis added]

[31] The same themes resonate in the judgment of Bean J in *DIL and Others v Metropolitan Police Commissioner* [2014] EWHC 2184 (QB), at paras [4] and [25]–[38] especially. Notably, the judge forged a link with the common law, at para [25]:

> "The common law has long recognised a rule of policy whereby the identities of informers must not be revealed …"

At para [39] Bean J formulated three propositions:

> "I derive the following guidance from the authorities:
>
> (1) There is a very strong public interest in protecting the anonymity of informers, and similarly of undercover officers (UCOs), and thus of permitting them and their superiors neither to confirm nor deny their status; but it is for the court to balance the public interest in the NCND policy against any other competing public interests which may be applicable *(McNally; Mohamed and CF v SSHD)*.
>
> (2) There is a well-established exception in a criminal trial where revealing the identity of the informer or the UCO is necessary to avoid a miscarriage of justice (*Marks v Beyfus; R v Agar)*: this does not arise in the present case.
>
> (3) Even where an individual informant or UCO has self-disclosed, the police (or the Secretary of State) may nevertheless be permitted to rely on NCND in respect of allegations in the case where to admit or deny them might endanger other people, hamper police investigations, assist criminals, or reveal police operational methods. (*Savage; Carnduff*)."

Notably, Bean J observed that the rationale of the NCND policy applies in every type of legal proceedings and, indeed, every context.

[32] In this jurisdiction a frontal attack on the NCND policy has been rejected: see *Re Scappaticci's Application* [2003] NIQB 56. Carswell LJ, having identified many of the considerations outlined in the preceding paragraphs, stated at para [15]:

> "To state that a person is an agent would be likely to place him in immediate danger from terrorist organisations. To deny that he is an agent may in some cases endanger another person, who may be under suspicion from terrorists. Most significant, once the Government confirms in the case of one person that he is not an agent, a refusal to comment in the case of another person would then give rise to an immediate suspicion that the latter was in fact an agent, so possibly placing his life in grave danger (a comparable proposition may be found in paragraph 35(3)(a) of the decision of the Information Tribunal in *Baker v Secretary of State for the Home Department* (2001), a copy of which was furnished to me). If the Government were to deny in all cases that persons named were agents, the denials would become meaningless and would carry no weight. Moreover, if agents became uneasy about the risk to themselves being increased through the effect of Government statements, their willingness to give information and the supply of intelligence vital to the war against terrorism could be gravely reduced. There is in my judgment substantial force in these propositions, and they form powerful reasons for maintaining the strict NCND policy."
>
> [emphasis added.]

The legitimacy of the NCND policy has been recognised in the more recent decisions in this jurisdiction of *Re JR 209* [2022] NIKB 30 and *Re Bassalat's Application* [2023] NIKB 8.

[33] Judgements in all matters pertaining to national security are formed by elected government ministers who in turn are informed and advised by presumptively expert security personnel. The <u>evaluative judgements</u> of the executive and its agencies in matters of national security stand in stark contrast with the <u>assessments and analyses</u> of a court, in whatever context. Furthermore, the factor of government accountability to the population has featured in judicial reasoning from time to time (see the cases discussed at para [36] ff *infra).* Parliamentary endorsement of the need to protect security sensitive information by means of the NCND principle is another phenomenon. This features in the Security Service Act 1989, the Intelligence Services Act 1994 and, most recently, the CHIS Code of Conduct Act 2023.

[34] All of the foregoing features of national security impel ineluctably to the conclusion that the disagreement by a judicial officer or court with any aspect of a PII claim in a national security context is constitutionally permissible but should be an occurrence of some rarity. The legal, constitutional and policy ingredients discernible in the preceding paragraphs combine to highlight another crucial consideration, namely the intrinsic limitations of the judicial function. This explains and illuminates another well-established principle in this field: where a judicial officer or court is inclined towards a disagreement of this kind, solid and cogent reasons must be forthcoming (see for example para [44] *infra).*

[35] An illustration is pertinent. In the hypothetical case of a state agent now deceased, the foregoing analysis demonstrates convincingly why it would be both simplistic and fallacious to suggest that national security information revealing the existence or involvement of this person at a time or in a specified context should be disclosed by reason of their demise without more, without risking damage to the public intertest. National security methods, systems and arrangements are altogether more sophisticated, complex and nuanced than this, as the main Ministerial certificate in this case convincingly confirms. So too the risks to innocent people. To all of this one must add the ruthless mindset of the terrorist or other miscreant.

National Security: The overlay of legal principle

[36] Belonging firmly, as they do, to the domain of Government policy, constitutionally national security issues and in particular the substance of national security policy have never been a matter for the judiciary. Notwithstanding, a body of legal principles, with associated procedures, has evolved in response to the increasing prominence of national security issues in litigation in recent decades. Summarising, since national security and the interests of justice have, from time to time, found themselves pulling in different directions a solution became necessary. The constitutional solution devised is that the court is the ultimate arbiter of whether a claim for public interest immunity on the basis of national security (or otherwise) should be upheld. This function and duty, however, must be performed respecting settled principles.

[37] In *Re Grosvenor Hotel London (No 2)* [1965] 1 Ch 1210 the English Court of Appeal considered the question of the correct legal characterisation of a claim for Crown privilege (as then, now PII). Addressing an argument by the Attorney General based on the discovery of documents regime in Order 24 RSC, Lord Denning MR stated at 1243C:

> "What then are the powers of the Rules Committee? They can make rules for regulating and prescribing the procedure and practice of the court, but they cannot alter the rules of evidence, or the ordinary law of the land. The law as to Crown privilege is not mere procedure or

> practice. It may perhaps be said to be a rule of evidence, but I would rank it higher."

If there were any doubt about the entitlement of the court to examine the sensitive material in order to conduct the balancing exercise was removed three years later, in *Conway v Rimmer* [1968] AC 910. That case also recognised the effective functioning of police forces as a legitimate public interest.

[38] The interface between the competing interests noted in the immediately preceding paragraph featured in *D v NSPCC* [1978] AC 171, where a claim for public interest immunity in respect of information provided confidentially to the NSPCC by an informant concerning the possible ill treatment of a very young girl by her parents was upheld in the context of a claim for personal injuries brought by the child's mother subsequently. The House of Lords decided that the protection which the law afforded to police informants, namely that the identity of the informer should not be disclosed, whether by interrogatories, discovery of documents or questions at the trial, should be extended. Lord Diplock said the following of police informants, at 218E:

> "The rationale of the rule as it applies to police informers is plain. If their identity were liable to be disclosed in a court of law, these sources of information would dry up and the police would be hindered in their duty of preventing and detecting crime. So the public interest in preserving the anonymity of police informers had to be weighed against the public interest that information which might assist a judicial tribunal to ascertain facts relevant to an issue upon which it is required to adjudicate should be withheld from that tribunal. By the uniform practice of the judges which by the time of Marks v Beyfus 25 QBD 494 had already handed into a rule of law, the balance has fallen upon the side of non-disclosure except where upon the trial of a defendant for a criminal offence disclosure of the identity of the informer could help to show that the defendant was innocent of the offence. In that case, and in that case only, the balance falls upon the side of disclosure."

[39] Lord Simon of Glaisdale, at 235H–236F, highlighted the broad range of public authorities which could in principle assert a claim for public interest immunity:

> "Secondly, 'the State' cannot on any sensible political theory be restricted to the Crown and the departments of central government (which are, indeed, part of the Crown in constitutional law). The State is the whole organisation of the body politic for supreme civil rule and government – the whole political organisation which is the basis for civil government. As such it certainly extends to local – and, as

> I think, also statutory – bodies insofar as they are exercising autonomous rule."

There are two further passages of some resonance in the speech of Lord Simon. First, at 232F:

> "But the police can function effectively only if they receive a flow of intelligence about planned crime or its perpetrators. Such intelligence will not be forthcoming unless informants are assured that their identity will not be divulged …
>
> The law therefore recognises here another class of relevant evidence which may – indeed must – be withheld from forensic investigation, namely sources of police information …."

And at 234E:

> "By contrast, the exclusion of evidence because its adduction would imperil the security of the State ensures to the advantage of citizens generally, so that its exclusion cannot be waived by any party or witness before the court …"

[40] Thus the entitlement of a police organisation to assert a claim for public interest immunity in respect of its sources of information (as in the present case) has been long recognised at the highest judicial level. Finally, the importance of, and challenges posed by, the balancing exercise were emphasised by Lord Edmund-Davies in particular, first at 242B:

> "It is a serious step to exclude evidence relevant to an issue, for it is in the public interest that the search for truth should, in general, be unfettered. Accordingly, any hindrance to its seeker needs to be justified by a convincing demonstration that an even higher public interest requires that only part of the truth should be told."

And, more emphatically, at 246D:

> "The disclosure of all evidence relevant to the trial of an issue being at all times a matter of considerable public interest, the question to be determined is whether it is clearly demonstrated that in the particular case the public interest would, nonetheless, be better served by excluding

> evidence despite its relevance. If, on balance, the matter is left in doubt, disclosure should be ordered."

[41] The rule of the court was reaffirmed resoundingly in *R v Chief Constable of West Midlands Police, ex parte Wiley* [1995] 1 AC 274 in the speech of Lord Woolf (the main speech) at 296G/H. Also of note is the observation of Lord Lloyd of Berwick, at 308A, that in order to be sustained a claim for public interest immunity must always have a solid basis, which he described as an "evidential basis."

[42] *R (Mohammad) v Secretary of State for Foreign and Commonwealth Affairs (No 2)* [2011] QB 218 is a vivid illustration of the court, having examined the sensitive material, disagreeing with a Government Minister's assertion of public interest immunity. The principles which feature most prominently in the three detailed judgments of the Court of Appeal are open justice, democratic accountability and the rule of law itself. All three judges recognised emphatically the vital importance of intelligence in the realm of the State's counter-terrorism efforts. For example, per Lord Judge CJ, at 232G:

> "It is difficult to exaggerate the value of good intelligence and its contribution to the safety and wellbeing of the nation."

The so-called "control" principle (possible described more accurately as a protocol) lay at the heart of the appeal. The essence of this arrangement is that the working relationships between the intelligence services of different countries are subject to an understanding of absolute confidentiality. The relationship in question was that between the UK and the USA. One particular fact, fundamental in nature, was the absence of any suggestion that there was anything in the redacted passages of the materials under scrutiny which would involve a breach of security or disclose any intelligence material such as names, places or means of communication: disclosure would not of itself damage the national interest (para [13]). The undesirable consequences of non-disclosure were outlined by Lord Judge CJ at para [34]:

> "The omission of the redacted paragraphs will have a number of undesirable consequences. A public judgment will be incomplete. Mr Mohamed will be deprived of the full reasons which led the court to conclude that, notwithstanding the initial rejection of his claim of involvement in wrongdoing by UK authorities, it was not merely sustainable, but amply vindicated, whereas the Foreign Secretary, whose initial stance was to deny that there was any basis or justification for Mr Mohamed's claim, will have access to all of the court's reasoning. This facility will extend to the UK intelligence services, notwithstanding that the redacted paragraphs are directly relevant to the adverse findings against them. As already

> recorded, the Divisional Court acquitted the Foreign Secretary of any element of bad faith or improper manipulation of the process. However, the stark fact remains that if the redacted paragraphs are not revealed to Mr Mohamed, the parties to this litigation will not be treated equally. Although this may be a necessary consequence of the application of the wider public interest, as a matter of principle, and for obvious reasons, this is always undesirable, not least because it almost inevitably and unsurprisingly leads to a sense of grievance in the mind of the party subjected to this disadvantage. In this particular case the problem is aggravated by the reality that the claim for continued redaction is advanced by the Foreign Secretary who has ultimate responsibility for the SIS whose conduct is successfully impugned by Mr Mohamed."

At paras [37]–[42] the Lord Chief Justice dilated on the principle of open justice. Next, having emphasised that the "control" principle is not a principle of law – at para [44] – he reiterated a principle of overarching importance, at para [46]:

> "….. in our country, which is governed by the rule of law, upheld by an independent judiciary, the confidentiality principle is indeed subject to the clear limitation that the Government and the intelligence services can never provide the country which provides intelligence with an unconditional guarantee that the confidentiality principle will never be set aside if the courts conclude that the interests of justice make it necessary and appropriate to do so."

[43] The potency of one of the competing public interests is a theme of all three judgments, expressed with particular emphasis by the Lord Chief Justice at para [57]:

> "… Unless the control principle is to be treated as if it were absolute, it is hard to conceive of a clearer case for its disapplication than a judgment in which its application would partially conceal the full reasons why the court concluded that **those for whom the executive in this country is ultimately responsible were involved in or facilitated wrongdoing in the context of the abhorrent practice of torture**. Such a case engages concepts of democratic accountability and, ultimately, the rule of law itself."
>
> [emphasis added.]

[44] In the concurring judgment of Lord Neuberger MR one finds certain differences of emphasis. First, in an oft quoted passage, he states at para [131]:

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

Para [136] makes clear that the role of the appellate court in cases of this kind is one of "reconsideration" – to be contrasted with (I would add), for example, merely supervisory review.

[45] Sir Anthony May P, also concurring, having noted that the contentious issue required a balance of various interests by the court, endorsed the four questions formulated by the Divisional Court, at para [229]:

> "In applying the balancing test the Divisional Court properly addressed four questions, which were: (i) is there a public interest in bringing the redacted paragraphs into the public domain? (ii) Will disclosure bring about a real risk of serious harm to an important public interest, and if so, which interest? (iii) Can the real risk of serious harm to national security and international relations be protected by other methods or more limited disclosure? (iv) If the alternatives are insufficient, where does the balance of the public interest lie?"

The President considered that the issue involved a stark clash of two principles, the first being open justice. As regards the second:

> "The second principle is that material should not generally be published if its publication would give rise to a serious risk of damaging consequences to national security; and that the court should not substitute any view or its own of the existence or seriousness of such a risk for that of the

> Foreign Secretary (in this instance) **unless it is persuaded that there is no proper basis for that view**."
> [emphasis added]

At para [278] the President recorded the submission on behalf of the Foreign Secretary that the court should override the Ministerial view of the risk to national security only if irrational. At para [289] one finds the twin touchstones of "irrational" and "not based on evidence." For the President, the factor tipping the balance in favour of disclosure was that it would entail the publication by a UK court of summary material whose essential content had been publicly found to be true in a US Court: see para]295].

[46] The extensive jurisprudence in this sphere includes other decisions of the highest court. In all of them the themes of deference to the Minister and corresponding judicial restraint are readily identifiable. In *R v Shayler* [2003] 1 AC 247, Lord Bingham of Cornhill stated at para [33]:

> "The court's willingness to intervene will very much depend on the nature of the material which it is sought to disclose. If the issue concerns the disclosure of documents bearing a high security classification and there is apparently credible unchallenged evidence that disclosure is liable to lead to the identification of agents or the compromise of informers, the court may very well be unwilling to intervene. If, at the other end of the spectrum, it appears that while disclosure of the material may cause embarrassment or arouse criticism, it will not damage any security or intelligence interest, the court's reaction is likely to be very different."

Lord Bingham added that the judicial exercise would normally be carried out in a context where the proposed disclosure belonged to a point somewhere between these two extremes.

[47] The inter-related themes of the deference due to the evaluative judgement of the relevant Minister in asserting PII and the limitations of the judicial function feature with particular prominence in *Secretary of State for the Home Department v Rehman* [2003] 1 AC 153, first at para [49], followed by the statement at para [50] that the question of whether something is in the interests of national security is not a question of law:

> "It is a matter of judgement and policy. Under the constitution of the United Kingdom and most other countries, decisions as to whether something is or is not in the interests of national security are not a matter for judicial decision. They are entrusted to the executive …

> "Not only is the decision entrusted to the Home Secretary, but he also has the advantage of a wide range of advice from people with day to day involvement in security matters …"

Lord Hoffman also emphasised the factor of democratic accountability, at para [62]:

> "… Such decisions, with serious potential results for the community, require a legitimacy which can be conferred only by entrusting them to persons responsible to the community through the democratic process. If the people are to accept the consequences of decisions, they must be made by persons whom the people have elected and whom they can remove."

Thus there is a contrast between the executive and police organisations. Lord Steyn made the following notable contribution, at para [31]:

> "It is well established in the case law that issues of national security do not fall beyond the competence of the courts …
>
> **It is, however, self-evidently right that national courts must give great weight to the views of the executive on matters of national security.**"
> [emphasis added]

[48] The Supreme Court has recently adopted without qualification Lord Hoffman's approach: see *R (Begum) v Special Immigration Appeals Commission* [2021] UKSC 7, at paras [55]–[62]. The court also approved, again without qualification, a passage in the judgment of Lord Sumption in *Pham v Secretary of State for the Home Department* [2015] UKSC 19, at para [108], which the court explained at para [81] in these terms:

> "…. Lord Sumption was referring to the common law test of rationality or reasonableness. As he observed, the application of that test 'must necessarily depend on the significance of the right interfered with, the degree of interference involved and notably the extent to which, even on a statutory appeal, the court is competent to reassess the balance which the decision maker was called upon to make given the subject matter.'"

[49] The main themes noted above are prominent in paras [60]–[62]:

> "60. Turning next to the limitations of the appellate process, Lord Hoffmann explained at para 49 that:

> 'They arise from the need, in matters of judgement and evaluation of evidence, to show proper deference to the primary decision-maker.'

He pointed out at para 57, first, that SIAC was not the primary decision-maker, and that it was institutionally less well qualified than the Secretary of State:

> 'Not only is the decision entrusted to the Home Secretary, but he also has the advantage of a wide range of advice from people with day-to-day involvement in security matters which the Commission, despite its specialist membership, cannot match.'

61. A further factor was the nature of the decision under appeal, which did not involve a yes or no answer as to whether it was more likely than not that someone had done something, but an evaluation of risk:

> 'In such questions an appellate body traditionally allows a considerable margin to the primary decision-maker. Even if the appellate body prefers a different view, it should not ordinarily interfere with a case in which it considers that the view of the Home Secretary is one which could reasonably be entertained.'

Lord Hoffmann acknowledged that this limited approach might not be necessary in relation to every issue which SIAC had to decide. For example, the approach to whether the rights of an appellant under Article 3 of the ECHR were likely to be infringed might be very different.

62. Finally, Lord Hoffmann explained at para 62 that a further reason for SIAC to respect the assessment of the Secretary of State was the importance of democratic accountability for decisions on matters of national security:

> 'It is not only that the executive has access to special information and expertise in these matters. It is also that such decisions, with serious potential results for the community,

> require a legitimacy which can be conferred only by entrusting them to persons responsible to the community through the democratic process. If the people are to accept the consequences of such decisions, they must be made by persons whom the people have elected and whom they can remove.'

> These points have been reiterated in later cases, including A v Secretary of State for the Home Department [2004] UKHL 56; [2005] 2 AC 68 ("A") and R (Lord Carlile of Berriew) v Secretary of State for the Home Department [2014] UKSC 60; [2015] AC 945."

[50] What, therefore, does irrationality denote in contemporary public law jurisprudence? The virtues and vices of the *Wednesbury* principle having been the subject of debate for many years, the Supreme Court pronounced authoritatively on this subject in *Kennedy v Charity Commission* [2014] UKSC 20 at paras [51]–[56] especially. Lord Mance stated at para [51]:

> "The common law no longer insists on the uniform application of the rigid test of irrationality once thought applicable under the so-called Wednesbury principle …
>
> The nature of judicial review in every case depends on the context."

Lord Neuberger and Lord Clarke agreed with Lord Mance, while Lord Toulson agreed with his reasoning.

[51] In *Pham (supra),* Lord Mance drew attention to this, at paras [94]–[95]. The three members of the seven-judge court who expressly agreed with Lord Mance also agreed with Lord Sumption, who in turn agreed with Lord Mance and Lord Carnwath: see para [110]. Lord Reed, the seventh member, agreed with the judgment of Lord Carnwath and with "much" in the judgments of Lord Mance and Lord Sumption: see para [112]. Lord Sumption, at para [107], in discussing "how broad the range of rational decisions is in the circumstances of any given case", stated:

> "That must necessarily depend on the significance of the right interfered with, the degree of interference involved **and notably the extent to which, even on a statutory appeal, the court is competent to reassess the balance which the decision maker was called on to make given the subject matter.**"
> [emphasis added]

He continued at para [108]:

> "…. The security of this country against terrorist attack is on any view a countervailing public interest which is potentially at the weightiest end of the scale …
>
> The court must of course have regard to the fact that the Home Secretary is the statutory decision-maker, and to the executive's special institutional competence in the area of national security."

This last statement reverberates throughout the jurisprudence in this field.

[52] Many of the strands in the leading jurisprudence discussed above are drawn together in another frequently cited case, *Secretary of State for Foreign and Commonwealth Affairs v Assistant Deputy Coroner for Inner North London* [2013] EWHC 3724 (Admin) (concerning the Alexandrov Litvinenko inquest). There the Secretary of State challenged the decision of the Coroner to disclose certain information by providing gists of the sensitive documents in question. This was challenged on three grounds, namely that the Coroner had failed to accord adequate respect to the Secretary of State's assessment of how the balance of the competing public interests should be struck; had failed to properly undertake the balancing exercise of the competing public interests by treating his desire to conduct what he considered to be a 'full and proper' inquest as a 'trump card' which overrode all other considerations; and he had made an irrational decision: see para [26]. At paras [53]–[61] Goldring LJ formulated the following principles:

> "[53] 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.
>
> [54] 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.
>
> [55] 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.

[56] 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.

[57] 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.

[58] 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.

[59] 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.

[60] 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.

[61] 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."

[53] The evolution in the last three decades in the courts' approach to PII issues is summarised by Professor Anthony in Judicial Review In Northern Ireland (3rd ed), para 4.18:

> "The nature of the shift from justiciability to reviewability/deference can be seen most clearly in the context of challenges to decisions taken with reference to national security considerations. Matters of national security were previously and par excellence regarded as non-justiciable and the courts accorded the executive an absolute discretion in the area. The judicial approach has, however, long since changed and it is axiomatic that decisions of ministers can now be subject to judicial review. While any such review will typically be linked to a presumption in favour of restraint (a presumption that may be reflected in, for instance, lessened procedural protections), the courts accept that some decisions, for instance a deportation decision that has implications for an individual's right not to be tortured, or his or her right to a fair trial in his or her country of origin, are demanding of closer scrutiny."

The restrained terms in which the courts of the United Kingdom at every tier have consistently expressed themselves has been a consistent theme. One could easily multiple the examples. The familiar expressions "great weight" and "wide margin of appreciation" are familiar features of the jurisprudence: see for example *R (Naik) v SSHD* [2011] EWCA Civ 1546 at [48] (per Carnwath LJ) and [88] (per Gross LJ).

The Chief Constable's approach

[54] Turning to the present context, the PII issues generating the high level dispute noted above have been the subject of consideration by, sequentially, the Chief Constable, the Minister of State on behalf of the Executive and his advisers, the Deputy Chief Constable, the Coroner and Humphreys J in the High Court. To begin with, careful scrutiny of the approach of the Chief Constable is required. As the chronology above demonstrates, the sequence of events culminating in the Ministerial certificates was triggered by the Chief Constable's threefold written assessment that (a) disclosure of <u>any</u> of the information concerned "... would cause real risk of serious harm to the public interest", (b) "... the balance falls in favour of asserting a claim for public interest immunity in respect of the proposed redactions in certain portions of the materials before me", and (c) the mechanism of a "gist" was not feasible. Consistent with the foregoing the ensuing submissions to the Minister advised that the <u>Chief Constable</u> was desirous that a PII claim be made in respect of the relevant sensitive documents. The first (dominant) Ministerial certificate followed. Chronologically, the next material development consisted of the Chief Constable considering further sensitive documents ("Folder 7") and repeating the

aforementioned assessments, with an accompanying request for a PII certificate, which duly followed.

[55] Next, precisely the same sequence of events unfolded in respect of what is described as "one additional subdivided folder of material … [and] … the addendum Opinion of counsel to the PSNI." The only material factual difference, of no apparent moment, is that the assessment and request were those of the Deputy Chief Constable in this instance. The generation of three successive Ministerial PII certificates unfolded accordingly.

[56] Within days of the relevant events and decisions in the forum of the inquest, SOSNI wrote to the Chief Constable (by letter dated 26 March 2024). The impetus for this letter was the Chief Constable's approach regarding the revised gist in the present inquest (see para [4] *supra*) and the possibility that he "… may intend to consent to such proposed departures from PII certificates and from NCND in other cases." The letter reminded the Chief Constable of the following:

> "You will recall that PII certificates were signed by UK government ministers having considered all of the issues arising and on the basis of **you or your predecessor's assessment of relevant materials** at that time (and not any subsequent undisclosed assessment). **There has been no approach to me or to my officials asserting any basis for any different assessments to those reflected in PII certificates, no reasons have been given for any proposed departures or disclosures and no fresh certificates have been sought.**"
> [emphasis added.]

Concluding, the letter invited the Chief Constable to communicate in appropriate terms with SOSNI in every instance where he was proposing either (a) to consent to the disclosure of information in respect of which a Ministerial certificate had asserted PII or (b) to effect any proposed departure from the NCND policy, by way of gist or otherwise.

[57] The Chief Constable replied by letter dated 27 March 2024. The central theme of his response entailed a suggestion of a misunderstanding of his approach. The salient passage is this:

> "In both the Brown and Thompson cases, I claimed PII over sensitive information, the claims were upheld and, as is standard practice, the Coroner proposed very brief gists explaining the nature of the information and the reasons for upholding those claims. In both cases, I requested amendments to the proposed gists prior to their release in

> order that they did not compromise sensitive matters or undermine the claims for PII."

The letter continues:

> "In the Brown case, the Coroner agreed my amendments and there was no disclosure of information subject to PII or departure from the government's NCND policy. In particular nothing was said which was capable of confirming or denying the identity of any agent."

(In passing, SOSNI has now initiated a judicial review challenge in the Brown case.)

[58] The conduct and reasoning of the Chief Constable invite the following analysis. First the stance ultimately adopted by him flatly contradicted his initial stance viz the unqualified nature of <u>his</u> several requests that PII be asserted in respect of the sensitive information concerned. While his counsel contested this, I consider this argument manifestly untenable. Second, the Chief Constable fails to engage with the <u>specific</u> aspects of the public interest detailed in the main Ministerial certificate rehearsed in paras [13]–[15] and [24]-[25] above. Third, he fails to engage with the intimation given to, and accepted by, the Minister that the Chief Constable's organisation (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." Furthermore, the Chief Constable has provided no explanation for his later volte-face. There is no note or record, contemporaneous or otherwise, and the Chief Constable has sworn no affidavit. In addition, the Chief Constable does not acknowledge, much less engage with, the Coroner's view that the public interest engaged is less potent than assessed by (initially) him, his Deputy and the Minister. Moreover, he maintains the fundamentally misconceived suggestion that his later stance is compatible with the NCND policy: see my closed judgment. Finally, the Chief Constable's description of the "standard practice" (in his letter, highlighted above), is neither particularised nor evidenced.

"Gists" and "Gisting"

[59] In the lexicon which has evolved in the world of PII in litigation, "gists" and "gisting" have become familiar terms. Neither is a legal term, and neither is the subject of statutory or (to my knowledge) judicial definition. Both words are, in my view, uncomplicated and unpretentious members of the English language. A "gist" is the essence, in summary terms, omitting the detail, of certain information: in this context, information contained in the sensitive material concerned. Fundamentally, it must convey something both relevant and intelligible to the reader.

[60] On behalf of SOSNI, Mr McGleenan submitted that a gist is a mechanism for providing a sanitised version of a piece of underlying sensitive information which conveys something meaningful without risking damage to any of the public interests

in play. He further submitted that a gist should not be employed as a means of providing an inferential narrative which may or may not be correct. Gists, he submitted, are not designed to convey or describe a general state of affairs. I agree with all of these submissions. In passing, none of them was contentious in any of the several hearings which this court conducted.

The Impugned Rulings of the Coroner

[61] As noted above, on 4 March 2024 the Coroner, having considered the contents of Folders 1 to 6, pronounced a brief open oral ruling upholding the PII claim. In respect of Folder 7, the Coroner added that the possibility of a gist was under contemplation. A draft gist was then provided by her, and the Chief Constable's legal representatives were given the opportunity of taking instructions. Three days later, still further documents were provided on behalf of the Chief Constable to the Coroner. These reinforced the Coroner's view that the documents in Folder 7 were "highly relevant to the inquest." On the same date, the Chief Constable's legal representatives intimated to the Coroner that the information in Folder 7 "was not amenable to gisting." The Coroner expressed her contrary view in a short oral ruling. Later that day the Chief Constable wrote to the Coroner inviting her to revoke her ruling. The following day the Coroner replied, rejecting this invitation. The first judicial review followed.

[62] On the same date (8 March 2024) the Coroner promulgated her first open ruling, stating that her approach was based on the following four "key questions":

(a) Is the threshold for disclosure overcome?

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

(c) [If yes], can the real risk of serious harm be mitigated or prevented by other means or by some restricted disclosure?

(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?

There can be no criticism of this self–direction, which derives in substance from *R (Mohamed) v SOCSFCA (No 2)* [2009] 1 WLR 2563, para [34], and [2011] QB 218, para [229]. Sequentially, the Coroner:

(a) Answered the first question affirmatively.

(b) Answered the second question thus: "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) Answered the third question thus: some of the information in Folder 7 could be partially disclosed by a gist, this mechanism mitigating "any real risk of serious harm to the public interest."

(d) With regard to the fourth question, and in the alternative, expressed the assessment that the subject information 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."

[63] At para [27] the Coroner purported to summarise the elements of the PII claim asserted by the Minister in the certificates. Her summary was that this consisted of six elements of "information", while her seventh subparagraph simply rehearsed the view of a MOD representative that there was a continuing threat from terrorism in Northern Ireland categorised as "substantial", ie a terrorist attack is considered likely and might well occur without further warning. At para [29] the Coroner's self-direction was one of having proper regard to the Minister's assertions and being mindful of the "limited circumstances" in which a court or judicial officer may depart there from. At para [30] the Coroner states:

> "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(s). The reasons for that view are set out in the closed ruling."

Having answered the first and second of the four questions in the affirmative, the Coroner pronounced herself satisfied that the "real risk of serious harm" could be "mitigated" by the mechanism of the proposed (first) gist, thereby supplying an affirmative answer to the third question. She added that if this was erroneous "… then I also determine that the same gist should be disclosed under the fourth key question" – at para [33] – continuing:

> "In my assessment 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."

[64] My analysis of this ruling is the following:

(i) At para [27], the Coroner's summary of the multiple facets of the public interest asserted in the Ministerial certificates makes no mention of the wider, indirect concerns advanced by the Minister, noted in paras [24]-[25] above.

(ii) There is no engagement at all with the weighty judicial pronouncements rehearsed in paras [30]–[53] above.

(iii) At para [29], rather than rehearsing the potent principle of judicial restraint the Coroner employed the language of the "limited circumstances" (without particularisation) in which a judge may depart from the ministerial assessment of the risk of damage to national security.

(iv) At para [30], the Coroner stated in conclusionary terms that the Ministerially assessed risk to national security was not "of a level asserted in the certificate(s)", adding that her reasons for that view are set out in the closed ruling. As my closed judgment explains further, I consider that the requirement to provide cogent reasons is not satisfied.

(v) At para [32], with specific reference to Folder 7 the Coroner opined that "that information" could be disclosed by an "… alternative means … which mitigates any real risk of serious harm to the public interest", enunciating that the mechanism would be "partial disclosure by means of a gist." This is a conclusionary, unreasoned statement.

(i) There is no mention of, much less engagement with, the NCND principle.

[65] The Coroner's first closed ruling followed. Subsequently, the Coroner, having determined to accept the Chief Constable's revised gist in substitution for the gist devised by her, provided a brief open ruling to this effect. A second, closed, ruling in respect of the revised (second) came next. In this open judgment it is necessary to pause at this juncture. My associated closed judgment completes the narrative and contains my extended critique of both closed rulings.

[66] While each of the impugned rulings of the Coroner was of course that of an independent judicial officer, the unqualified adoption in the second ruling of all aspects of the Chief Constable's approach in proposing the revised "gist" is incontestable. Given my assessment of the Chief Constable's approach (above), a shadow inevitably looms, since in this way the Chief Constable's errors as diagnosed above became those of the Coroner.

Humphreys J's open judgments

[67] In consequence of the progression from the first gist to the revised gist and the associated timings (as described above), Humphreys J found himself having to deliver four successive judgments, staggered by a period of approximately four weeks, a challenge which he accomplished admirably. In his first judgment, the judge distilled the grounds of challenge to (i) error of law and (ii) irrationality, based on the Coroner's reasons: see para [22]. I consider that he was in error in this respect, given the more extensive grounds formulated in the Order 53 pleading – considered, insofar as

necessary, with related sources such as the parties' skeleton arguments. Summarising, the judge endorsed fully the first ruling of the Coroner.

[68] Humphreys J granted leave to apply for judicial review and dismissed the challenges to the first gist of the Chief Constable and SOSNI substantively. At para [17] of his open judgment he recalled the supervisory approach to procedural matters in inquest proceedings adopted by this court in *Re Officer C* [2012] NICA 47 at para [8]. He further noted the cautionary words of Lord Neuberger in *Mohamed* at para [131] (*supra*). Next the judge rehearsed the nine principles formulated by Goldring LJ in the *Litvinenko* case, at para [53]ff (see para [52] above) and the four questions rehearsed in para [62] above.

[69] In short, Humphreys J charted the course which had been followed by the Coroner in her open ruling.

[70] At para [17] the judge recalled the supervisory approach to procedural matters in inquest proceedings espoused by this court in *Re Officer C* [2012] NICA 47 at para [8]. In that case, the focus of the legal challenge was on "rulings by the Coroner on procedural issues" in an inquest whereby the Coroner ordered that the protective measures of anonymity and screening be applied to certain police officers: see paras [1] and [2]. In one of the two reasoned and concurring judgments, Girvan LJ stated at para [8]:

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

> an inquest. As experience shows in relation to any disputed procedural ruling it is frequently possible to produce plausible arguments to support a complaint that the Coroner has got it wrong. Different Coroners might decide the same procedural question differently, each one acting within the parameters of his powers and discretions. This applies equally in the course of procedural rulings in the course of civil and criminal trials. In the context of civil and criminal litigation it is recognised that it would be a recipe for chaos if there was a general right for litigants to seek to stop a trial mid flow to take a procedural question on appeal. It would be contrary to the interests of justice which can be properly protected and vindicated at the end of the process. Taken to its logical conclusion if a party in inquest proceedings can challenge by judicial review any and every procedural ruling or, since a Coroner will be keeping all his rulings under review in the course of the inquest, any and every revised ruling made in the course of the inquest there would be no end to the matter. The case would become, to use Dickens' words, "perennially hopeless."

Humphreys J reproduced a reduced version of this paragraph in formulating the correct approach for the High Court in determining the judicial review.

[71] In my estimation the judge erred in making this comparison. The rulings challenged in these proceedings relate to the adduction of a heavily reduced version of sensitive evidence in a PII/national security context. I consider that the "procedural rulings" which Girvan LJ had in mind are of a significantly different character. I further consider that the judge's erroneous reliance on this passage had the material consequence of according to the Coroner an impermissibly wide margin of appreciation, to the neglect of the principles clearly formulated in the leading cases considered in paras [30]–[53] above. This is particularly clear in para [35], where the judge states that "a considerable degree of latitude" must be afforded to the Coroner in the context under scrutiny. This, with respect, is not the correct test.

[72] Next, adopting the approach of Morris Kay LJ in *Mohamed v SSHD* [2014] EWCA Civ 559 at para [20], he 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."

The judge then adverted to some well publicised instances of both state and judicial departure from this policy, a recent illustration being the open ruling of Kinney J in *Re Brown's Inquest* [2024] NI Coroner 18. He noted the high level encouragement of resort to the mechanism of gists in the judgment of this court in *Flynn v Chief Constable of PSNI* [2018] NICA 3 and the comparable statement in the Presiding Coroner's Case Management Protocol for Legacy Inquests (2021), para [39].

[73] At para [25] the judge noted "several high profile instances" of the non-application of the NCND policy. He does not acknowledge that each was a highly fact specific instance, nor does he give any consideration to whether the policy departure was uncontentious in any of them. Each is a mere illustration, having no precedent value.

[74] At para [28] the judge was critical of the legal representatives of the challenging parties for the description of NCND as a "principle." I do not agree with his assessment that this was in effect an illicit attempt to elevate NCND to the status of a legal principle. The evidential materials emanating from the executive consistently describe it as a "policy." Nothing of real substance would turn on this were it not for the judge's consequential evaluation that what he was criticising "... renders much of the pleading redundant." His focus in what follows in the judgment became erroneously narrowed in consequence.

[75] In the remainder of his judgment the judge did not engage with any aspects of the analysis of the Coroner's first open ruling in paras [64]–[66] above or in the corresponding passages in my closed judgment. In particular the judge did not acknowledge the Coroner's unreasoned opinion that the risk to national security belonged to a level lower than that asserted by the Minister or her failure to engage with the NCND policy. Furthermore, neither the Coroner nor the judge engaged with the correct standard of review of the Ministerial judgements as set out in paras [36]-[53] above.

[76] The judge rejected the illegality ground on the basis that the Coroner's self-direction in law was in his view, unimpeachable. With regard to the irrationality ground, the judge observed that the Coroner had taken into account all material considerations and had acknowledged the limited circumstances in which a judicial officer should differ from a Ministerial evaluation of PII based on national security. The judge considered that the Coroner enjoyed "a considerable degree of latitude." His conclusion was that her decision could not be condemned as "… one which no reasonable Coroner could have arrived at." As appears from the foregoing and what follows, I consider that these analyses and conclusions are not harmonious with the governing legal principles rehearsed above.

[77] The sequence of events thereafter is outlined in paras [6] - [7] above and Appendix 1. In his second open judgment, Humphreys J addressed the challenge of SOSNI to the revised gist. My analysis of this judgment is as follows. At para [13] the judge stated:

> "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."

This I consider tantamount to impermissibly conferring on the Coroner expertise and insights which belong to the Minister only. At para [17] the judge added:

> "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."

I would observe that awareness of the need for cogent reasons in this discrete respect is not the requirement in play, which dictates that cogent reasons <u>be provided</u>. At para [18] the judge expressed himself "… quite satisfied that she did provide proper and adequate reasons." The judge does not identify these "proper and adequate reasons" and, as a necessary consequence, does not assess how "proper and adequate" they were.

[78] I digress to the open and closed rulings of the Coroner. First, I consider it clear that the Coroner (a) disagreed with the Ministerial assessment of the importance of the public interest in play and (b) did so without any reasoning whatsoever or, as a minimum, reasoning of an acceptable standard. Second, while both the initial gist and the revised gist involved the disapplication of the NCND policy, the Coroner did not acknowledge this and, in consequence, provided <u>no</u> reasons – much less any "cogent reasons" – for the course she was proposing. As a result, reverting to the approach of the judge at para [17], it was not possible for the High Court to "scrutinise" the basis and rationale of the Coroner's approach and conclusion.

[79] In a separate passage in para [17] the judge suggested that the Coroner:

> "… acting with the benefit of her own legal team … is peculiarly well placed to make the types of judgement required in the PII exercise, relating as they do to the scope of the inquest, the issues to be determined and the evidence available."

This invites the following riposte. This judicial review challenge is not concerned with the Coroner's determination about the scope of the inquest or the issues to be determined. Both had been the subject of anterior rulings by the Coroner. Rather the challenge focuses exclusively on the Coroner's approach to and handling of the national security considerations. The judge's assessment, therefore, entails asking the wrong questions. Furthermore, insofar as there is an oblique suggestion that the Coroner was "peculiarly well placed" to make a judgement about the national security considerations, this is not sustainable as it fails to engage with Lord Neuberger's exhortation (supra) and other comparable high level judicial statements which emphasise the crucial distinction between the differing types of expertise possessed by government ministers (on the one hand) and courts and judicial office holders (on the other).

[80] Next, at paras [20]–[22] the judge rejected the argument on behalf of SOSNI that the Coroner had failed to take into account in the balancing exercise that completion of the inquest was not viable and that such failure was "… a fatal flaw in that it was a potentially telling factor against the release of the gist." The judge considered that this was indeed a factor belonging to the *Wiley* balancing exercise. He gave two reasons for rejecting the argument. First, by the stage when 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." The flaw in this reasoning in my view is that the Coroner did not "reach" this issue at all. The judge's second reason for rejecting the argument was that:

> "… no one submitted to the Coroner that she ought to refrain from issuing any gists by reason of the questionable viability of the inquest."

This reasoning is not compatible with the duty imposed on every public authority exercising a discretionary power to take into account and balance all material facts and factors. This duty is inalienable in nature. Being of this character the performance of the duty cannot be modified or excused by the failure of some person or agency, whether with an interest in the exercise or otherwise, to highlight to the authority concerned (in this instance the Coroner) any suggested material fact or factor. Fault has no role to play in any exercise of this nature.

[81] The effect of the foregoing analysis is that what the judge considered to be virtues in the impugned decision of the Coroner were, properly analysed, significant frailties. Furthermore, the materiality of these frailties is beyond plausible dispute. To this one must add the following. As demonstrated above, there were several significant flaws in the Chief Constable's approach to the national security/disclosure issues. None of these flaws can be divorced from the Chief Constable's proposal of the revised gist. Moreover, none of them can be considered immaterial. The Coroner accepted the Chief Constable's revised gist without question or qualification. In this way I consider that the Coroner adopted the several flaws diagnosed above.

[82] Applying a public law framework one can view the identified shortcomings in the impugned decision of the Coroner in a series of alternative or inter-related ways: failing to take into account all material facts and factors; and/or taking into account immaterial facts or factors; and/or error of law; and/or lapsing into the irrational; and/or failing to provide solid and cogent reasons. For the reasons given, the impugned decision of the Coroner is in my view infected by all of these public law misdemeanours. It cannot be sustained in consequence.

The "Gist" Error of Law

[83] Further to, and independently of, the foregoing omnibus conclusion it is necessary to concentrate on the terms of the second "gist." In short, I agree fully with the submission of Mr McGleenan – which, notably, counsel for the Coroner did not contest and counsel for the Chief Constable accepted - that the appellation of "gist" cannot be properly applied to the text under scrutiny. A "gist" should be the essence, in summary terms, omitting the detail, of the material concerned: see paras [59]–[60] above. The Coroner's text is not of this kind. It is a <u>commentary</u>, coupled with a statement of coronial intent and an aside about possible future developments in the inquest. In Mr McGleenan's terms, it may also be described as an "inferential narrative."

[84] A further error of law is readily diagnosed. The Coroner clearly considered that she was proposing to provide a "gist" according with the widely accepted meaning of this word and in accordance with settled practice. For the reasons elaborated above, each of the "gists" proposed by her were something quite different. This in my view is a free standing and material error of law.

[85] Furthermore, I consider that both gists suffer from the vice of the unintelligible. The supreme virtues of clarity and coherence are absent. Far from advancing any lawful purpose of the inquest, their incurable tendency and effect are to encourage potentially harmful speculation and uninformed debate. This is not in the interests of the Thompson family or any other interested agency. Nor does it further any identifiable public interest. Furthermore, this does not advance any of the statutory aims.

The Legacy Act error of law

[86] I further consider that the Coroner's decision is unsustainable in law on the freestanding ground of failing to take into account a material consideration and/or acting for an illegitimate purpose and/or acting *ultra vires* in the following respect. The main ingredient in this conclusion is the unassailable (and uncontested) <u>fact</u> that at the time when the impugned decision of the Coroner regarding the second gist was made there was <u>no prospect</u> of the inquest being completed by the statutory deadline of 1 May 2024 imposed by section 44 of the Northern Ireland Troubles (Legacy and Reconciliation) Act 2023 (the "2023 Act"), amending section 16 of the Coroners Act

(NI) 1959 (the "1959 Act"). This, unfortunately, was doomed to be an inquest without an outcome, an uncompleted inquisitorial process.

[87] The development of this discrete issue requires a brief outline of the governing statutory framework pertaining to inquests in Northern Ireland. It is worth noting at the outset that the inquest regime in this jurisdiction differs in a number of material respects from its counterpart in the jurisdiction of England and Wales. What follows in the next few paragraphs is drawn substantially from my judgment in *Re Steponaviciene's Application* [2018] NIQB 90, paras [12]–[17].

[88] The somewhat elderly coronial/inquest statutory framework in Northern Ireland remains as it has been for some 60 years, being constituted by the 1959 Act and the Coroners (Practice and Procedure) Rules (NI) 1963 (the "1963 Rules"). As the present case does not involve a suspected death in prison, the mandatory requirement of a jury under section 18(1)(b) of the 1959 Act, does not arise. As a result, this inquest has been conducted by a presiding Coroner alone who, as is common in this jurisdiction, has been assisted by appointed counsel.

[89] Until 1 May 2024 section 16 of the 1959 Act provided without qualification:

> "***Inquest where body cannot be found***
>
> Where a Coroner is satisfied that the death of any person has occurred within the district for which he is appointed but, either from the nature of the event causing the death or for some other reason, neither the body nor any part thereof can be found or recovered, he may proceed to hold an inquest."

A fundamental alteration was effected by section 44(1) of the 2023 Act:

> "**Inquests, investigations and inquiries**
>
> (1) After section 16 of the Coroners Act (Northern Ireland) 1959 insert—
>
> **16A Death resulting directly from the Troubles: closure of existing inquest**
>
> (1) This section applies to an inquest into a death that resulted directly from the Troubles that was initiated before 1 May 2024 unless, on that day, the only part of the inquest that remains to be carried out is the Coroner or any jury making or giving the final determination, verdict or findings, or something subsequent to that.

(2) On and after that day, a Coroner must not progress the conduct of the inquest.

(3) As soon as practicable on or after that day, the Coroner responsible for the inquest must close the inquest (including by discharging any jury that has been summoned).

(4) The provision in section 14(1) requiring a Coroner to conduct an inquest is subject to this section.

16B Death resulting directly from the Troubles: prohibition of new inquest

On and after the day on which section 44 of the Northern Ireland Troubles (Legacy and Reconciliation) Act 2023 comes into force—

(a) a Coroner must not decide to hold an inquest into any death that resulted directly from the Troubles, and

(b) the Attorney General or Advocate General for Northern Ireland must not give a direction under section 14 for the conduct of an inquest into any death that resulted directly from the Troubles.

16C Interpretation

(1) This section applies for the purposes of sections 16A and 16B and this section.

(2) A death "resulted directly from the Troubles" if—

(a) the death was wholly caused by physical injuries or physical illness, or a combination of both, that resulted directly from an act of violence or force, and

(b) the act of violence or force was conduct forming part of the Troubles.

(3) "Conduct forming part of the Troubles" has the same meaning as in the Northern Ireland Troubles (Legacy and Reconciliation) Act 2023 (see section 1 of that Act).

(4) An inquest is "initiated" —

(a) by a Coroner deciding to hold the inquest, or

(b) by a direction under section 14 being given for the conduct of the inquest."

(2) Schedule 11 makes provision about investigations and inquests in England and Wales and inquiries and investigations in Scotland."

[90] Inquest jury verdicts are governed by section 31 of the 1959 Act, which provides:

> "Where all members of the jury at an inquest are agreed they shall give, in the form prescribed by rules under section thirty-six, their verdict setting forth, so far as such particulars have been proved to them, who the deceased person was and how, when and where he came to his death.
>
> (2) Where all members of the jury at an inquest fail, within such reasonable time as the Coroner may determine, to agree upon a verdict as aforesaid, the Coroner may discharge the jury and instruct the Juries Officer for the division where the inquest is held to summon another jury in accordance with the Juries (Northern Ireland) Order 1996, and thereupon the inquest shall proceed in all respects as if the proceedings which terminated in the disagreement had not taken place (save that none of the former jurors shall be eligible to serve on it); and in this subsection "Juries Officer" and "division" have the same meanings as in the Juries (Northern Ireland) Order 1996."

Where there is no jury these requirements apply fully to the presiding Coroner.

[91] The prominent role and influence of the 1963 Rules in the statutory matrix in Northern Ireland derive from the enabling power in the parent statute, section 36(1), which provides:

> "36.-(1) Rules under this section may-
>
> (a) make provision with respect to the records, accounts and returns which the relevant authority may require Coroners to keep and submit to it and

with respect to information to be supplied by Coroners;

(b) regulate the practice and procedure at or in connection with inquests and, in particular (without prejudice to the generality of the foregoing provisions), such rules may contain provisions-

(i) as to the procedure at inquests held with a jury;

(ii) as to the procedure at inquests held without a jury;

(iii) as to the issue by Coroners of orders authorising exhumations or burials;

(iv) for empowering a Coroner to alter the date fixed for the holding of any adjourned inquest within the jurisdiction of the Coroner;

(v) as to the procedure to be followed where a Coroner decides not to resume an adjourned inquest;

(vi) as to the notices to be given to jurymen or witnesses where the date fixed for an adjourned inquest is altered or where a Coroner decides not to resume an adjourned inquest; and

(vii) for prescribing forms of verdicts for use at inquests."

The breadth of this enabling provision is striking.

[92] Rule 15 is arguably the stand-out provision of the 1963 Rules. It provides:

"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) [am. SR (NI) 1980/444] the particulars for the time being required by the Births and Deaths Registration (Northern Ireland) Order 1976 to be registered concerning the death."

"How" has consistently been construed to mean "by what means": see *In Re Ministry of Defence's Application* [1994] NI 279. In this respect, the law in the two jurisdictions is the same: see *R v North Humberside and Scunthorpe Coroner, ex parte Jamieson* [1994] 3 All ER 972.

Rule 15 is supplemented by Rule 22, which provides:

> "22.-(1) After hearing the evidence the Coroner, or where the inquest is held by a Coroner with a jury, the jury, after hearing the summing up of the Coroner shall give a verdict in writing, which verdict shall, so far as such particulars have been proved, be confined to a statement of the matters specified in Rule 15. [Amended by SR (NI) 1980/444]
>
> (2) When it is proved that the deceased took his own life the verdict shall be that the deceased died by his own act, and where in the course of the proceedings it appears from the evidence that at the time the deceased died by his own act the balance of his mind was disturbed, the words "whilst the balance of his-mind was disturbed" may be added as part of the verdict."

Rule 23(1) provides:

> "Any verdict given in pursuance of Rule 22 shall be recorded in the form set out in the Third Schedule."

[93] The Third Schedule contains a series of forms, designed for sundry purposes. Form 22 is the "Verdict on Inquest" pro-forma. This, when completed, is signed by both the Coroner and the members of the jury. It must contain, inter alia, the "cause of death" and "findings." The following is the text of Form 22:

> "**Form 22**
>
> **VERDICT ON INQUEST**

On an inquest for our Sovereign lady the Queen, at .... in the [administrative] Division of .... on .... the .... day of .... 20.... , [and by adjournment on the .... day of .... 20..........] before me, ... Coroner for the district of .... [and under mentioned jurors] touching the death of .... to inquire how, when and where the said .... came to his/her death, the following matters were found:

[same as in Form 21]

Date ....

Signed ________ Coroner for ....

Jurors

1........... ....
2. ....
3. ....
4. ....
5. ....
6. ....
7. ....
8. ....
9. ....
10. ....
11. ....
12. ....”

[94] The impact of the Human Rights Act 1998 must be addressed at this juncture. A different, wider kind of inquest with an outcome extending beyond one of the blunt statutory verdicts may be required in cases where Article 2 ECHR applies. This arises out of the decision of the House of Lords in *Regina (Middleton) v West Somerset Coroner* [2004] 2 AC 182. The decision in *Middleton*, where it is applicable, effects an adjustment to the interpretation of the word “how.” The effect of this adjustment is to extend the meaning from ***by what means*** to ***by what means and in what circumstances***.

[95] The inquest underlying these proceedings is of the Article 2 species ie the procedural, or adjectival, requirements of Article 2 must be observed. These are rehearsed in the decision of the ECtHR in *Jordan v United Kingdom* [2003] 37 EHRR 2, paras [105]–[109]:

“105. The obligation to protect the right to life under Art.2 of the Convention, read in conjunction with the State's general duty under Art.1 of the Convention to “secure to everyone within [its] jurisdiction the rights and freedoms defined in [the] Convention”, also requires by implication that there should be some form of effective official investigation when individuals have been killed as a result of the use of force. The essential purpose of such 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. What form of investigation will achieve those purposes may vary in different circumstances. However, whatever mode is employed, the authorities must act of their own motion, once the matter has come to their attention. They cannot leave it to the initiative of the next-of-kin either to lodge a formal complaint or to take responsibility for the conduct of any investigative procedures.

106. For an investigation into alleged unlawful killing by State agents to be effective, it may generally be regarded as necessary for the persons responsible for and carrying out the investigation to be independent from those implicated in the events. This means not only a lack of hierarchical or institutional connection but also a practical independence.

107. The investigation must also 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. This is not an obligation of result, but of means. The authorities must have taken the reasonable steps available to them to secure the evidence concerning the incident, including, inter alia, eye witness testimony, forensic evidence and, where appropriate, an autopsy which provides a complete and accurate record of injury and an objective analysis of clinical findings, including the cause of death. Any deficiency in the investigation which undermines its ability to establish the cause of death or the person or persons responsible will risk falling foul of this standard.

108. A requirement of promptness and reasonable expedition is implicit in this context. It must be accepted

> that there may be obstacles or difficulties which prevent progress in an investigation in a particular situation. However, a prompt response by the authorities in investigating a use of lethal force may generally be regarded as essential in maintaining public confidence in their adherence to the rule of law and in preventing any appearance of collusion in or tolerance of unlawful acts.
>
> 109. For the same reasons, there must be a sufficient element of public scrutiny of the investigation or its results to secure accountability in practice as well as in theory. The degree of public scrutiny required may well vary from case to case. In all cases, however, the next-of-kin of the victim must be involved in the procedure to the extent necessary to safeguard his or her legitimate interests."

[96] Previously, the disclosure of documents in the inquest process in Northern Ireland attracted limited attention and controversy and was handled in a somewhat desultory way. This is exemplified in *Re Arthur's Application* [unreported, 24 May 1996, Lexis transcript]. As stated in Coroners' Law and Practice in Northern Ireland, at para 10-06:

> "In general, there is no right to be provided with … material in advance of the inquest. Since an inquest is an inquisitorial process conducted by the Coroner, the doctrine of discovery of documents has no application."

This changed with the advent of the Human Rights Act. By reason of the procedural dimension of Article 2 ECHR, since 2 October 2000 (the operative date of most of the provisions of the Human Rights Act), one distinctive, recurring and frequently controversial feature of legacy inquests in this jurisdiction has been the disclosure of documents to participating parties: more specifically and most frequently, disclosure by security agencies, principally the police and the military, to the Coroner and onwards to the families of the bereaved.

[97] In *Jordan,* the ECtHR held that the lack of advance disclosure of witness statements had contributed to the failure to comply with the Article 2 ECHR procedural obligation. Thereafter, a significant reappraisal by Coroners and security agencies was required having regard to their respective duties under section 6 of the Human Rights Act. Notably, in England & Wales a similar approach was adopted in non–Article 2 inquests: see for example, *R v Avon Coroner, ex p Bentley* [2001] 166 J.P. 297 and *R (Ahmed) v South and East Cumbria* [2009] EWHC163 (Admin). It may be noted that Northern Ireland has never had the equivalent of Home Office Circular No 31 of 2002.

[98] In order to complete this discrete juridical matrix I consider that the *Padfield* principle must also be reckoned. The reason for this is that the Coroner is a creature of statute who exercises a series of powers, discretions, functions and duties conferred or imposed by the statutory measures in question viz the 1959 Act and the 1963 Rules. Every act of a Coroner must promote the policy and objects of the legislation: *Padfield v Minister of Agriculture, Fisheries and Food* [1968] AC 997, at 1030 B-D. As regards the Article 2 ECHR requirements, where these apply, the legality of the acts of a Coroner is measured by asking whether they are harmonious with and/or in furtherance of the *Jordan* principles, in the discharge of this judicial officer's duty under section 6 of the Human Rights Act.

[99] Reverting to this ground of challenge, I recall that the decision impugned in these proceedings is the Coroner's decision to promulgate the second gist. I consider that this decision was incomplete until the Coroner provided her reasons in the closed ruling, an event which occurred on 11 April 2024. This converted the incomplete and brief previous oral ruling into a fully reasoned decision which had legal effects and consequences. This analysis has not been contested by any party.

[100] In determining this ground of challenge the focus is, therefore, on the date of 11 April 2024. What was the state of the inquest then? Rewinding briefly, I shall assume that it may have been theoretically possible that at the stage when the Coroner pronounced her first oral ruling (concerning the first gist) on 8 March 2024, the inquest had some prospect of achieving completion. When the Coroner next provided her second ruling (regarding the second gist), on 24 March 2024, these proceedings had been initiated and the prospects of completing the inquest were vanishingly thin. On the later date when the Coroner completed the decision under challenge in these proceedings, 11 April 2024, there was <u>no</u> prospect of the inquest being completed. Before this court, all parties were agreed on this. The Coroner's position was unrelenting. The appeal proceedings in this case were completed after 5pm on 30 April 2024. The Coroner was, of course, the victor, by virtue of the judgment of the majority of this court. But for the stay order of this court noted in para [7] above the Coroner would have proceeded to disclose the gist, an act which would have unfolded just hours before the advent of the statutory deadline.

[101] I consider that in consequence of the stark reality that the inquest could not conceivably be completed it was incapable of furthering or achieving in any material or legally effective way any of the statutory aims and purposes or any of the aims and purposes of Article 2 ECHR when the Coroner made the impugned decision. In my view all of the material provisions of the statutory framework considered above, together with the material Article 2 principles, point firmly to the view that the disclosure which the Coroner was proposing to make (via the second gist) would have been disclosure in a legal vacuum, being disclosure for disclosure's sake, detached from the statutory and Article 2 frameworks and in furtherance of neither. In particular, as regards Article 2, in the language of *Jordan* (supra), an incomplete judicial investigation with <u>no outcome</u> in circumstances where a discrete chapter involving the reception of material evidence had not even begun and certain PII

disclosure issues remained unresolved, the fulfilment of the "essential purpose", namely "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" could not have realistically been achieved.

[102] Ever since the decision of the House of Lords in *Council of Civil Service Unions and Others v Minister for the Civil Service* [1985] AC 374 experience has shown that in certain instances the legality of the actions of a public authority may engage more than one of the established public law grounds of challenge. I consider this to be one such instance. Ultimately, the challenge was formulated in the submissions of Mr McGleenan as an *ultra vires* contention. I accept his submission. In my estimation the Coroner was not legally empowered by either the domestic law framework or Article 2 ECHR, in the discharge of her duty as a public authority under section 6 of the Human Rights Act 1998, to make disclosure in the circumstances prevailing. Her decision to do so was *ultra vires* in consequence.

[103] The application of a different analytical tool is in my view an available alternative. The Coroner, in the impugned decision, did not grapple with the fact that the inquest was doomed to the fate of premature extinction. This is not addressed in either her open or closed ruling concerning the second gist. I consider the materiality of this consideration to be incontestable. In short, this was a factor which the Coroner was impliedly obliged by the statute to take into account: in *Re Findlay* [1985] AC 318, at 333H–334C.

[104] The *Wednesbury* standard of review provides a further, or alternative, prism which in my view is also engaged. Given the analysis and conclusions in the preceding paragraphs, I consider that the impugned decision of the Coroner was irrational. Summarising, it cannot have been rational to take a course which could neither further nor achieve any of the statutory aims or objectives or those of Article 2 ECHR. This analysis is in my view confirmed beyond peradventure by the reasoning disclosed in the Coroner's open ruling. She applied an affirmative response to the fourth of the four questions noted in para [62] *supra* viz was the public interest in non-disclosure outweighed by the public interest in disclosure for ***the purposes of doing justice in the proceedings*** (my emphasis). Logically, this purpose could be neither furthered nor achieved in the context of an inquest confronted by the spectre of imminent extinction without <u>any</u> further "proceedings."

[105] Summarising, I consider that by virtue of the inevitability of premature termination of the inquest the Coroner's proposed disclosure of the sensitive information cannot be said to have been either in furtherance of any of the statutory aims or objectives of the 1959 Act or required to comply with Article 2 ECHR. Properly analysed, it would have been disclosure in a vacuum, disclosure for disclosure's sake. The Coroner was not legally empowered to thus act. It follows that the fundamental public law misdemeanour committed was that of acting *ultra vires*.

[106] Furthermore, the course of action determined in the Coroner's second ruling is at odds with the general rule, long established, that documents are disclosed for the sole purpose of the proceedings in question and will not be used for any collateral or ulterior purpose without the permission of the tribunal or providing party: Matthews and Malek, Disclosure (6th ed) para 19-01 ff. Unfortunately, the acute time constraints prevailing in the appeal proceedings did not permit exploration of this issue.

[107] For the reasons elaborated, I would hold that the first three grounds of appeal (paras [19]–[21]) above are made out.

The procedural unfairness ground

[108] The procedural fairness issue is uncomplicated. In the submissions of Mr McGleenan KC and Mr McAteer it is formulated thus:

> "The Coroner reached an agreement with the Chief Constable about disclosure that amounted to a frank breach of a PII certificate without affording [SOSNI] any opportunity to make representations."

Disregarding any debate about the first clause in this sentence, factually this statement is incontestable. The next consideration is that while in principle SOSNI could have applied for the status of properly interested person in the inquest proceedings there was no evident reason for making such application, particularly in the absence of any warning of what was to come. In the inquest context, SOSNI and NIO are not to be confused with each other.

[109] Notably, in response to questions from the court, the legal representatives of the Coroner and the Chief Constable conceded that SOSNI should have been afforded (by the Coroner) the opportunity of making representations about the proposed adoption and disclosure of the second "gist" before determining to pursue this course.

[110] By the happenstance of these judicial review proceedings, the objections of SOSNI to the impugned decisions of the Coroner could be (and were) canvassed fully. However, this occurred in the forum of the High Court proceedings. This was not in my view an adequate substitute for the process which should have been adopted in the forum of the inquest proceedings. Furthermore, by the stage of the legal proceedings the Coroner had clearly made a final decision and had given no indication of a willingness to reconsider it. The Coroner had refused the Chief Constable's request to reconsider her first ruling, relating to disclosure of the first gist. In this context, the celebrated precepts of Lord Mustill resonate (*Doody v Secretary of State for the Home Department* [1994] 1 AC 531, P.560).

[111] Giving effect to the foregoing analysis, I consider that the complete exclusion of SOSNI from the decision making process vitiated each of the Coroner's disclosure rulings on the ground of procedural unfairness.

Overarching conclusion

[112] For the reasons elaborated, I consider that the impugned disclosure decisions of the Coroner are unsustainable in law on the grounds of error of law, the disregard of material considerations, the absence of reasons, ultra vires, irrationality and procedural unfairness. I would, therefore, have allowed the appeal of SOSNI.

APPENDIX 1

CHRONOLOGY OF THESE PROCEEDINGS

1.	**11 March 2024**	CCPSNI (Chief Constable PSNI) proceedings filed challenging gist 1 – ICOS 24/23433/01.
2.	**12 March 2024**	SOSNI (Secretary of State NI) proceedings filed challenging gist 1 – ICOS 24/23554/01.
3.	**13 March 2024**	Leave granted at first review in both JRs. Both JRs then travelled together and were heard together on 22 March.
4.	**22 March 2024**	Cases heard together. At hearing, gist 2 was agreed between CCPSNI and CSNI (the Coroner).
5.	**22 March 2024**	Oral application was made to amend SOSNI O53 statement to include gist 2 and leave was granted. Proceedings on gist 2 stayed pending judgment on gist 1.
6.	**25 March 2024**	Court delivered an OPEN judgment on gist 1.
7.	**28 March 2024**	Court made available a CLOSED judgment on gist 1.
8.	**16 April 2024**	SOSNI filed an amended O53 Statement to include a challenge to gist 2.
9.	**19 April 2024**	Hearing on gist 2.
10.	**23 April 2024**	SOSNI filed an amended O53 Statement to include procedural unfairness challenge.
11.	**25 April 2024**	OPEN and CLOSED judgments on gist 2.
12.	**26 April 2024**	Notice of Appeal filed with Court of Appeal

APPENDIX 2

CHRONOLOGY OF THE INQUEST

1.	**27 April 1994**	Date of death.
2.	**28 April 1994**	Death reported to the Coroner for Northern Ireland. Police investigation opened.
3.	**3 August 1995**	Inquest opened and adjourned by Coroner owing to potential outstanding witnesses.
4.	**11 September 1996**	Inquest listed on 14 October 1996.
5.	**24 April 1997**	Inquest listed 4 June 1997.
6.	**15 October 1997**	Inquest listed 19 November 1997.
7.	**26 July 1999**	Inquest listed for 1 September 1999
8.	**20 December 2001**	Inquest to be listed in March 2002.
9.	**27 June 2002**	PSNI unable to comply with deadline for disclosure as material requires redactions.
10.	**14 November 2002**	Coroner confirms conducting an article 2 ECHR compliant inquest and has raised issue of NIO disclosure with Secretary of State.
11.	**14 April 2010**	Preliminary hearing: *PSNI to confirm disclosure to NOK within 7 days.* *NOK to provide underlining community inquiry material by end of April 2010.*
12.	**6 May 2015**	Preliminary hearing: *PSNI hope to disclose sensitive materials within 2 months.*
13.	**4 October 2019**	Preliminary hearing: *6 folders of HET materials with Coroner and 2 folders of sensitive materials viewed by Coroner.*
14.	**22 March 2022**	Liam Paul Thompson Inquest is allocated to Year 3 of the '5 Year Plan.'
15.	**17 October 2022**	Preliminary Hearing: Coroner Fee

		PSNI had been directed to provide all relevant materials by 10 December 2022. Coroner had provided comments on redactions of HET materials to CSO and discussions ongoing.
16.	**10 January 2023**	6 folders of PSNI HET materials disseminated to PIPs.
17.	**24 January 2023**	Preliminary Hearing
18.	**28 February 2023**	Preliminary Hearing: *Coroner confirms Inquest listed for further week commencing on 5 June 2023.*
19.	**16 March 2023**	Preliminary Hearing: Coroner Fee *4 folders of PSNI material have previously been disseminated to the PIPs. 6 folders of HET materials were disseminated to the NOK 10th January 2023. 6 folders of sensitive material have been viewed by counsel to the Coroner on two occasions and materials have been deemed potentially relevant. The PSNI has requested that further consideration is given to the materials by counsel to the Coroner. A date is to be agreed for this further review - to be attended by counsel to the Coroner and counsel to the PSNI.* *Confirms hearing dates for second module on w/c 5 June 2023.*
20.	**10 May 2023**	Preliminary Hearing: *Confirmed 6 folders of sensitive materials have been identified as potentially relevant.*
21.	**8 June 2023**	Preliminary Hearing: ***PSNI sensitive material to be processed by CSO by October 2023**.*
22.	**2 October 2023**	Preliminary Hearing: *PSNI sensitive materials: 6 folders viewed by Coroner's counsel and materials deemed potentially relevant in October 2022 (further viewings of materials and 2 reviews with PSNI)*
23.	**10 January 2024**	PII Certificate signed by Dr Andrew Murrison MP, Minister for Defence People and Families Preliminary Hearing:

		PII hearing set for 7 February 2024
24.	**10 January 2024**	Preliminary Hearing: *PSNI sensitive materials made available in December 2023 recalled.*
25.	**17 January 2024**	NIO receive PSNI application for PII certificate (Annex C note that there is a seventh folder and clarity is sought from the Coroner on relevance).
26.	**2 February 2024**	NOK receive PSNI and MOD provisionally redacted PII materials (7 folders) Coroner's counsel made aware by PSNI of the evidence of folder 7 PSNI sensitive material but was told it was not relevant to the Inquest.
27.	**5 February 2024**	PII Certificate signed by Steve Baker MP, Minister of State for Northern Ireland
28.	**12 February 2024**	PII Certificate signed by Steve Baker MP, Minister of State for Northern Ireland in respect of Folder 7
29.	**26 February 2024**	PII Open session.
30.	**27 February 2024**	Inquest hearing due to commence for 3 weeks adjourned as PII hearings and further investigations continue. ***Consideration of Folders 1 – 6 PSNI sensitive materials complete. Folder 7 considered and further enquiries required.***
31.	**3 March 2024**	OPEN ruling to publish gist of PII material delivered by Coroner Kinney J in the inquest into the death of Sean Brown
32.	**4 March 2024**	Coroner reconvenes closed PII session. *Brief oral ruling given (with reasons to follow) upholding Folders 1 to 6 PII application in full.* *Coroner raises possibility of providing a gist. PSNI afforded time for instructions.*
33.	**7 March 2024**	PSNI provide more documents not previously disclosed to CSNI. Closed PII hearing reconvened. Letter received by CSNI at 20:00 from CC PSNI requesting the Coroner change ruling.